



FEDERAL REGISTER

Vol. 88

Friday,

No. 221

November 17, 2023

Pages 80079–80550

OFFICE OF THE FEDERAL REGISTER



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

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Title 3—

Memorandum of November 13, 2023

The President

Modernizing United States Spectrum Policy and Establishing a National Spectrum Strategy

Memorandum for the Heads of Executive Departments and Agencies

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to meet the growing requirements of United States radio frequency spectrum users, it is hereby ordered as follows:

Section 1. Policy. Radio frequency spectrum is among our Nation's most important national resources. The United States has long advanced our global technological leadership by striking an appropriate balance between promoting private-sector innovation and furthering the missions of executive departments and agencies (agencies). In recent years, however, rising demand for always-connected devices and other factors, such as the development of cooperative and automated vehicles, the commercialization of space, and the growing complexity and increased requirements of Federal missions, have all led to increased competition for scarce spectrum resources. Managing these diverse, and at times competing, spectrum demands requires careful planning and coordination. Agencies and private-sector users must address these challenges by working together in the best interests of the American people.

This memorandum directs my Administration to build on prior innovation by promoting efficient and effective spectrum use by both agencies and non-Federal users. My Administration's goal is to accelerate United States leadership in wireless communications and other spectrum-based technologies and to unlock innovations that benefit the American people, while ensuring necessary access to spectrum for agencies and private-sector users, such as for scientific, public safety, critical infrastructure, and national security uses, now and into the future.

The policy of my Administration is to ensure that spectrum management, usage, and allocation decisions are coordinated, consistent, and reflect the needs and diverse missions of agencies and non-Federal users. This memorandum reaffirms the policies and authorities stated in Executive Order 12046 of March 27, 1978 (Relating to the Transfer of Telecommunications Functions), regarding the duties and powers of the Department of Commerce, and recognizes the role of the National Telecommunications and Information Administration (NTIA) within the Department of Commerce, as laid out in its organic statute, as "the executive branch agency principally responsible for advising the President on telecommunications and information policies" (47 U.S.C. 901(b)(6)). This policy recognizes the discrete mission needs and associated statutory oversight that agencies must fulfill as they develop and implement operating requirements that rely on spectrum.

The Congress has charged NTIA and the Federal Communications Commission (FCC) with jointly managing the Nation's radio spectrum resources. The NTIA and FCC perform their functions consistent with the August 1, 2022, Memorandum of Understanding (MOU) between the two agencies; the Presidential Memorandum of January 27, 2021 (Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking); the November 23, 2022, MOU among NTIA, FCC, and the Department of the Interior; and Executive Order 13175 of November 6, 2000 (Consultation

and Coordination With Indian Tribal Governments), honoring the Federal trust relationship with Tribal Nations.

Accordingly, I direct the following actions to modernize the usage of spectrum in the United States:

Sec. 2. *Coordination.* To ensure that the United States manages its spectrum resources in a manner that benefits all Americans, the executive branch must work cooperatively to arrive at consensus positions reflecting my Administration's spectrum policy goals.

There is hereby established the Interagency Spectrum Advisory Council (Council) to serve as the principal interagency forum for heads of agencies to advise NTIA on spectrum policy matters and to ensure that all decisions made by NTIA take into consideration the diverse missions of the Federal Government. Within 90 days of the date of this memorandum, NTIA shall publish a charter for the Council. The Council shall be led by the Assistant Secretary of Commerce for Communications and Information and shall be composed of Assistant Secretary-level representatives or their designees with spectrum management oversight from agencies holding Federal spectrum assignments or otherwise having spectrum-related statutory authorities within their respective agencies. The Executive Office of the President shall participate in the work of the Council, and NTIA shall request that FCC participate in the work of the Council.

The NTIA's Interdepartment Radio Advisory Committee (IRAC) shall continue to advise NTIA with respect to NTIA's statutory role to develop and execute policies, programs, procedures, and technical criteria pertaining to the allocation, management, and Federal use of the electromagnetic spectrum.

Sec. 3. *National Spectrum Strategy.* By December 31, 2023, the Secretary of Commerce, acting through NTIA, shall develop a National Spectrum Strategy (Strategy), and the Secretary shall submit it to the President, through the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, and the Director of the Office of Science and Technology Policy. The NTIA shall seek to collaborate with FCC and coordinate with the Council in the development of the Strategy, which shall include, at a minimum:

(a) a roadmap to make spectrum resources available to continue United States leadership in advanced wireless technologies and services, which shall provide a "pipeline" of spectrum bands to support commercial innovation and agencies' needs now and into the future by identifying at least 1500 megahertz for in-depth study to determine suitability for repurposing, which may include spectrum bands currently allocated for Federal operations, non-Federal operations, or shared Federal and non-Federal operations;

(b) data-driven processes for long-term spectrum planning that increase transparency into current and future Federal and non-Federal spectrum use; anticipate and enable technological advances in order to facilitate spectrum access; and fully account for essential Federal missions, including national defense and homeland security, safeguarding the national airspace, securing the Nation's critical infrastructure, climate monitoring and forecasting, and other scientific endeavors;

(c) plans to optimize United States spectrum management and use by considering different types of spectrum governance models, including exclusive licensing, unlicensed use, shared use, and combinations of these approaches;

(d) plans for investing in and promoting the development of emerging technological advancements in spectrum management, including spectrum sharing and improving understanding of electromagnetic spectrum science; and

(e) recommendations for developing an enduring, scalable mechanism for managing shared spectrum access for the Federal Government, with the goal of increasing the efficiency of spectrum use.

Sec. 4. *Implementation Plan.* Within 120 days of the submission of the Strategy, the Secretary of Commerce, acting through NTIA, in coordination with the Council, and after seeking to collaborate with FCC, shall publish an Implementation Plan for the Strategy. The Implementation Plan shall include a schedule for detailed studies of the pipeline bands identified in the Strategy to be completed within 2 years of the submission of the Strategy or, in the case of proposals by agencies to conduct studies under the Spectrum Pipeline Act of 2015 (Public Law 114–74), within 2 years of the date of receipt of funding.

Sec. 5. *Responsibilities of the Department of Commerce and NTIA.* The Secretary of Commerce, acting through NTIA, has “[t]he responsibility to promote the best possible and most efficient use of electromagnetic spectrum resources across the Federal Government, subject to and consistent with the needs and missions of Federal agencies.” (47 U.S.C. 902(b)(2)(U)). In order to properly fulfill this responsibility, NTIA, consistent with its “authority . . . as the executive branch agency principally responsible for advising the President on telecommunications and information policies,” shall, in coordination with the Council and the IRAC as appropriate, ensure that the views of the executive branch on spectrum matters are properly developed, documented, and, if necessary, presented to FCC and, in appropriate circumstances, in coordination with the Director of the Office of Management and Budget, to the Congress, as required by statute (47 U.S.C. 901(b)(6), 902(b)(2)(J)). This duty shall extend to all Federal spectrum matters, both where agencies hold NTIA-issued frequency assignments and where non-Federal spectrum use may have a substantial impact on agency missions.

(a) In undertaking these duties, NTIA shall:

(i) adhere to the terms of the August 1, 2022, MOU between NTIA and FCC and any successor arrangement, so long as the arrangement remains in effect;

(ii) solicit views of stakeholder agencies in a timely fashion and provide sufficient time and procedures for such agencies to present their views and supporting technical information to NTIA;

(iii) provide agencies with timely written feedback articulating why and how agency views will be incorporated into the position that NTIA communicates to FCC;

(iv) facilitate the presentation by agencies of classified or otherwise sensitive views to FCC;

(v) develop the position of the executive branch on spectrum-related issues, including any supporting technical and operational information to facilitate FCC decision-making, and provide that position to FCC; and

(vi) endeavor to provide such views and information within FCC’s applicable timelines and request additional time when needed.

(b) In matters where NTIA and an agency or agencies cannot reach a consensus on the views to be presented to FCC, NTIA shall:

(i) notify FCC of the lack of consensus and anticipated next steps and timing to resolve it;

(ii) request the joint assistance of the Secretary of Commerce and the head of any agency objecting to NTIA’s proposed submission to FCC to find a mutually agreeable resolution; and

(iii) keep FCC informed, as appropriate, regarding anticipated next steps and timing of resolution.

(c) If a resolution is not reached, NTIA shall within 90 days submit, or the disputing agency or agencies may submit, the disagreement to the Assistant to the President for National Security Affairs and the Assistant to the President for Economic Policy, who shall, in consultation with the Director of the Office of Science and Technology Policy and the National Space Council, resolve the dispute through the interagency process described in National Security Memorandum 2 of February 4, 2021 (Renewing the

National Security Council System), or the process described in any successor Presidential directive. The NTIA shall advise FCC on the executive branch position following adjudication and decision.

Sec. 6. *Post-FCC Action Procedures.* Since agencies are directed to participate fully and actively in NTIA's development of positions on spectrum matters, disputes following FCC action should be rare. When FCC has acted to make spectrum available for non-Federal use and an agency believes that, for a reason unforeseen before FCC action, the new use is causing or potentially will cause harmful interference to existing Federal operations or non-Federal operations that are regulated by an agency, the following procedures shall be adhered to:

(a) The complainant agency, no later than 45 days after learning of the unforeseen risk of harmful interference, shall formally request that NTIA address the matter with FCC for an appropriate remedy, and in that request shall:

- (i) clearly indicate the manner in which the public interest will be implicated or harmed or an agency's mission will be adversely affected;
- (ii) present evidence to NTIA that such new use is causing or potentially will cause harmful interference or potential harm to the public interest, including any technical or scientific data that supports that position; and
- (iii) explain why the complainant agency cannot take steps to ensure mission continuity that are consistent with FCC's decision.

(b) If NTIA believes that the complainant agency has produced sufficient evidence that the new use will risk harmful interference that cannot be reasonably mitigated without FCC action, it shall, within 60 days of the complainant agency's request, address FCC under established processes for seeking appropriate relief. If NTIA does not believe that there is sufficient evidence to seek relief from FCC, the complainant agency may invoke the process set forth in sections 5(b) and 5(c) of this memorandum.

(c) Before any significant regulatory action directly related to the spectrum subject to license is taken by the complainant agency pursuant to its statutory authorities, the regulatory action shall be submitted to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget, as required by sections 3(f) and 6(a)(3) of Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review).

Sec. 7. *Other Responsibilities of Agencies.* Consistent with NTIA's statutory authorities and to ensure the coordination and consistency called for in this memorandum:

(a) Agencies shall expeditiously, and no later than 45 days subsequent to any NTIA request outside of the time frames set by section IV(3) of the August 1, 2022, MOU between NTIA and FCC, respond to and, to the extent possible, share with NTIA any technical and operational information needed to facilitate spectrum coordination and policy development.

(b) Agencies shall furnish NTIA "with such information, support, and assistance, not inconsistent with law, as it may require in the performance of its functions," (47 U.S.C. 904(c)(2)), including coordinating with NTIA on:

- (i) all relevant information to be considered for filing with FCC; and
- (ii) any significant regulatory actions to be taken by the agency pursuant to its statutory authorities directly relating to spectrum issues, prior to its submission to OIRA as required by Executive Order 12866.

(c) Agencies shall collaborate with NTIA to facilitate long-term spectrum planning, including by sharing information about their current spectrum use and long-term spectrum needs as requested by NTIA.

(d) Agencies shall coordinate with NTIA prior to carrying out any electromagnetic compatibility study or testing plan that the agency seeks to be considered in formulating the views of the executive branch regarding spectrum regulatory matters. Coordination with NTIA will ensure the use of

consistent methods across the executive branch, promoting reliable findings as well as evidence-based decision-making. Nothing herein is intended to prevent agencies from conducting spectrum-related studies for internal purposes unrelated to formulating executive branch views on spectrum regulatory matters. Agencies are strongly encouraged to conduct spectrum-related testing and research in cooperation with NTIA's Institute for Telecommunication Sciences.

(e) Agencies shall favor the development and procurement of systems that enable coexistence with other spectrum users. Accordingly, agencies shall ensure that their acquisition processes properly consider spectrum coexistence and access prior to milestone investment decisions. The NTIA shall, in turn, improve its criteria and processes for certification regarding spectrum availability to facilitate spectrum access.

Sec. 8. *Spectrum Management Principles and Methods.* By May 14, 2025, the Secretary of Commerce, working in partnership with the Council, shall publish a report identifying spectrum management principles and methods that will guide the Federal Government in spectrum studies and science. The report shall identify the coordination guidelines for spectrum studies and identify processes for determining types of studies, criteria, assumptions, and timelines that will be acceptable in decision-making involving the use of Federal spectrum and the use of non-Federal spectrum by agencies.

Sec. 9. *Revocation.* The Presidential Memorandum of October 25, 2018 (Developing a Sustainable Spectrum Strategy for America's Future), is hereby revoked.

Sec. 10. *Protection of Information.* Nothing in this memorandum shall be construed to require the disclosure of classified information, law enforcement sensitive information, or other information that must be protected in the interests of national security.

Sec. 11. *General Provisions.* (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

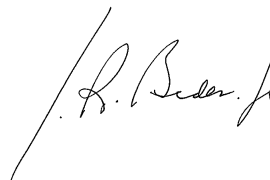
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of Commerce is authorized and directed to publish this memorandum in the *Federal Register*.

A handwritten signature in black ink, appearing to read "R. B. Biden" with a stylized flourish at the end.

THE WHITE HOUSE,
Washington, November 13, 2023

Presidential Documents

Memorandum of November 13, 2023

White House Initiative on Women's Health Research

Memorandum for the Heads of Executive Departments and Agencies

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. Women make up half of the United States population, but for too long, a lack of timely research and data on women's health has left health care providers without important tools to diagnose and treat millions of women with debilitating conditions, including cardiovascular disease, Alzheimer's disease, autoimmune disorders, mental health conditions, and conditions specific to women such as endometriosis and fibroids.

Beyond the immediate health consequences, underinvesting in women's health research can decrease women's well-being and quality of life, hold women back in the workplace, and affect their families' economic security. By contrast, increasing investments in women's health research can yield broad societal gains, including lower health care costs and a more productive and inclusive workforce.

To address pervasive gaps in our knowledge of women's health, we must accelerate research on the unique health needs of women across their lifespans. Research gaps are especially acute for diseases and conditions that are more prevalent among women and for health conditions associated with women's midlife and later years, including perimenopause and menopause. Gaps are often even more significant for those who have been historically underrepresented in, or excluded from, research.

We can—and must—increase our efforts to invest in research that maximizes our ability to prevent, diagnose, and treat health conditions in women across the United States. Meaningful progress requires robust, dedicated research infrastructure—including a strong, diverse research workforce—and investment within and beyond the Federal Government. We all have a part to play in galvanizing women's health research, developing innovative and cutting-edge interventions that promote women's health, and ensuring that women across the United States have access to high-quality health care.

Accordingly, I hereby direct the following actions:

Sec. 2. Establishment. There is established, within the Office of the First Lady, a White House Initiative on Women's Health Research (Initiative).

Sec. 3. Membership. (a) The Initiative shall be led by a Chair designated by the President who shall hold a dual role in the Office of the First Lady and on the staff of the White House Gender Policy Council.

(b) In addition to the Chair, the members of the Initiative shall consist of the heads of the following executive departments and agencies (agencies) and offices, or their designees:

- (i) the Office of the Vice President;
- (ii) the Department of Defense;
- (iii) the Department of Agriculture;
- (iv) the Department of Health and Human Services;
- (v) the Department of Veterans Affairs;
- (vi) the Environmental Protection Agency;

- (vii) the Office of Management and Budget;
- (viii) the Domestic Policy Council;
- (ix) the Office of Science and Technology Policy;
- (x) the National Science Foundation;
- (xi) the National Institutes of Health;
- (xii) the Food and Drug Administration;
- (xiii) the Centers for Disease Control and Prevention;
- (xiv) the Indian Health Service;
- (xv) the Centers for Medicare and Medicaid Services;
- (xvi) the Health Resources and Services Administration;
- (xvii) the Substance Abuse and Mental Health Services Administration;
- (xviii) the Agency for Healthcare Research and Quality;
- (xix) the Advanced Research Projects Agency for Health;
- (xx) the National Institutes of Health Office of Research on Women's Health; and
- (xxi) the heads of such other agencies and offices as the Chair may, from time to time, designate.

(c) The Department of Health and Human Services shall provide funding and administrative support as may be necessary for the performance and functions of the Initiative, to the extent permitted by law and within existing appropriations.

(d) At the direction of the Chair, the Initiative may establish subgroups consisting exclusively of Initiative members or their designees, as appropriate, including to coordinate across agency offices dedicated to women's health.

Sec. 4. Mission and Functions. (a) The mission of the Initiative is to advance women's health research in the United States. The functions of the Initiative are advisory only and shall include, consistent with applicable law, the following actions with the goal of advancing women's health research:

- (i) assessing the Federal research landscape to identify opportunities for additional investments that could catalyze significant progress in addressing women's health needs;
- (ii) setting Initiative-wide priorities to help guide strategic Federal research investments;
- (iii) improving coordination among agencies and offices pursuing women's health research, including by better integrating research efforts and facilitating interdisciplinary research;
- (iv) developing policy recommendations to better ensure that the health needs of women are considered, assessed, and reported for Federal research and data collection efforts, where feasible and in accordance with current research and data collection and analysis guidelines;
- (v) forming targeted recommendations to address health disparities and inequities affecting women, including those related to race, ethnicity, age, socioeconomic status, disability, and exposure to environmental factors and contaminants that can directly affect health;
- (vi) developing recommendations to support the translation of research advancements into practical benefits for patients and providers;
- (vii) identifying opportunities to develop public-private partnerships and to increase coordination of Federal efforts with the private and philanthropic sectors in order to drive innovation;
- (viii) engaging the scientific and research communities, including by helping promote the publication and dissemination of actionable research and data on women's health and by making Federal datasets available to support research;

(ix) assessing opportunities to recruit, train, and support women pursuing health and biomedical research careers to help strengthen and diversify the research workforce; and

(x) identifying ways to increase public awareness of the need for greater investment in and attention to women's health research, as well as women's health outcomes.

(b) Consistent with the objectives of this memorandum and applicable law, the Initiative may gather relevant information from external stakeholders, including Federal, State, local, Tribal, and territorial government officials; researchers and academics; women's health organizations; philanthropic leaders; industry stakeholders; and other entities and persons that may assist the Initiative in accomplishing the objectives of this memorandum.

Sec. 5. *Recommendations to the President.* (a) Within 45 days of the date of this memorandum, the members of the Initiative or their designees shall provide recommendations to the President, through the Chair, on concrete actions that agencies and offices can take to advance women's health research.

(b) The heads of agencies and offices participating in the Initiative shall assist and provide information to the Chair, consistent with applicable law, as may be necessary to carry out the functions of the Initiative. Each participating agency and office shall bear its own expense for participating in the Initiative.

(c) The heads of agencies and offices participating in the Initiative, or their designees, shall inform the President, through the Chair, on progress implementing this memorandum at least twice each year.

Sec. 6. *General Provisions.* (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

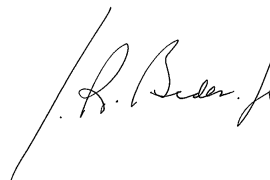
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of Health and Human Services is authorized and directed to publish this memorandum in the *Federal Register*.

A handwritten signature in black ink, appearing to read "R. B. Biden", is written over a diagonal line that extends from the top right towards the center of the page.

THE WHITE HOUSE,
Washington, November 13, 2023

Presidential Documents

Proclamation 10673 of November 14, 2023

America Recycles Day, 2023

By the President of the United States of America

A Proclamation

On America Recycles Day, we recognize the critical role recycling plays in caring for our environment and addressing the existential threat of climate change. We honor the people, communities, and organizations that are working every day to recycle and responsibly steward our natural resources. We recommit to each doing our own part to secure a greener, cleaner, and more sustainable future for our communities, country, and planet.

Over a third of the world's greenhouse gas emissions—and many of the toxins and pollutants that harm public health—come from the production and processing of materials that people use every day. That is why recycling and reducing waste as much as possible is so important. By recycling, we send less waste to landfills and reduce the need for raw materials, thereby saving energy and conserving valuable natural resources. Still, our country faces too many barriers to recycling. Some Americans are unsure about which materials can be recycled, and municipalities struggle to establish connections with markets that can use their recycled materials. Many people, especially people of color and low-income Americans, have suffered disproportionately from the damaging effects of pollution, including landfilled, dumped, or incinerated waste.

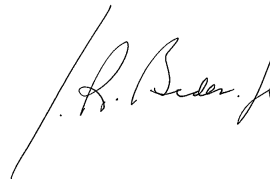
To improve the way our Nation recycles, my Administration made the largest investment in recycling in nearly three decades through our Bipartisan Infrastructure Law. These funds have helped launch dozens of new initiatives, including projects to improve waste management, reduce harm in communities that have long faced environmental injustice, and increase public awareness and education about recycling. We also released a National Recycling Strategy to highlight the ways government, industry, and other entities can utilize our recycling and waste management systems—including best practices for collecting recyclable products, reaching markets for these materials, and funding the latest recycling technologies that will protect public health and the environment. In pursuit of our goal to reach net-zero greenhouse gas emissions by 2050, I signed the Inflation Reduction Act, which made the largest investment in climate action in history.

There is still more we can do to improve recycling practices across the country. I call upon manufacturers and businesses to offer more sustainable products, to reuse materials and reduce the use of raw materials, to adopt effective recycling practices, and to design and build durable projects that are fully recyclable. I also call upon all Americans to learn what is recyclable in their cities and towns, sort waste into the appropriate bins, embrace reusable containers, engage in food composting, and reduce the use of non-recyclable materials, such as many single-use plastics. Everyone has a role to play, and by working together to recycle, we can improve the health of our environment and our world for generations to come.

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 November 15, 2023, as America Recycles Day. I call upon the people of the United States of America to observe this day with appropriate programs and activities, and

I encourage all Americans to continue their environmental efforts by recycling throughout the year.

IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of November, 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.

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

[FR Doc. 2023-25639

Filed 11-16-23; 8:45 am]

Billing code 3395-F4-P

Rules and Regulations

Federal Register

Vol. 88, No. 221

Friday, November 17, 2023

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

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

FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Part 2429

Miscellaneous and General Requirements

AGENCY: Federal Labor Relations Authority.

ACTION: Final rule.

SUMMARY: This final rule adopts, with one minor change, a proposed rule published in the **Federal Register** on September 29, 2023. The final rule specifies that, if parties wish to file documents with the Federal Labor Relations Authority's (FLRA's) Office of Case Intake and Publication (CIP) in person, then they must schedule an appointment at least one business day in advance. The final rule also makes other minor technical and formatting changes. In addition, like the proposed rule, the final rule specifies that documents filed through the FLRA's electronic-filing (eFiling) system must be filed electronically by "11:59 p.m.," rather than "midnight," on the due date. However, unlike the proposed rule, the final rule specifies that the 11:59 p.m. filing deadline is "Eastern Time."

DATES: This final rule is effective on December 18, 2023.

FOR FURTHER INFORMATION CONTACT: Erica Balkum, Chief, Office of Case Intake and Publication at ebalkum@flra.gov or at: (771) 444-5805.

SUPPLEMENTARY INFORMATION: On September 29, 2023, in 88 FR 67117, the FLRA's three-Member, decisional component (the Authority) proposed to amend 5 CFR 2429.24(a) to revise the rules regarding filing documents in cases before the Authority (as distinct from the FLRA's General Counsel, Regional Directors, or Administrative Law Judges). Specifically, the Authority proposed to revise 5 CFR 2429.24(a) to eliminate the references to parties being: (1) able to file documents with CIP between 9 a.m. and 5 p.m. E.T., Monday

through Friday (except federal holidays), and (2) required to file any hand-delivered documents by 5 p.m. E.T. Instead, the proposed revisions would specify that: (1) to file documents with CIP by personal delivery, parties must schedule an appointment at least one business day in advance by calling CIP; and (2) personal delivery will be accepted by appointment Monday through Friday (except federal holidays). In addition, the proposed revisions would: (1) update CIP's phone number to (771) 444-5805; (2) delete the period after "NW" in CIP's mailing address; (3) change the term "hand delivery" to "personal delivery"; (4) change the eFiling deadline from "midnight E.T." on the due date to "11:59 p.m." on the due date; and (5) in the second-to-last sentence of the regulation, change "federal legal documents" to "federal legal holidays."

The FLRA invited written comments on the proposed rule, stating that any such comments must be received by the FLRA by October 30, 2023. The FLRA received only two comments: one from an individual, and the second from a union.

The individual commenter states that it is unclear from the proposed rule whether the Authority intends for the new eFiling deadline to be 11:59 p.m. "Eastern Time." The commenter notes that the current version of 5 CFR 2429.24(a) specifies that the deadline is Eastern Time, but the proposed rule does not do so.

The proposed rule's deletion of Eastern Time in connection with eFiling was inadvertent. Therefore, the final rule revises the proposed rule to specify that the 11:59 eFiling deadline is 11:59 p.m. Eastern Time.

The union commenter opposes the proposed rule's requirement that parties who wish to file documents with CIP in person must schedule an appointment at least one business day in advance. First, the commenter notes that, in the **Federal Register** notice for the proposed rule, the Authority relied on the fact that no parties filed documents in person since in-person filing was reinstated on May 30, 2023. According to the union commenter, the FLRA did not publicize or tell parties about the May 30, 2023 reinstatement of in-person filing, so the absence of in-person filers since that date does not support the proposed rule. Second, the union

commenter claims that the National Labor Relations Board (NLRB) allows in-person filing without an appointment, and there is no justification for the FLRA having a different rule. Third, the union commenter asserts that recent Executive Branch policies and proposed federal legislation are aimed at increasing in-person services at federal agency offices, and the proposed rule would conflict with those aims.

In response to the union commenter's first assertion, even assuming parties were unaware of the resumption of in-person-filing availability on May 30, 2023—despite the FLRA's Web site being updated to prominently note that resumption—that does not undercut the Authority's broader point that, even pre-pandemic, in-person filing was rare. In fact, even since the proposed rule was published in the **Federal Register**—which was also announced by a press release the same day—CIP has received only two in-person filings. As such, the alleged absence of publicity surrounding the resumption of in-person filing does not undercut the notion that in-person filing is rarely used.

With regard to the assertions concerning the NLRB, as an initial matter, it is not clear that the filing practices of the FLRA should necessarily mirror those of the NLRB—a much larger agency, with far more staff and regulated parties, than the FLRA. In any event, the NLRB's filing regulations do not set forth standard hours when parties may file in person—and, in fact, they generally require parties to eFile documents. See 29 CFR 102.5(c) (specifying that, "[u]nless otherwise permitted under this section, all documents filed in cases before the Agency must be filed electronically ('E-Filed') on the Agency's website"). In this regard, NLRB guidance provides that in-person filing is permitted "only if the filer does not have access to the means for filing electronically or filing electronically would impose an undue burden." NLRB, Guide to Board Procedures 3 (2023), <https://www.nlr.gov/sites/default/files/attachments/pages/node-174/guide-to-board-procedures-2023.pdf>. The FLRA's proposed requirement to schedule in-person filing in advance—which does not in any way limit which parties may engage in such filing—is arguably even

less restrictive than the NLRB's requirements.

Finally, we acknowledge that there recently has been an increased focus on the resumption of certain in-person services at federal agency offices. However, nothing in the proposed rule would eliminate in-person filing; it would simply require one business day's advance notice in order to engage in such filing. Further, the resumption of certain in-person services does not undercut agencies' and courts' general trend of favoring eFiling over in-person filing, based on eFiling's numerous advantages for both parties and agencies. *See*, for example, IRS, Exempt Organizations e-file: Benefits of e-file, available at <https://www.irs.gov/charities-non-profits/exempt-organizations-e-file-benefits-of-e-file>.

In addition, as discussed in greater detail in the **Federal Register** notice for the proposed rule, there are multiple reasons for this proposed change. Specifically: even before the COVID-19 pandemic, it was rare for parties to file with CIP in person; there are multiple other, easily accessible methods of filing documents with CIP; the FLRA desires to strongly encourage parties to use eFiling whenever possible; and CIP has limited staffing, which could become even more limited if budgetary or other considerations preclude the FLRA from filling positions as they become vacant.

For these reasons, the Authority has not modified the proposed rule's requirement for parties to schedule in-person filing at least one business day in advance. Therefore, with the one minor modification discussed above—adding “Eastern Time” to the eFiling deadline—the Authority adopts the rule as originally proposed.

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Chairman of the FLRA has determined that this rule would not have a significant impact on a substantial number of small entities, because this rule would apply only to Federal agencies, Federal employees, and labor organizations representing those employees.

Executive Order 12866, Regulatory Review

The FLRA is an independent regulatory agency and thus is not subject to the requirements of E.O. 12866 (58 FR 51735, Sept. 30, 1993).

Executive Order 13132, Federalism

The FLRA is an independent regulatory agency and thus is not

subject to the requirements of E.O. 13132 (64 FR 43255, Aug. 4, 1999).

Unfunded Mandates Reform Act of 1995

This rule would not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it would not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This action is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule would not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act of 1995

The rule contains no additional information collection or record-keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*

List of Subjects in 5 CFR Part 2429

Administrative practice and procedure, Government employees, Labor management relations.

For the reasons stated in the preamble, the FLRA amends 5 CFR part 2429 as follows:

PART 2429—MISCELLANEOUS AND GENERAL REQUIREMENTS

■ 1. The authority citation for part 2429 continues to read as follows:

Authority: 5 U.S.C. 7134; § 2429.18 also issued under 28 U.S.C. 2112(a).

■ 2. Amend § 2429.24 by revising paragraph (a) to read as follows:

§ 2429.24 Place and method of filing; acknowledgment.

(a) Except for documents that are filed electronically through use of the eFiling system on the FLRA's website at www.flra.gov, anyone who files a document with the Authority (as distinguished from the General Counsel, a Regional Director, or an Administrative Law Judge) must file that document with the Chief, Case

Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 200, 1400 K Street NW, Washington, DC 20424-0001 (telephone: (771) 444-5805). To file documents by personal delivery, you must schedule an appointment at least one business day in advance by calling the telephone number in the previous sentence. Personal delivery is accepted by appointment Monday through Friday (except federal holidays). If you file documents electronically through use of the FLRA's eFiling system, then you may file those documents on any calendar day—including Saturdays, Sundays, and federal legal holidays—and the Authority will consider those documents filed on a particular day if you file them no later than 11:59 p.m. Eastern Time on that day. Note, however, that although you may eFile documents on Saturdays, Sundays, and federal legal holidays, you are not required to do so. Also note that you may *not* file documents with the Authority by electronic mail (“email”).

* * * * *

Approved: November 13, 2023.

Thomas Tso,

Solicitor and Federal Register Liaison, Federal Labor Relations Authority.

[FR Doc. 2023-25300 Filed 11-16-23; 8:45 am]

BILLING CODE 7627-01-P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1489

RIN 0551-AB06

Regional Agricultural Promotion Program

AGENCY: Foreign Agricultural Service and Commodity Credit Corporation, U.S. Department of Agriculture (USDA).

ACTION: Final rule.

SUMMARY: The Commodity Credit Corporation (CCC) is amending the Agricultural Trade Promotion Program regulation to implement the Regional Agricultural Promotion Program (RAPP). The RAPP will provide assistance to eligible organizations that conduct market promotion activities, including activities to address existing or potential non-tariff barriers to trade, to promote U.S. agricultural commodities in certain foreign markets. Among other changes, this rule updates terminology used throughout the regulation, clarifies timeframes for reporting requirements, and removes the specific application and review

requirements from the regulation to be defined in Notices of Funding Opportunity (NOFOs) announced through the *Grants.gov* website.

DATES: This rule is effective November 17, 2023. Although not required by the Administrative Procedure Act (APA), CCC will accept comments received by December 18, 2023.

ADDRESSES: You may send comments, identified by RIN 0551–AB06, by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. This portal enables respondents to enter short comments or attach a file containing lengthier comments.

- *Email:* PODadmin@usda.gov. Include 0551– in the subject line of the message.

- *Mail, Courier, or Hand Delivery:* Curt Alt, U.S. Department of Agriculture, Foreign Agricultural Service, 1400 Independence Avenue SW, Room 6512, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Curt Alt, (202) 690–4784, podadmin@usda.gov. Persons with disabilities who require an alternative means for communication of information (e.g., Braille, large print, audiotape, etc.) should contact RARequest@usda.gov.

SUPPLEMENTARY INFORMATION:

Background

In the face of significant and unpredictable challenges around the world, including impacts to international commodities markets in the wake of ongoing conflicts, a changing climate, an increasing agricultural trade deficit, and increased competition in U.S. export markets, USDA recognizes that additional investments in market development are needed to keep U.S. agriculture ahead of the competition. Consistent with a bipartisan request from the Senate Committee on Agriculture, Nutrition, and Forestry, USDA is utilizing CCC funds to implement the RAPP program to address the challenges related to trade impacting U.S. farmers and the international community. Continuing the work started under the Agricultural Trade Promotion Program (ATP), RAPP funding will ensure that U.S. agricultural industries are able to sustain the relationships key to effective market development and will enable exporters to break into new markets and increase market share in growth markets. RAPP Participants may receive assistance for either generic or brand promotion activities as well as assistance to conduct activities to address existing or potential non-tariff barriers to trade.

The Foreign Agricultural Service (FAS) will administer the RAPP on behalf of the CCC. Specific program requirements and details for applying for assistance under the RAPP will be set forth in NOFOs announced through the *Grants.gov* website.

Eligible Organizations

As with ATP, the RAPP is a cost-share program that is designed to reimburse nonprofit U.S. agricultural trade organizations, nonprofit state regional trade groups, state agencies, U.S. agricultural cooperatives, and other entities that conduct approved foreign market promotion activities. When considering applicant organizations, the CCC will give priority to organizations that have the broadest producer representation and affiliated industry participation of the commodity being promoted. Eligible activities can be generic or branded in nature. In order to be eligible for RAPP assistance, U.S. for-profit entities shall be limited to those whose size does not exceed 300 percent of the small business size standards established for their particular industry and published at 13 CFR part 121, Small Business Size Regulations. Eligible for-profit entities may participate in a RAPP Participant's brand promotion program. Any RAPP Participant that operates a brand promotion program will be required to establish brand program operational procedures. A RAPP Participant shall publicize its RAPP program and make participation possible for commercial entities throughout the relevant commodity sector or, in the case of State Regional Trade Groups (SRTGs), throughout the corresponding region.

General Provisions

CCC will use the Unified Export Strategy (UES) internet-based system to receive RAPP applications and to receive reimbursement requests from RAPP Participants. This is the system used for the ATP and similar CCC programs. Details about the application requirements and process will be announced in the RAPP NOFOs.

CCC will evaluate each eligible proposal against the factors described in the appropriate NOFO to identify those applications that it considers to best meet the criteria and objectives outlined in the NOFO. Based on its review and evaluation, CCC will, subject to the availability of funds, recommend an appropriate funding level for each proposal and submit the proposals and funding recommendations to the appropriate officials for decision.

As with the ATP program, participants in the RAPP will be

required to contribute a total amount in goods, services, and/or cash equal to at least 10 percent of the value of resources to be provided by the CCC for all generic promotion activities proposed to be undertaken by the RAPP Participant. Brand participants will also be required to contribute an amount in goods, services, and/or cash equal to at least 50 percent of the cost of all brand promotion activities they undertake under the RAPP.

This rule includes updated lists of expenses eligible and ineligible for reimbursement under the RAPP. Procedures for requesting reimbursement for eligible expenditures, or, if appropriate, for advances of program funds, are described in the regulation. Because it is critical that program funds are managed and accounted for properly and are focused on achieving results, paragraphs regarding financial management, reporting on outcomes that tie assistance directly to increased trade, evaluation, and compliance review are included. Finally, to ensure that funds provided under the RAPP are expended in a cost-effective manner and are protected from fraud, CCC carries forward the provisions regarding ethical conduct, contracting, and anti-fraud requirements from the existing regulation.

Effective Date and Comments

This rule is effective upon publication in the **Federal Register**. The Administrative Procedure Act (APA) (5 U.S.C. 553) provides that notice and comment and a 30-day delay in the effective date of the rule are not required when the rule involves specified actions, including matters relating to grants or benefits. This rule establishes procedures and conditions related to the provision of assistance to entities conducting activities that promote U.S. agricultural commodities in foreign markets and thus falls within the exemption to the public participation requirements under the APA. Although not required by the APA, CCC has chosen to accept comments on the rule and may consider the comments when determining whether any changes to the regulations are warranted in the future.

Executive Orders 12866 and 13563

Executive Order 12866, "Regulatory Planning and Review," and Executive Order 13563, "Improving Regulation and Regulatory Review," direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize

net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasized the importance of quantifying both costs and benefits of reducing costs, of harmonizing rules, and of promoting flexibility.

This rule has been determined to be non-significant and, therefore, was not reviewed by the Office of Management and Budget (OMB).

Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act (SBREFA)

The Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by the SBREFA of 1996 (SBREFA, Pub. L. 104–121), generally requires an agency to prepare a regulatory flexibility analysis of any rule whenever an agency is required by the APA or any other law to publish a proposed rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule is not subject to the Regulatory Flexibility Act because the CCC is not required by the APA or any other law to publish a proposed rule for this rulemaking. This rule is not a major rule under SBREFA. SBREFA generally requires that an agency delay the effective date of a major rule for 60 days from the date of publication to allow for congressional review.

Environmental Assessment

The CCC has determined that the RAPP does not constitute a major State or Federal action that would significantly affect the human or natural environment. Consistent with the National Environmental Policy Act (NEPA) (42 U.S.C. 4321–4347), no environmental assessment or environmental impact statement will be prepared for this regulatory action.

Executive Order 12372

Executive Order 12372, “Intergovernmental Review of Federal Programs,” requires consultation with State and local officials that would be directly affected by proposed Federal financial assistance. The objectives of the Executive order are to foster an intergovernmental partnership and a strengthened federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance and direct Federal development. This program is subject to the requirements of Executive Order 12372, “Intergovernmental Review of Federal Programs,” as implemented

under USDA’s regulations at 2 CFR part 415, subpart C.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, “Civil Justice Reform.” This rule will not preempt State or local laws, regulations, or policies unless they represent an irreconcilable conflict with this rule. The rule will not have retroactive effect. Before any judicial action may be brought regarding the provisions of this rule, the administrative appeal provisions in this part must be exhausted.

Executive Order 13132

This rule has been reviewed under Executive Order 13132, “Federalism.” The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, except as required by law. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Executive Order 13175

This rule has been reviewed for compliance with Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments, proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

FAS has assessed the impact of this rule on Indian tribes and determined that this rule does not, to the knowledge of FAS, have Tribal implications that required Tribal consultation under Executive Order 13175. If a tribe requests consultation, FAS will work with the USDA Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions, and modifications identified herein are not expressly mandated by Congress.

The Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Pub. L. 104–4) requires Federal agencies to assess the effects of their regulatory actions on State local, and Tribal governments or the private sector. Agencies generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures of \$100 million or more in any 1 year for State, local, or Tribal governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates, as defined in Title II of UMRA, for State, local, and Tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Federal Assistance Programs

The title and number of the Assistance Listing found in the System for Award Management to which this rule applies is “Regional Agricultural Promotion Program”—10.618.

Paperwork Reduction Act of 1995

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), this rule does not change the information collection approved by OMB under control number 0551–0049.

List of Subjects in 7 CFR Part 1489

Agricultural commodities, Exports.

■ Accordingly, the CCC revises 7 CFR part 1489 to read as follows:

PART 1489—REGIONAL AGRICULTURAL PROMOTION PROGRAM

Sec.

- 1489.10 General purpose and scope.
- 1489.11 Definitions.
- 1489.12 Participation eligibility.
- 1489.13 Application process.
- 1489.14 Application review and formation of agreements.
- 1489.15 Operational procedures for brand promotion programs.
- 1489.16 Contribution rules.
- 1489.17 Reimbursement rules.
- 1489.18 Reimbursement procedures.
- 1489.19 Advances.
- 1489.20 Financial management.
- 1489.21 Reports.
- 1489.22 Evaluation.
- 1489.23 Compliance reviews and notices.
- 1489.24 Failure to make required contribution.
- 1489.25 Submissions.
- 1489.26 Disclosure of program information.

- 1489.27 Ethical conduct.
- 1489.28 Contracting procedures.
- 1489.29 Property standards.
- 1489.30 Anti-fraud requirements.
- 1489.31 Program income.
- 1489.32 Amendment.
- 1489.33 Noncompliance with an agreement or this part.
- 1489.34 Suspension, termination, and closeout of agreements.
- 1489.35 Paperwork reduction requirements.

Authority: 15 U.S.C. 714c(f).

§ 1489.10 General purpose and scope.

(a) This part sets forth the general terms, conditions, and policies governing the Commodity Credit Corporation's (CCC) operation of the Regional Agricultural Promotion Program (RAPP), which subsumes the former Agricultural Trade Promotion Program (ATP). This program will provide assistance to eligible organizations that conduct market promotion activities, including activities to address existing or potential non-tariff barriers to trade, to promote U.S. agricultural commodities in certain foreign markets. Specific program requirements will be set forth in Notices of Funding Opportunity (NOFO) announced through the *Grants.gov* website.

(b)(1) In addition to the provisions of this part, other regulations of general applicability issued by the U.S. Department of Agriculture (USDA), including the regulations set forth in chapter XXX of this title, may apply to the RAPP and RAPP Participants, to the extent that the regulations of general applicability in this paragraph (b)(1) do not directly conflict with the provisions of this part. The regulations include, but are not limited to:

- (i) 7 CFR part 1, subpart A.
- (ii) 7 CFR part 3.
- (iii) 7 CFR part 15, subpart A.
- (iv) 2 CFR part 417.
- (v) 2 CFR part 418.
- (vi) 2 CFR part 421.
- (vii) 48 CFR part 31.

(2) In addition, relevant provisions of the CCC Charter Act (15 U.S.C. 714 *et seq.*) and any other statutory provisions that are generally applicable to the CCC are also applicable to the RAPP and the regulations set forth in this part.

(3) RAPP Participants must also comply with Title VI of the Civil Rights Act of 1964 and related civil rights regulations and policies.

(4) Other laws and regulations that apply to the RAPP and RAPP Participants include, but are not limited to:

- (i) 2 CFR part 25.
- (ii) 2 CFR part 170.
- (iii) 2 CFR part 175.
- (iv) 2 CFR part 180.

(v) 2 CFR part 200.

(vi) 2 CFR part 400.

(vii) 37 CFR 401.1.

(viii) Executive Order 13224, as amended, "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism."

(c) Under the RAPP, the CCC may provide multi-year grant assistance to eligible U.S. entities to conduct certain marketing and promotion activities, including activities to address existing or potential non-tariff trade barriers, aimed at developing, maintaining, or expanding commercial export markets for U.S. agricultural commodities. RAPP Participants may receive assistance for either generic or brand promotion activities. While activities generally take place overseas, reimbursable activities may also take place in the United States. The CCC expects that all activities that occur in the United States for which RAPP reimbursement is sought will develop, maintain, or expand the commercial export market for the relevant eligible commodity in accordance with the RAPP Participant's approved RAPP program.

(d) The RAPP generally operates on a reimbursement basis.

(e) The CCC's policy is to ensure that benefits generated by RAPP agreements are broadly available throughout the relevant agricultural sector and that no single entity gains an undue advantage. The CCC also endeavors to enter into RAPP agreements covering a broad array of agricultural commodity sectors. The RAPP is administered by personnel of the Foreign Agricultural Service (FAS) acting on behalf of the CCC.

§ 1489.11 Definitions.

For purposes of this part the following definitions apply:

Activity means a specific foreign market development effort undertaken by a RAPP Participant.

Administrative expenses or costs means expenses or costs of administering, directing, and controlling an organization that is a RAPP Participant. Generally, this would include expenses or costs such as those related to:

(1) Maintaining a physical office (including, but not limited to: rent, office equipment, office supplies, computer hardware and software, office maintenance);

(2) Personnel (including, but not limited to, salaries, benefits, payroll taxes, individual insurance, training);

(3) Communications (including, but not limited to, phone expenses, internet, mobile phones, mobile phone service

postage, courier services, television, radio, walkie talkies);

(4) Management of an organization or unit of an organization (including, but not limited to, planning, supervision, supervisory travel, recruiting, hiring);

(5) Utilities (including, but not limited to, sewer, water, energy, Wi-Fi); and

(6) Professional services (including, but not limited to, accounting expenses, financial services, investigatory services).

Approval letter means a document by which the CCC informs an applicant that its RAPP application has been approved for funding. This letter may also approve specific activities and contain terms and conditions in addition to the program agreement. This letter requires a countersignature by the RAPP Participant before it becomes effective.

Attaché/Counselor means the FAS employee representing USDA interests in the foreign country in which promotional activities are conducted.

Brand participant means a U.S. for-profit entity that owns the brand(s) of the eligible commodity to be promoted (or has the exclusive rights to use such brand(s)) and that is participating in the RAPP brand promotion program of another RAPP Participant. This definition does not include any U.S. agricultural cooperatives.

Brand promotion means an activity that involves the exclusive or predominant use of a single U.S. company name, or the logo or brand name of a single U.S. company, or the brand of a U.S. agricultural cooperative, or any activity undertaken by a brand participant in a brand program.

Budget period means the period during which a RAPP Participant can undertake activities consistent with this part and its program agreement and approval letter with CCC. Budget periods will be specified in a RAPP Participant's approval letter.

CCC means the Commodity Credit Corporation, including any agency or official of the United States delegated the responsibility to act on behalf of the CCC.

Constraint means a condition in a particular country or region that needs to be addressed in order to develop, expand, or maintain exports of a specific eligible commodity.

Contribution means an expenditure made by a RAPP Participant, the U.S. industry, or a State agency in support of an approved activity. This includes expenditures to be made by entities in the RAPP Participant's industry in support of the entities' related promotion activities in the markets

covered by the RAPP Participant's agreement.

Credit memo means a commercial document, also known as a credit memorandum, issued by the RAPP Participant to a commercial entity that owes the RAPP Participant a certain sum. A credit memo is used when the RAPP Participant owes the commercial entity a sum less than the amount the entity owes the Participant. The credit memo reflects an offset of the amount the RAPP Participant owes the entity against the amount the entity owes to the RAPP Participant.

Demonstration projects means activities involving the erection or construction of a structure or facility or the installation of equipment.

Eligible commodity means any U.S. agricultural commodity or product thereof, excluding tobacco, that is comprised of at least 50 percent by weight, exclusive of added water, of agricultural commodities grown or raised in the United States.

Expenditure means either payment made by a RAPP participant via the transfer of funds or an offset reflected in a credit memo in lieu of a transfer of funds.

FAS means Foreign Agricultural Service, USDA.

FAS website means a website maintained by FAS providing information on RAPP. It is currently accessible at <https://fas.usda.gov/programs/regional-agricultural-promotion-program>.

Foreign third party means a foreign entity that a RAPP Participant works with to promote the export of an eligible commodity under the RAPP program.

Generic promotion means an activity that is not a brand promotion but, rather, promotes an eligible commodity generally. A generic promotion activity may include the promotion of a foreign brand (*i.e.*, a brand owned primarily by foreign interests and being used to market a commodity or product in a foreign market), if the foreign brand uses the promoted eligible commodity from multiple U.S. suppliers. A generic promotion activity may also involve the use of specific U.S. company names, logos, or brand names. However, in that case, the RAPP Participant must ensure that all U.S. companies seeking to promote such eligible commodity in the market have an equal opportunity to participate in the activity and that at least two U.S. companies participate. In addition, an activity that promotes separate items from multiple U.S. companies will be considered a generic promotion only if the promotion of the separate items maintains a unified theme (*i.e.*, a dominant idea or motif)

and style and is subordinate to the promotion of the generic theme.

Market means the country or countries targeted by an activity.

Notification means a document from the RAPP Participant by which the RAPP Participant proposes to CCC changes to the activities and/or funding levels in an approved RAPP program agreement and/or approval letter.

Period of performance means the total time interval between the start of a RAPP award and the planned end date, which may include one or more funded portions, or budget periods. A RAPP award's period of performance will be defined by the dates contained in the program agreement.

Product samples means a representative part of a larger whole promoted commodity or group of promoted commodities. Product samples include all forms of a promoted commodity (*e.g.*, fresh or processed), independent of the ultimate utilization of the sample. Product samples must be used in support of international marketing activities including, but not limited to, displays, food process testing, cooking demonstrations, or trade and consumer tastings.

Program agreement means a document entered into between CCC and a RAPP Participant setting forth the terms and conditions of approved activities under RAPP, including any subsequent amendments to such agreement.

Promoted commodity means an eligible commodity the sale of which is the intended result of a promotional activity.

RAPP means the Regional Agricultural Promotion Program.

RAPP notice means Regional Agricultural Promotion Program notices, which are documents that CCC issues for informational purposes. These RAPP notices are made available electronically on the FAS website. These notices have no legal effect. They are intended to alert RAPP Participants to various aspects of CCC's current administration of the RAPP program.

RAPP Participant or Participant means an entity that has entered into a RAPP program agreement with the CCC.

Sales and trade relations expenditures (STRE) means expenditures made on breakfast, lunch, dinner, receptions, and refreshments at approved activities; miscellaneous courtesies such as checkroom fees, taxi fares and tips for approved activities; and decorations for a special promotional occasion that is part of an approved activity.

Sales team means a group of individuals engaged in an approved

activity intended to result in specific sales.

SRTG means State Regional Trade Group. An SRTG is a nonprofit association of State-funded agricultural promotion agencies.

Temporary contractor means a contractor, typically a consultant or other highly paid professional, that is hired on a short-term basis to assist in the performance of an activity.

Trade team means a group of individuals engaged in an approved activity intended to promote the interests of an entire agricultural sector rather than to result in specific sales by any of its members.

UES website means a website maintained by FAS through which applicants may apply and are reimbursed for RAPP and other USDA market development programs. The website is currently accessible to persons with e-authentication certification at <https://apps.fas.usda.gov/ues/webapp/>. FAS may prescribe a different system through which applicants may apply to the RAPP and will announce such system in the applicable NOFO.

Unified Export Strategy (UES) means a standardized online internet application developed by USDA and available for use by entities to apply to USDA market development programs, including the RAPP.

U.S. agricultural commodity means any agricultural commodity of U.S. origin, including food, feed, fiber, forestry product, livestock, insects, and fish harvested from a U.S. aquaculture farm or harvested by a vessel (as defined in title 46 of the United States Code) in waters that are not waters (including the territorial sea) of a foreign country, and any product thereof.

USDA means the United States Department of Agriculture.

U.S. for-profit entity means a firm, association, or other entity organized or incorporated, located, and doing business for profit in the United States, and engaged in the export or sale of an eligible commodity.

§ 1489.12 Participation eligibility.

(a) To participate in the RAPP as a RAPP Participant, an entity must be:

- (1) A nonprofit U.S. agricultural trade organization;
- (2) A nonprofit SRTG;
- (3) A U.S. agricultural cooperative; or
- (4) A State agency.

(b) CCC will enter into an agreement only for the promotion of an eligible commodity.

(c) FAS may set forth specific eligibility information, including any factors or priorities that will affect the

eligibility of an applicant or application for selection, in the full text of the applicable NOFO posted on the U.S. Government website for grant opportunities.

§ 1489.13 Application process.

(a) *General application requirements.* CCC will periodically issue a NOFO through the *Grants.gov* website announcing that it is accepting applications for participation in the RAPP. Applications shall be submitted in accordance with the terms and requirements specified in the NOFO and in this part. Applicants may apply to conduct a generic promotion program and/or a brand promotion program that provides RAPP funds to brand participants for brand promotion, as well as to conduct other market promotion activities, including activities to address existing or potential non-tariff trade barriers. An applicant that is a U.S. agricultural cooperative may also apply for funds to conduct its own brand promotion program.

(b) *Requests for evaluation information.* CCC may request any information that it deems necessary to evaluate an application, including, but not limited to, performance measurement information. Applicants shall provide any requested information in the manner and according to the timeframe specified by CCC.

(c) *Special rules governing demonstration projects funded with CCC resources.* CCC will consider proposals for demonstration projects, provided:

(1) No more than one such demonstration project per constraint is undertaken within a market;

(2) The constraint to be addressed in the target market is a lack of technical knowledge or expertise;

(3) The demonstration project is a practical and cost-effective method of overcoming the constraint; and

(4) A third party must participate in such project through a written agreement with the RAPP Participant.

(d) *Universal identifier and System for Award Management (SAM).* In accordance with 2 CFR part 25, each entity that applies to the RAPP program and does not qualify for an exemption under 2 CFR 25.110 must:

(1) Be registered in SAM prior to submitting an application or plan;

(2) Maintain an active SAM registration with current information at all times during which it has an active Federal award or an application or plan under consideration by CCC; and

(3) Provide its unique identifier in each application or plan it submits to CCC.

(e) *Reporting subaward and executive compensation information.* In accordance with 2 CFR part 170, each entity that applies to the RAPP program and does not qualify for an exception under 2 CFR 170.110(b) must ensure it has the necessary processes and systems in place to comply with the applicable reporting requirements of 2 CFR part 170 should it receive RAPP funding.

§ 1489.14 Application review and formation of agreements.

(a) *General.* (1) CCC will review all proposals for eligibility and completeness. CCC will evaluate each eligible proposal against the factors described in the appropriate NOFO to identify those applications that it considers to best meet the criteria and objectives outlined in the NOFO. Based on its review and evaluation, CCC will, subject to the availability of funds, recommend an appropriate funding level for each proposal and submit the proposals and funding recommendations to the appropriate officials for decision. CCC may, when appropriate to the subject matter of the proposal, request the assistance of other U.S. Government experts in evaluating a proposal. All reviewers will be required to sign a conflict-of-interest form, and when conflicts of interests are identified the reviewer will be recused from the objective review process.

(2) When considering applicant organizations, CCC may give priority to those organizations that have the broadest producer representation and affiliated industry participation of the commodity being promoted, as determined by CCC. CCC may require that an applicant participate in the RAPP through another RAPP Participant or applicant.

(3) CCC will approve those applications that it determines best satisfy the criteria and factors specified in the NOFO.

(4) CCC will notify each applicant in writing of the final disposition of its application.

(b) *Formation of agreements.* CCC will send a program agreement (or amendment to an existing program agreement), an approval letter, and a signature card to each approved applicant. The program agreement or amendment and the approval letter will outline which activities and budgets are approved and will specify any special terms and conditions applicable to a RAPP Participant's program, including any requirements with respect to contributions and program evaluations. An applicant that decides to accept the terms and conditions contained in the program agreement or amendment and

the approval letter must so indicate by having the appropriate personnel sign the program agreement or amendment and the approval letter and submit these to CCC. Final agreement shall occur when the program agreement or amendment and the approval letter are signed by both parties.

(c) *Signature cards.* The RAPP Participant is encouraged to designate at least two individuals in its organization to sign program agreements and amendments, approval letters, reimbursement claims, and advance requests. The RAPP Participant shall submit the signature card signed by those designated individuals and by the RAPP Participant's Chief Executive Officer (or designee) to CCC. The Participant shall immediately notify CCC in writing of any changes in signatories and shall submit a revised signature card accordingly.

(d) *UES ID and passwords.* CCC will provide each RAPP Participant with IDs and passwords for the UES website, as necessary. RAPP Participants shall immediately notify CCC whenever a person who possesses the ID and password information no longer needs such information, or when a person who is not authorized gains such information.

(e) *Annual certifications.* A RAPP Participant through which U.S. for-profit entities are participating in the RAPP program shall obtain annual certifications from all such entities that certify their size, as defined in this part. The Participant shall retain these certifications in accordance with the recordkeeping requirements of this part.

(f) *Changes to activities and funding—*
(1) *Adding a new activity.* (i) A RAPP Participant may not conduct a new activity without first obtaining an approved activity budget for such change. To request approval of such activity budget, the RAPP Participant shall submit a notification to CCC.

(ii) A notification for a new activity shall provide an activity justification and identify any related adjustments to the approved strategic plan, including changes in the market, constraint, or opportunity that the activity proposes to address. The notification shall contain the activity description and the proposed budget.

(iii) After receipt of the notification, CCC will inform the RAPP Participant via the UES website whether the requested budget is approved.

(2) *Modifying existing activities and their funding levels.* (i) A RAPP Participant desiring to increase the funding level for existing, approved activities addressing a single constraint or opportunity by more than \$25,000 or

25 percent of the approved funding level, whichever is greater, must first submit a notification explaining the adjustment to CCC before making such change.

(ii) A RAPP Participant may make significant adjustments below \$25,000 or 25 percent of the approved funding level, whichever is greater, to the funding levels for existing, approved activities without prior notification to CCC, but only if it submits a notification explaining the adjustments to CCC no later than 30 days after the change. Minor adjustments to existing, approved activities and/or funding levels do not require notification.

(iii) Notifications shall describe the activity, changes to the activity, the existing funding level, the proposed funding level, and a justification for transfer of funds, if applicable.

§ 1489.15 Operational procedures for brand promotion programs.

(a) Where CCC approves an application by a RAPP Participant to run a brand promotion program that will include brand participants, the RAPP Participant shall establish brand program operational procedures. The RAPP Participant shall submit to CCC for approval its proposed brand program operational procedures. CCC will notify all RAPP Participants in writing in each Participant's approval letter as to applicable submission dates for and dates for approvals of brand program operation procedures. Such procedures shall include, at a minimum, a brand program application, application procedures, application review criteria, brand participant eligibility requirements, a participation agreement, reimbursement requirements, compliance requirements, reporting and recordkeeping requirements, employment practices, financial management requirements, contracting procedures, and evaluation requirements. The RAPP Participant must submit to CCC for approval any proposed changes to already approved brand program operational procedures before implementing such proposed changes.

(b) The RAPP Participant shall not enter into any participation agreements with brand participants, nor shall it implement any RAPP brand activities, unless and until CCC has communicated in writing its approval of the proposed operational procedures to the RAPP Participant.

(c) Where CCC approves a RAPP Participant's application to run a brand promotion program that will include brand participants, the RAPP Participant shall enter into participation

agreements with brand participants. Brand participants' size may not exceed 300 percent of the applicable small business size standard as found in 13 CFR part 121. These agreements must:

(1) Specify a time period for such brand promotion and require that all brand promotion expenditures be made within the RAPP Participant's approved budget period;

(2) Make no allowance for extension or renewal;

(3) Limit reimbursable expenditures to those made in countries and for activities approved in the brand participant's activity plan;

(4) Specify the percentage of promotion expenditures that will be reimbursed, reimbursement procedures, and documentation requirements;

(5) Include a written certification by the brand participant that it either owns the brand of the product it will promote or has exclusive rights to promote the brand in each of the countries in which promotion activities will occur;

(6) Require that all product labels, promotional material, and advertising will identify the origin of the eligible commodity as "American", "Product of the United States of America", "Product of the U.S.", "Product of the U.S.A.", "Product of America", "Grown in the United States of America", "Grown in the U.S.", "Grown in the U.S.A.", "Grown in America", "Made in the United States of America", "Made in the U.S.", "Made in the U.S.A.", "Made in America", or product of, grown in or made in any state or territory of the United States of America spelled out in its entirety, or other U.S. regional designation if approved in advance by the CCC; that such origin identification will be conspicuously displayed in a manner easily observed as identifying the origin of the product; and that such origin identification will conform, to the extent possible, to the U.S. standard of 1/8 inch (.42 centimeters) in height based on the lower case letter "o". The use of the above terms as a descriptor or in the name of the product (e.g., Cincinnati style chili, Gina's American Pizza) does not satisfy the product origin requirement. Phrases "product of", "grown in" or "made in" are encouraged, but not required. A RAPP Participant that wishes to use an origin statement that varies from those set out in this subsection must submit the proposed statement to CCC for review and must receive approval to use the statement before its use in an activity. A RAPP Participant may request an exemption from this requirement on a case-by-case basis. All such requests shall be in writing and include justification satisfactory to the CCC that

the labeling requirement in this paragraph (c)(6) would hinder a RAPP Participant's promotional efforts. CCC will determine, on a case-by-case basis, whether sufficient justification exists to grant an exemption from the labeling requirement. In addition, the CCC may temporarily waive this requirement where the CCC has determined that such labeling will likely harm sales rather than help them. Such determinations will be announced to RAPP Participants via a RAPP notice issued on the FAS website;

(7) Include a written certification by the brand participant that identifies its size on the date of its application for branded program funding, or that it is a U.S. agricultural cooperative;

(8) Require that the brand participant submit to the RAPP Participant a statement certifying that any Federal funds received will supplement, but not supplant, any private or third-party funds or other contributions to program activities; and

(9) Require the brand participant to maintain all original records and documents relating to program activities for three calendar years following the end of the applicable budget period and make such records and documents available upon request to authorized officials of the U.S. Government.

§ 1489.16 Contribution rules.

(a) In RAPP generic promotion programs, a RAPP Participant shall contribute a total amount in goods, services, and/or cash equal to at least 10 percent of the value of resources provided by the CCC for all generic promotion activities undertaken by the RAPP Participant.

(b) In RAPP brand promotion programs, a RAPP Participant conducting its own brand promotion or a brand participant that is participating in the RAPP brand promotion program of another RAPP Participant shall contribute at least 50 percent of the total eligible expenditures submitted in accordance with § 1489.17 made on each approved brand promotion.

(c) A RAPP Participant must use its own funds and may not use RAPP program funds to pay any administrative costs of the RAPP Participant's U.S. office(s), including legal fees, except as set forth in this part. Where the RAPP Participant uses its own funds to pay for administrative costs, such costs may be counted in calculating the amount of contributions the RAPP Participant contributes to RAPP generic or brand promotion programs.

(d) Regarding eligible contributions:

(1) In calculating the amount of contributions that it will make, and the contributions that the U.S. industry (including expenditures to be made by entities in the applicant's industry or agricultural sector in support of the entities' related promotion activities in the markets covered by the applicant's application) or State agency will make, the RAPP applicant may include the costs listed under paragraph (d)(2) of this section if such expenditures:

(i) Are necessary and reasonable for accomplishment of an approved activity;

(ii) Are not included as contributions for any other Federal award; and

(iii) Are not paid by the Federal Government under another Federal award, except where the Federal statute authorizing a program specifically provides that Federal funds made available for such program can be applied to the matching or cost sharing requirements of other Federal programs.

(2) Subject to paragraph (d)(1) of this section, as well as the cost principles in 2 CFR part 200 to the extent these principles do not directly conflict with the provisions of this part, eligible contributions are:

(i) Cash;

(ii) Compensation paid to personnel;

(iii) The cost of acquiring materials, supplies or services;

(iv) The cost of office space;

(v) A reasonable and justifiable proportion of general administrative costs and overhead;

(vi) Payments for indemnity and fidelity bond expenses;

(vii) The cost of business cards that target a foreign audience;

(viii) The cost of subscriptions that are of a technical, economic, or marketing nature and that are relevant to the approved activities of the RAPP Participant;

(ix) The cost of activities conducted overseas;

(x) Credit card fees;

(xi) The cost of any independent evaluation or audit that is not required by the CCC to ensure compliance with program agreement or regulatory requirements;

(xii) The cost of giveaways, awards, prizes and gifts;

(xiii) The cost of product samples;

(xiv) Fees for participating in U.S. Government-sponsored or endorsed export promotion activities;

(xv) The cost of air and local travel in the United States;

(xvi) STRE and the costs associated with trade shows, seminars, and entertainment conducted in the United States where the STRE and costs associated with trade shows, seminars,

and entertainment have a programmatic purpose and are authorized in the program agreement and/or the approval letter or authorized by prior written approval of the CCC;

(xvii) Other administrative expenses (e.g., supervisory travel from the U.S. to an overseas office); and

(xviii) The cost of any activity expressly listed as reimbursable in this part.

(3) The following are not eligible contributions:

(i) Any portion of salary or compensation of an individual who is the target of an approved promotional activity;

(ii) Any expenditure, including that portion of salary and time spent, related to promoting membership in the Participant organization (sometimes referred to in the industry as "backsell");

(iii) Any land costs other than allowable costs for office space;

(iv) The cost of refreshments and related equipment provided to office staff;

(v) The cost of insuring articles owned by private individuals;

(vi) The cost of any arrangement that has the effect of reducing the selling price of a U.S. agricultural commodity;

(vii) The cost of product development, product modifications, or product research, except as described in § 1489.17(c)(22);

(viii) Slotting fees or similar sales expenditures;

(ix) Membership fees in clubs and social organizations; and

(x) Any expenditure for an activity prior to the CCC's approval of that activity.

(4) The CCC shall determine, at the CCC's discretion, whether any cost not expressly listed in this section may be included by the RAPP Participant as an eligible contribution.

§ 1489.17 Reimbursement rules.

(a) A RAPP Participant may seek reimbursement for an eligible expenditure if:

(1) The expenditure was necessary and reasonable for the accomplishment of an approved RAPP activity; and

(2) The Participant has not been and will not be reimbursed for such expenditure by any other source.

(b) Subject to paragraphs (a) and (d) of this section, as well as the cost principles in 2 CFR part 200 to the extent these principles do not directly conflict with the provisions of this part, for either brand or generic promotion activities, the CCC will reimburse, in whole or in part, the costs of:

(1) Production and placement of advertising, in print, electronic media,

billboards, or posters, which may include advertising the availability of price discounts, except that advertising associated with a coupon or price discount for the RAPP-promoted product is not reimbursable. If advertising is related to both coupons or price discounts for products other than the RAPP Participant's promoted products as well as for RAPP-promoted products, then expenditures for such advertising will not be reimbursed in whole or in part (e.g., expenditures may not be prorated and submitted for reimbursement). Electronic media include, but are not limited to, radio, television, electronic mail, internet, telephone, text messaging, social media, and podcasting.

(2) Production and distribution of banners, recipe cards, table tents, shelf talkers, and other similar point of sale materials.

(3) Direct mail advertising.

(4) In-store and food service promotions, product demonstrations to the trade and to consumers, and distribution of product samples (but not the purchase of the product samples, except as authorized in paragraph (c)(9) of this section).

(5) Temporary displays and rental of space for temporary displays.

(6) Expenditures, other than travel expenditures, associated with seminars and educational training, whether conducted in the United States or outside the United States.

(7) Subject to paragraph (b)(18) of this section, expenditures, other than travel expenditures, associated with retail, trade and consumer exhibits and shows, whether held outside or inside the United States, including participation fees, booth construction, transportation of related materials, rental of space and equipment, and duplication of related printed materials. However, with regard to non-travel expenditures associated with retail, trade and consumer exhibits and shows held inside the United States, such expenditures are reimbursable only if the exhibit or show is: a food or agricultural show with no less than 30 percent of exhibitors selling food or agricultural products; and, an international show that targets buyers, distributors and the like from more than one foreign country and no less than 15 percent of its visitors are from outside the U.S. CCC will compile a list of approved retail, trade and consumer exhibits and shows held inside the United States for which RAPP reimbursement is available, and such list will be announced to RAPP Participants via a RAPP notice issued on FAS' website.

(8) Subject to paragraph (b)(18) of this section, international travel expenditures, not to exceed the full fare economy rate, including any fees for modifying the originally purchased airline ticket, per diem, passports, visas and inoculations, as allowed under the U.S. Federal Travel Regulations (41 CFR parts 301 through 304) and 2 CFR part 200, for no more than two representatives of a single brand participant (or RAPP Participant directly running its own brand program) to exhibit their company's (or cooperative's) products at a retail, trade, or consumer exhibit or show held outside the United States.

Representatives may include employees and board members of private companies, employees or members of cooperatives, or any broker, consultant, or marketing representative contracted by the company or cooperative to represent the company or cooperative in sales transactions. All travel should follow a direct or usually traveled route.

(9) Subscriptions that are of a technical, economic, or marketing nature and that are relevant to the approved activities of the RAPP Participant.

(10) Demonstrators, interpreters, translators, receptionists, and similar temporary workers who help with the implementation of individual promotional activities, such as trade shows, in-store promotions, food service promotions, and trade seminars.

(11) Giveaways, awards, prizes, gifts and other similar promotional materials, subject to such reimbursement limitation as CCC may determine and announce in writing to RAPP Participants via a RAPP notice issued on FAS' website. Reimbursement is available only when:

(i) The items are described in detail with a per unit cost in an approved strategic plan; and

(ii) Distribution of the promotional item is not contingent upon the consumer, or other target audience, purchasing a good or service to receive the promotional item.

(12) The design and production of packaging, labeling or origin identification, to be used during the budget period in which the expenditure is made, if such packaging, labeling or origin identification is necessary to meet the importing requirements of a foreign country.

(13) The design, production, and distribution of coupons for products other than the RAPP Participant's promoted products. If such activities include both coupons or price discounts for products other than the RAPP Participant's promoted products as well

as for RAPP-promoted products, then expenditures for such activities will not be reimbursed in whole or in part (*e.g.*, expenditures may not be prorated and submitted for reimbursement).

(14) An audit of a RAPP Participant as required by 2 CFR part 200, subpart F, if the RAPP is the RAPP Participant's largest source of Federal funding.

(15) The translation of written materials as necessary to carry out approved activities.

(16) Expenditures associated with developing, updating, and servicing websites on the internet that clearly target a foreign audience.

(17) International travel expenditures, not to exceed the full fare economy rate, including any fees for modifying the originally purchased airline ticket, per diem, passports, visas and inoculations, as allowed under the U.S. Federal Travel Regulations (41 CFR parts 301 through 304) and 2 CFR part 200, incurred for a foreign trade mission conducted outside the United States that is an activity under an approved branded program and that has met the following conditions:

(i) Trade mission travel for company (or cooperative) representatives was identified as a separate approved activity in the RAPP Participant's UES;

(ii) The trade mission included representatives, as defined in paragraph (b)(8) of this section, from a minimum of five different companies (or cooperatives), and no more than two representatives from each participating company (or cooperative);

(iii) The appropriate FAS overseas office supported the trade mission by dedicating meaningful funding or other resources (such as facilities or staff time) to the activity; and

(iv) The RAPP Participant with the approved brand program produced an itinerary or agenda for the trade mission that demonstrated that company (or cooperative) representatives would be engaged for a minimum of 6 hours per day (except for the first and last days of the mission) in trade mission activities that include, at a minimum, each of the following:

(A) A product showcase where the FAS overseas office approved an invitation list of qualified buyers;

(B) Pre-arranged one-on-one business meetings; and

(C) Evaluation and feedback sessions with FAS staff and trade mission sponsors.

(v) Reimbursement is conditional on the RAPP Participant having notified in writing the Attaché/Counselor in the destination country in advance of the travel to that country or region. All

travel should follow a direct or usually traveled route.

(18) Where USDA has sponsored or endorsed a U.S. pavilion at a retail, trade and consumer exhibit or show, whether held outside or inside the United States, RAPP funds may be used to reimburse the travel and/or non-travel expenditures of only those RAPP Participants located within the U.S. pavilion. Such expenditures must also adhere to the standard terms and conditions of the U.S. pavilion organizer. All travel should follow a direct or usually traveled route. Upon written request, the CCC may temporarily waive this subsection, on a case-by-case basis, where:

(i) The trade show is segregated into product pavilions; or

(ii) A company's distributor or importer is located outside the U.S. pavilion. Such waiver will be provided to the RAPP Participant in writing.

(19) Contracts with U.S.-based organizations when the only contracted service such organizations provide to a RAPP Participant is carrying out a specific market promotion activity in the United States directed to a foreign audience (*e.g.*, a trade mission of foreign buyers coming to the United States to visit U.S. exporters). Such contracts may be reimbursable as a direct promotional expense. If a U.S.-based organization provides administrative services to the RAPP Participant's domestic home office during a budget period, any direct promotional services such organization provides to the Participant, whether for the Participant's domestic or overseas offices, during the same budget period are not reimbursable.

(c) Subject to paragraphs (a) and (d) of this section as well as the cost principles in 2 CFR part 200 to the extent these principles do not directly conflict with the provisions of this part, but for generic promotion activities only, the CCC will also reimburse, in whole or in part, the cost of:

(1) Temporary contractor fees for contractors stationed overseas, except the CCC will not reimburse any portion of any such fee that exceeds the daily gross salary of a GS-15, Step 10 for U.S. Government employees in effect on the date the fee is earned, unless a bidding process reveals that such a contractor is not available at or below that salary rate.

(2) Subject to paragraph (b)(18) of this section, international travel expenditures, not to exceed the full fare economy rate, including any fees for modifying the originally purchased airline ticket, per diem, passports, visas, and inoculations, for activities held outside the United States or in the United States, as allowed under the U.S.

Federal Travel Regulations (41 CFR parts 301 through 304) and 2 CFR part 200, except that if the activity is participation in a retail, trade, or consumer exhibit or show held inside the United States, then international travel expenditures are covered only if the exhibit or show is: a food or agricultural show with no less than 30 percent of exhibitors selling food or agricultural products; and, an international show that targets buyers, distributors and the like from more than one foreign country and no less than 15 percent of its visitors are from countries other than the United States. The CCC will compile a list of approved retail, trade, and consumer exhibits and shows held inside the United States for which RAPP reimbursement is available, and such list will be announced to RAPP Participants via a RAPP notice issued on FAS' website.

(i) The CCC generally will not reimburse any portion of air travel, including any fees for modifying the originally purchased ticket, in excess of the full fare economy rate or when the RAPP Participant fails to notify the Attaché/Counselor in the destination country in advance of the travel to that country or region, unless the CCC determines it was impractical to provide such notice. If a traveler flies in business class or a different premium class, the basis for reimbursement will be the full fare economy class rate for the same flight and the RAPP Participant shall provide documentation establishing such full fare economy class rate to support its reimbursement claim. If economy class is not offered for the same flight or if the traveler flies on a charter flight, the basis for reimbursement will be the average of the full fare economy class rate for flights offered by three different airlines between the same points on the same date, and the RAPP Participant shall provide documentation establishing such average of the full fare economy class rates to support its reimbursement claim.

(ii) In limited circumstances, the RAPP Participant may be reimbursed for air travel up to the business class rate (*i.e.*, a premium class rate other than the first class rate) upon prior written approval by the CCC. Such circumstances are:

(A) Regularly scheduled flights between origin and destination points do not offer economy class (or equivalent) airfare, and the RAPP Participant receives written documentation from its travel agent to that effect at the time the tickets are purchased;

(B) Business class air travel is necessary to accommodate an eligible traveler's disability. Such disability must be substantiated in writing by a physician; and

(C) If an eligible traveler is an employee, contractor, or member of a RAPP participant organization, and the eligible traveler's origin and/or destination are outside of the continental United States and the scheduled flight time, beginning with the scheduled departure time, ending with the scheduled arrival time, and including stopovers and changes of planes, exceeds 14 hours. In such case, per diem and other allowable expenses will also be reimbursable for the day of arrival. However, no expenses will be reimbursable for a rest period or for any non-work days (*e.g.*, weekends, holidays, personal leave, etc.) immediately following the date of arrival.

(D) If an eligible traveler is the target of a market development activity (*e.g.*, a foreign buyer, foreign importer, member of the foreign media), then the RAPP Participant may be reimbursed for air travel up to the business class rate when the eligible traveler's origin and/or destination are outside of the continental United States and the scheduled flight time, beginning with the scheduled departure time, ending with the scheduled arrival time, and including stopovers and changes of planes, exceeds five hours. In such cases, per diem and other allowable expenses will also be reimbursable for the day of arrival. However, no expenses will be reimbursable for a rest period or for any non-work days (*e.g.*, weekends, holidays, personal leave, etc.) immediately following the date of arrival.

(iii) Alternatively, in lieu of reimbursing up to the business class rate in such circumstances noted in paragraphs (c)(2)(ii)(C) and (D) of this section, the CCC will reimburse economy class airfare plus per diem and other allowable travel expenses related to a rest period of up to 24 hours, either *en route* or upon arrival at the destination. For a trip with multiple destinations, each origin/destination combination will be considered separately when applying the 14-hour rule for eligibility of reimbursement of business class travel or rest period expenses.

(iv) A stopover for purposes of this paragraph (c)(2) is the time a traveler spends at an airport, other than the originating or destination airport, which is a normally scheduled part of a flight. A change of planes is the time a traveler spends at an airport, other than the

originating or destination airport, to disembark from one flight and embark on another.

(v) All travel under this paragraph (c)(2) should follow a direct or usually traveled route. Under no circumstances should a traveler select flights in a manner that extends the scheduled flight time to beyond 14 hours in part to secure eligibility for reimbursement of business class travel. An eligible traveler that is the target of a market development activity is only eligible for a rest period when that traveler flies in economy class and meets the 14-hour test.

(3) Automobile mileage at the local U.S. Embassy rate or rental cars while in travel status.

(4) Other allowable expenditures while in travel status as authorized by the U.S. Federal Travel Regulations (41 CFR parts 301 through 304) and 2 CFR part 200.

(5) Accident liability insurance premiums for facilities used jointly with third-party participants for RAPP activities or for RAPP-funded travel of third-party participants, provided the types and extent and cost of coverage are in accordance with the RAPP Participant's policy and sound business practice.

(6) Market research, including research to determine the types of products that are desired in a market.

(7) Legal fees incurred in resolving trade issues with foreign countries.

(8) The sample purchase price, and the cost of transporting samples domestically in the United States to the port of export and then to the first foreign port or first point of entry, for samples of eligible commodities used to provide on-site technical assistance to the trade necessary to facilitate successful use of the relevant eligible commodity by importers. The target of such activity must be the trade, and not consumers, but any product resulting from the technical training can be used to determine consumer preferences.

(9) STRE incurred outside of the United States and STRE incurred within the United States in conjunction with an approved activity where the STRE has a programmatic purpose and are authorized with prior written approval from the CCC. RAPP Participants are required to use the appropriate American Embassy representational funding guidelines for breakfasts, lunches, dinners and receptions incurred outside of the United States as the basis for their calculating eligible expenses. RAPP Participants may exceed Embassy guidelines by up to 25 percent without prior approval. RAPP Participants may only exceed 125

percent of Embassy guidelines when they have received written authorization from the FAS Agricultural Counselor at the Embassy. The amount of unauthorized STRE expenses that exceed 125 percent of the guidelines will not be reimbursed. RAPP Participants must pay the difference between the total cost of STRE events and the appropriate amount as determined by the guidelines and this part. For STRE incurred in the United States, the RAPP Participant should provide, in its request for approval, the basis for determining its proposed expenses.

(10) U.S. office(s) administrative support expenses, incurred specifically to administer the RAPP, for the National Association of State Departments of Agriculture, the SRTGs, and the Intertribal Agriculture Council. The level of such funding will be established in the approval letter.

(11) U.S. office(s) administrative support expenses, incurred specifically to administer the RAPP, for any RAPP Participants not identified in paragraph (c)(10) of this section, will be considered, except for agricultural cooperatives. Reimbursement for such expenses shall not exceed eight percent of the RAPP Participant's total RAPP budget. The level of such funding will be established by CCC in the approval letter.

(12) Non-travel expenditures associated with conducting international staff conferences held either in or outside the United States.

(13) Subject to paragraph (b)(18) of this section, domestic travel expenditures, as allowed under the U.S. Federal Travel Regulations (41 CFR parts 301 through 304) and 2 CFR part 200, for international retail, trade, and consumer exhibits and shows conducted in the United States upon prior written approval by CCC. Domestic travel expenses to such a show or exhibit are covered only if the exhibit or show is: a food or agricultural show with no less than 30 percent of exhibitors selling food or agricultural products; and an international show that targets buyers, distributors and the like from more than one foreign country and no less than 15 percent of its visitors are from countries other than the host country. CCC will compile a list of approved retail, trade, and consumer exhibits and shows held inside the United States for which RAPP reimbursement is available and such list will be announced to RAPP Participants via a RAPP notice issued on FAS' website.

(14) Domestic travel expenditures, as allowed under the U.S. Federal Travel

Regulations (41 CFR parts 301 through 304) and 2 CFR part 200, for seminars and educational training conducted in the United States.

(15) Domestic travel expenditures, as allowed under the U.S. Federal Travel Regulations (41 CFR parts 301 through 304) and 2 CFR part 200, for up to two individuals, whether home office RAPP Participant employees, RAPP Participant board members, or State department of agriculture employees paid by the RAPP Participant, or a combination thereof, when such individuals accompany foreign trade missions or technical teams while traveling in the United States where the following conditions are met:

(i) Such trade missions or technical team visits are identified in the RAPP Participant's UES;

(ii) Such trade missions or technical team visits have been approved by CCC; and

(iii) The RAPP-sponsored travelers submit a follow-up trip report to CCC that includes the following:

(A) Purpose for the individuals' participation;

(B) Any pre-arranged business meetings;

(C) Itinerary and/or agenda for the trip; and

(D) Feedback from sponsors and trade mission/technical team members on the success of the trip.

(16) Approved demonstration projects.

(17) Expenditures related to copyright, trademark, or patent registration, including attorney fees.

(18) Rental or lease expenditures for storage space for program-related materials.

(19) Business cards that target a foreign audience.

(20)(i) Expenditures associated with developing, updating, and servicing websites on the internet that:

(A) Contain a message related to exporting or international trade;

(B) Include a discernible "link" to the FAS website or an FAS overseas office website; and

(C) Have been specifically approved by the appropriate FAS division. Expenditures related to websites or portions of websites that are accessible only to an organization's members are not reimbursable.

(ii) Reimbursement claims for websites that include "members only" sections must be prorated to exclude the costs associated with those areas subject to restricted access.

(21) Expenditures not otherwise prohibited from reimbursement that are associated with activities held in the United States or abroad designed to

improve market access by specifically addressing temporary, permanent, or impending non-tariff barriers to trade that prohibit or threaten U.S. exports of agricultural commodities. Examples of such expenditures include, but are not limited to: initial pre-clearance programs, educational training, policy advocacy, public relations efforts, foreign country audits of U.S. facilities, export protocol and work plan support, seminars and workshops, study tours, field surveys, development of pest lists, pest and disease research, database development, and reasonable logistical and administrative support.

(22) Organization costs for overseas offices approved in agreements. Such costs include incorporation fees, brokers' fees, and fees to attorneys, accountants, or investment counselors, whether or not employees of the organization, incurred in connection with the establishment or reorganization of the overseas office, and rent, utilities, communications originating overseas, office supplies, accident liability insurance premiums (provided the types and extent and cost of coverage are in accordance with the RAPP Participant's policy and sound business practice), and routine accounting and legal services required to maintain the overseas office.

(23) With prior CCC approval, the purchase, lease, or repair of, or insurance premiums for, capital goods that have an expected useful life of at least one year, such as equipment, machinery, removable fixtures, computer hardware and software, and portable electronic communications devices (including mobile phones and wireless devices).

(24) Compensation and allowances for housing and cost of living adjustments paid to a U.S. citizen employee or a U.S. citizen contractor stationed overseas, provided such benefits are granted under established written policies, except CCC will not reimburse that portion of:

(i) The total of compensation and allowances that exceed 125 percent of the level of a GS-15 Step 10 salary for U.S. Government employees; or

(ii) Allowances that exceed the rate authorized for U.S. Embassy personnel.

(25) Compensation of non-U.S. citizen staff employees or non-U.S. contractors stationed overseas, subject to the following limitations:

(i) Where there is a local U.S. Embassy Foreign Service National (FSN) salary plan, CCC will not reimburse any portion of such compensation that exceeds the compensation prescribed for the most comparable position in the FSN salary plan; or

(ii) Where an FSN salary plan does not exist, CCC will not reimburse any portion of such compensation that exceeds locally prevailing levels, which the RAPP Participant shall document by a salary survey or other means.

(26) A retroactive salary adjustment for non-U.S. citizen staff employees or non-U.S. contractors stationed overseas that conforms to a change in FSN salary plans, effective as of the date of such change.

(27) Accrued annual leave as of the time employment is terminated or as of such time as required by local law.

(28) Overtime paid to clerical staff of approved RAPP-funded overseas offices.

(29) Such premiums for health or accident insurance and other benefits for foreign national employees that the employer is required by law to pay, provided that such benefits are granted under established written policies.

(30) Legal fees to obtain advice on the host country's labor laws.

(31) Employment agency fees.

(32) Evacuation payments (safe haven) and shipment and storage of household goods and motor vehicles for relocations lasting at least 12 months.

(33) Travel costs for dependents, as allowed in 2 CFR part 200 (e.g., for travel of duration of six months or more with prior approval of CCC).

(34) That portion of the cost of wireless phone plans that is devoted to program activities and monthly service fees prorated at the proportion of program-related usage to total usage.

(d) CCC will not reimburse any cost of:

(1) Forward year financial obligations, such as severance pay, attributable to employment of foreign nationals;

(2) Expenses, fines, settlements, or judgments relating to legal suits, challenges or disputes, except as otherwise allowed in 2 CFR part 200 and this part;

(3) The design and production of packaging, labeling or origin identification, except as specifically allowed in this part;

(4) Product development, product modification or product research, except as specified in paragraph (c)(21) of this section;

(5) Product samples to be distributed to consumers;

(6) Slotting fees or similar sales expenditures;

(7) The purchase of, construction of, or lease of space for permanent, non-mobile displays, *i.e.*, displays that are constructed to remain permanently in the same location beyond one budget period. However, the CCC may, at its discretion, reimburse the construction or purchase of permanent displays on a

case-by-case basis, if the Participant sought and received prior written approval from the CCC of such construction or purchase;

(8) Rental, lease or purchase of warehouse space, except for storage space for program-related material;

(9) Coupon redemption or price discounts of the RAPP promoted commodity;

(10) Refundable deposits or advances;

(11) Giveaways, awards, prizes, gifts and other similar promotional materials in excess of the limitation that the CCC will determine. Such determination will be announced in writing via a RAPP notice issued on FAS' website;

(12) Alcoholic beverages that are not a promoted commodity and part of an approved promotional activity;

(13) The purchase, lease (except for use in authorized travel status) or repair of motor vehicles;

(14) Travel of applicants for employment interviews;

(15) Unused non-refundable airline tickets or associated penalty fees, except where travel was restricted by U.S. Government action or advisory;

(16) Independent evaluations or audits, including evaluations or audits of the activities of a subcontractor, if the CCC determines that such a review is needed in order to confirm past or to ensure future program agreement or regulatory compliance;

(17) Any arrangement that has the effect of reducing the selling price of a U.S. agricultural commodity;

(18) Goods, services and salaries of personnel provided by U.S. industry or foreign third party;

(19) Membership fees in clubs and social organizations;

(20) Indemnity and fidelity bonds, except as otherwise allowed in 2 CFR part 200;

(21) Fees for participating in U.S. Government-sponsored activities, other than trade fairs and exhibits;

(22) Business cards that target a U.S. domestic audience;

(23) Seasonal greeting cards;

(24) Office parking fees;

(25) Subscriptions to publications that are not of a technical, economic, or marketing nature or that are not relevant to the approved activities of the RAPP Participant;

(26) U.S. office(s) administrative expenses, including communication costs, except as noted in paragraphs (c)(10) and (11) of this section, and except that usage costs for communications devices incurred while on reimbursable international or domestic travel for approved RAPP brand or generic promotion activities are reimbursable as eligible travel

expenditures as allowed under the U.S. Federal Travel Regulations (41 CFR parts 301 through 304) and 2 CFR part 200;

(27) Any expenditure on an activity that includes any derogatory reference or comparison to other U.S. agricultural commodities;

(28) Payment of U.S. and foreign employees' or contractors' share of personal taxes, except where a foreign country's laws require the RAPP Participant to pay such employees' or contractors' share;

(29) Any expenditure made for an activity prior to the CCC's approval of that activity;

(30) Contributions to a contingency reserve or any similar provision made for events the occurrence of which cannot be foretold with certainty as to time, intensity, or with an assurance of their happening;

(31) Expenditures associated with a RAPP Participant's creation or review of their fraud prevention program, contracting procedures, or brand program operational procedures;

(32) Entertainment (e.g., amusements, diversions, cover charges, personal gifts, or tickets to theatrical or sporting events); and

(33) Refreshments, or related equipment, for office staff.

(e) For a brand promotion activity, the CCC will reimburse no more than 50 percent of the total eligible expenditures made on that activity by a brand participant.

(f) The CCC will reimburse for expenditures made after the conclusion of a RAPP Participant's period of performance, provided:

(1) The activity was completed prior to the expiration date shown in the RAPP Participant's program agreement; and

(2) All expenditures for the activity were made within 6 months following the expiration date shown in the RAPP Participant's program agreement.

(g) A RAPP Participant shall not use RAPP funds for any activity or any expenses incurred by the RAPP Participant prior to the date of the program agreement or after the date the program agreement is suspended or terminated, except as otherwise permitted by the CCC.

(h) Except as otherwise provided in this part, RAPP-funded travel shall conform to U.S. Federal Travel Regulations (41 CFR parts 301 through 304) and 2 CFR part 200, and RAPP-funded air travel shall conform to the requirements of the Fly America Act (49 U.S.C. 40118). For international travel, the RAPP Participant shall notify the Attaché/Counselor in the destination

countries in writing in advance of any proposed travel.

(i) The CCC may determine, at the CCC's discretion, whether any cost not expressly listed in this section will be reimbursed.

\$ 1489.18 Reimbursement procedures.

(a) Participants are required to use the CCC's UES system to request reimbursement for eligible expenditures under RAPP.

(b) All claims for reimbursement shall be submitted by the RAPP Participant's U.S. office to the CCC through the UES system.

(c) [Reserved]

(d) The CCC will not reimburse claims submitted later than 6 months after the expiration date shown in the RAPP Participant's program agreement.

(e) If the CCC overpays a reimbursement claim, then the RAPP Participant shall repay the CCC the amount of the overpayment either by submitting a check payable to the CCC or by offsetting its next reimbursement claim. The Participant shall make such payment within 30 calendar days of the date that they discover, or are made aware, of any overpayment. The RAPP Participant shall make such payment in U.S. dollars, unless otherwise approved in advance, in writing, by the CCC.

(f) If a RAPP Participant receives a reimbursement or offsets an advanced payment that is later disallowed, the RAPP Participant shall repay the CCC within 30 days of such disallowance the amount disallowed either by submitting a check payable to the CCC or by offsetting its next reimbursement claim. The RAPP Participant shall make such payment in U.S. dollars, unless otherwise approved in advance, in writing, by the CCC.

(g) RAPP funds may be expended by RAPP Participants only on legitimate, approved activities as set forth in the program agreement and approval letter. If a RAPP Participant discovers that RAPP funds have not been properly spent, it shall notify the CCC and shall within 30 calendar days of its discovery repay the CCC the amount owed either by submitting a check payable to the CCC or by offsetting its next reimbursement claim. The RAPP Participant shall make such payment in U.S. dollars.

(h) The RAPP Participant shall report any actions that may have a bearing on the propriety of any claims for reimbursement in writing to CCC.

\$ 1489.19 Advances.

(a) *Policy.* In general, the CCC operates the RAPP on a reimbursable basis.

(b) *Exception.* A RAPP Participant may request an advance of RAPP funds from the CCC for generic promotion activities, provided the RAPP Participant meets the criteria for advance payments in 2 CFR part 200. The CCC will not approve any request for an advance submitted after the expiration date shown in the RAPP Participant's program agreement. At any given time, total payments advanced shall not exceed 40 percent of a RAPP Participant's approved generic activity budget for the budget period. The CCC will not advance funds to a RAPP Participant for brand promotion activities. When approving a request for an advance, the CCC may require the RAPP Participant to carry adequate fidelity bond coverage when the absence of such coverage is considered by the CCC to create an unacceptable risk to the interests of the RAPP. Whether an "unacceptable risk" exists in a particular situation will depend on a number of factors, such as, for example, the Participant's history of performance in RAPP; the Participant's perceived financial stability and resources; and any other factors presented in the particular situation that may reflect on the Participant's responsibility or the riskiness of its activities.

(c) *Interest.* A RAPP Participant shall deposit and maintain in an insured bank account in the United States all funds advanced by the CCC. The account shall be interest-bearing unless the exceptions in 2 CFR part 200 apply. Interest earned by the RAPP Participant on funds advanced by the CCC is not program income. The RAPP Participant shall remit any interest earned on the advanced funds to the appropriate entity as set forth in 2 CFR part 200.

(d) *Refunds due the CCC.* A RAPP Participant shall fully expend all advances on approved generic promotion activities within 90 calendar days after the date the advance was approved in the UES. By the end of the 90 calendar days, the RAPP Participant must submit reimbursement claims to offset the advance or submit a check made payable to CCC for any unexpended balance. The RAPP Participant shall make such payment in U.S. dollars, unless otherwise approved in advance, in writing, by the CCC.

\$ 1489.20 Financial management.

(a) A RAPP Participant shall implement and maintain a financial management system that conforms to generally accepted accounting principles. A RAPP Participant's financial management system shall comply with the standards in 2 CFR part 200.

(b) A RAPP Participant shall institute internal controls and provide written guidance to commercial entities participating in its activities to ensure their compliance with this part.

(c) A RAPP Participant shall retain all records concerning a RAPP program transaction for a period of three years after completion of the program transaction and permit the CCC to have full and complete access to such records during the transaction period and for such three-year period after completion of the program transaction. These records shall include all records pertaining to contractors.

(d) A RAPP Participant shall maintain its records of expenditures and contributions in a manner that allows it to provide information by activity plan, country, activity number, and cost category. Such records shall include:

(1) Receipts for all STRE (actual vendor invoices or restaurant checks, rather than credit card receipts);

(2) Original receipts for any other program-related expenditure in excess of a set amount that CCC will determine and announce in writing to all RAPP Participants via a RAPP notice issued on the FAS website. The CCC may, from time to time, set a different minimum amount. In that case, the CCC will announce the new amount in writing to all RAPP Participants via a RAPP notice issued on the FAS website;

(3) The exchange rate used to calculate the dollar equivalent of expenditures made in a foreign currency and the basis for such calculation;

(4) Copies of reimbursement claims;

(5) An itemized list of claims charged to each of the RAPP Participant's CCC resources accounts;

(6) Documentation with accompanying English translation supporting each reimbursement claim, including original evidence to support the financial transactions such as canceled checks, receipted paid bills, contracts or purchase orders, per diem calculations, travel vouchers, and credit memos; and

(7) Documentation supporting contributions. These must include the dates, purpose, and location of the activity for which the cash or in-kind items were claimed as a contribution; who conducted the activity; the participating groups or individuals; and the method of computing the claimed contributions. RAPP Participants must retain and make available for compliance review documentation related to claimed contributions.

(e) Upon request, a RAPP Participant shall provide to the CCC originals of documents supporting reimbursement claims.

§ 1489.21 Reports.

(a) *Contribution report.* Not later than 6 months after the expiration date shown in the RAPP Participant's program agreement, a RAPP Participant shall submit a report that identifies, by cost category and in U.S. dollar equivalent, contributions made by the Participant, the applicable U.S. industry, and the States during the Participant's RAPP period of performance. Foreign third-party contributions are not to be included in the contribution report.

(b) *Trip reports.* Not later than 45 days after completion of travel (other than local travel), a RAPP Participant shall electronically submit a trip report. The report must include the name(s) of the traveler(s), purpose of travel, itinerary, names and affiliations of contacts, and a brief summary of findings, conclusions, recommendations, and specific accomplishments.

(c) *Research reports.* Not later than 6 months after the expiration date shown in the RAPP Participant's program agreement, a RAPP Participant shall submit a report on any research conducted pursuant to the approved RAPP program.

(d) *Evaluation reports.* Not later than 6 months after the expiration date shown in the RAPP Participant's program agreement, a RAPP Participant shall submit a report on any evaluations conducted in accordance with the approved RAPP program, including the outcome of action taken with RAPP funding and the increased market access or exports that can be directly attributed to the RAPP program.

(e) *Annual audits.* Where the CCC is designated the cognizant agency for audit, the CCC may require the RAPP Participant to submit to the CCC an annual audit in accordance with 2 CFR part 200. If the CCC requires an additional audit with respect to a particular agreement, then the RAPP Participant shall arrange for such audit and shall submit to the CCC, in the manner to be specified by the CCC, such audit of the agreement.

(f) *Additional reports.* The CCC may require the submission of additional reports.

(g) *Approval letters.* A RAPP Participant's program agreement and/or approval letter shall specify to whom the Participant shall submit the reports required in this section.

(h) *Program reviews.* FAS, through its authorized representatives, may review project accomplishments, management control systems, and administration of funding provided through the program to ensure adherence to the requirements in this part. During such reviews, FAS

will review recipients' files related to the grant-funded program, and technical assistance may be required.

§ 1489.22 Evaluation.

(a)(1) The Government Performance and Results Act (GPRA) of 1993 (5 U.S.C. 306; 31 U.S.C. 1105, 1115–1119, 3515, 9703–9704) requires performance measurement of Federal programs, including the RAPP. Evaluation of the RAPP's effectiveness will depend on a clear statement by Participants of goals to be met within a specified time, schedule of measurable milestones for gauging success, plan for achievement, and assessment of results of activities at regular intervals. The overall goal of the RAPP and of individual Participants' programming is to increase sales that would not have occurred in the absence of RAPP funding. A RAPP Participant that can demonstrate such sales, taking into account extenuating factors beyond the Participant's control, will have met the overall objective of the GPRA and the need for evaluation.

(2) Evaluation is an integral element of program planning and implementation, providing the basis for the strategic plan. The evaluation results guide the development and scope of a RAPP Participant's program, contributing to program accountability and providing evidence of program effectiveness that directly ties program funds to increased sales.

(b) All RAPP Participants must report annual results against their target market and/or regional constraint/opportunity performance measures. These are outcome results usually based on multiple activities and should demonstrate progress made in the market during the latest budget period. This report shall be completed and submitted to the CCC no later than 6 months following the end of each Participant's budget period.

(c) When deemed appropriate or required by the CCC, a RAPP Participant shall complete a program evaluation. A program evaluation is a review of the RAPP Participant's entire program, or an appropriate portion of the program as agreed to by the RAPP Participant and CCC, to determine the effectiveness of the RAPP Participant's strategy in meeting specified goals. Actual scope and timing of the program evaluation shall be determined by the RAPP Participant and CCC and specified in the approval letter. A RAPP Participant shall submit, via a cover letter to CCC, an executive summary that assesses the program evaluation's findings and recommendations, as well as any proposed changes in program strategy or

design as a result of the evaluation. A program evaluation shall contain:

- (1) The name of the party conducting the evaluation;
- (2) The scope of the evaluation;
- (3) A concise statement of the market constraint(s)/opportunity(ies) and the goals specified in the approved strategic plan;
- (4) A description of the evaluation methodology;
- (5) A description of export sales achieved;
- (6) A summary of the findings, including an analysis of the strengths and weaknesses of the program(s); and
- (7) Recommendations for future programs.

(d) When deemed appropriate or required by the CCC, RAPP Participants conducting a branded program must also complete a brand promotion evaluation. A brand promotion evaluation is a review of the U.S. and foreign commercial entities' export sales to determine whether the activity achieved the goals specified in the approved RAPP program. Actual scope and timing of the brand promotion evaluation shall be determined by the RAPP Participant and CCC and specified in the approval letter.

(e) On an annual basis, or more often when appropriate or required by the CCC, a RAPP Participant shall complete and submit program success stories. The CCC will announce to all RAPP Participants in writing the detailed requirements for completing and submitting program success stories.

§ 1489.23 Compliance reviews and notices.

(a) USDA staff may conduct compliance reviews of RAPP Participants' activities under the RAPP program. RAPP Participants shall cooperate fully with relevant USDA staff conducting compliance reviews and shall comply with all requests from USDA staff to facilitate the conduct of such reviews.

(b) Upon conclusion of the compliance review, USDA staff will provide a written compliance report to the RAPP Participant. The compliance report will specify whether USDA staff believe that CCC may be entitled to recover funds from the Participant and/or it appears that the Participant is not complying with any of the terms or conditions of the program agreement, approval letter, or the applicable laws and regulations. The compliance report will explain the basis for any recovery of funds from the Participant. Within 60 calendar days of the date the compliance report cover letter is signed, the RAPP Participant shall repay the

CCC the amount owed either by submitting a check payable to the CCC or by offsetting its next reimbursement claim. The RAPP Participant shall make such payment in U.S. dollars, unless otherwise approved in advance, in writing, by the CCC. If, however, a RAPP Participant notifies the CCC within 60 calendar days of the date the compliance report cover letter is signed that the Participant intends to file an appeal pursuant to paragraph (e) of this section, then the amount owed to the CCC by the RAPP Participant is not due until the appeal procedures are concluded and the CCC has made a final written determination as to the amount owed. If, as a result of a compliance review, the CCC determines that further review is needed in order to ensure compliance with the requirements of RAPP, then the CCC may require the Participant to contract for an independent audit.

(c) In addition, the CCC may notify a RAPP Participant in writing at any time if CCC determines that CCC may be entitled to recover funds from the Participant. The CCC will explain the basis for any recovery of funds from the Participant in the written notice. The RAPP Participant shall, within 30 calendar days of the date of the notice, repay the CCC the amount owed either by submitting a check payable to the CCC or by offsetting its next reimbursement claim. The RAPP Participant shall make such payment in U.S. dollars, unless otherwise approved in advance, in writing, by the CCC. If, however, a RAPP Participant notifies the CCC within 30 calendar days of the date of the written notice that the Participant intends to file an appeal pursuant to paragraph (e) of this section, then the amount owed to the CCC by the RAPP Participant is not due until the appeal procedures are concluded and the CCC has made a final determination as to the amount owed.

(d) The fact that a compliance review has been conducted by USDA staff does not signify that a RAPP Participant is in compliance with its program agreement, approval letter, and/or applicable laws and regulations.

(e) For appeals:

(1) A RAPP Participant may, within 60 calendar days of the date of the compliance report or written notice from the CCC, submit a written response to the CCC appealing the report or notice. CCC, at its discretion, may extend the period for response.

(2) After review of the Participant's response, the CCC shall determine whether the Participant owes any funds to the CCC and will inform the Participant in writing of the basis for the

determination. The CCC will initiate action to collect such amount by providing the Participant a written demand for payment of the debt pursuant to Debt Settlement Policies and Procedures, 7 CFR part 3.

(3) Within 30 calendar days of the date of the determination, the Participant may request in writing that the CCC reconsider the determination and shall submit in writing the basis for such reconsideration. The Participant may also request a hearing.

(4) If the Participant requests a hearing, the CCC will set a date and time for the hearing. The hearing will be an informal proceeding. A transcript will not ordinarily be prepared unless the Participant bears the cost of a transcript; however, the CCC may in its discretion have a transcript prepared at the CCC's expense.

(5) The CCC will base its final determination upon information contained in the administrative record. The Participant must exhaust all administrative remedies contained in this section before pursuing judicial review of a determination by the CCC.

§ 1489.24 Failure to make required contribution.

A RAPP Participant's required contribution will be specified in the approval letter. If the RAPP Participant's required contribution is specified as a dollar amount and the RAPP Participant does not contribute a total dollar amount sufficient to make the required contribution, then the RAPP Participant shall pay to the CCC in dollars the difference between the amount actually contributed and the amount specified in the approval letter. If the RAPP Participant's required contribution is specified as a percentage of the total amount reimbursed by the CCC and the RAPP Participant does not provide a dollar amount of contributions sufficient to achieve the specified percentage, then the RAPP Participant may either return to the CCC the amount of funds reimbursed by the CCC to increase its actual contribution percentage to the required level or pay to the CCC in U.S. dollars the difference between the amount actually contributed and the amount of funds necessary to increase its actual contribution percentage to the required level. A RAPP Participant shall remit such payment within six months after the expiration date shown in the RAPP Participant's program agreement. The RAPP Participant shall make such payment in U.S. dollars, unless otherwise approved in advance, in writing, by the CCC.

§ 1489.25 Submissions.

For all permissible methods of delivery, submissions required by this part shall be deemed submitted as of the date received by the CCC.

§ 1489.26 Disclosure of program information.

(a) Documents submitted to CCC by RAPP Participants are subject to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, and 7 CFR part 1, subpart A, specifically § 1.12.

(b) Any research conducted by a RAPP Participant pursuant to a RAPP program agreement and/or approval letter shall be subject to the provisions relating to intangible property in 2 CFR part 200.

§ 1489.27 Ethical conduct.

(a) A RAPP Participant shall conduct its business in accordance with the laws and regulations of the country in which an activity is carried out and in accordance with applicable U.S. Federal, State, and local laws and regulations. A RAPP Participant shall conduct its business in the United States in accordance with applicable Federal, State, and local laws and regulations. All RAPP Participants must comply with the regulations in 2 CFR part 200 and this part.

(b) Except for a U.S. agricultural cooperative or a U.S. for-profit entity, neither a RAPP Participant nor its affiliates shall make export sales of eligible commodities covered under the terms of the applicable RAPP agreement. Nor shall such entities charge a fee for facilitating an export sale. A RAPP Participant may, however, collect check-off funds and membership fees that are required for membership in the RAPP Participant. For the purposes of this paragraph (b), *affiliate* means any partnership, association, company, corporation, trust, or any other such party in which the Participant has an investment other than in a mutual fund.

(c) A RAPP Participant shall not limit participation in its RAPP activities to members of its organization. Participants shall ensure that their RAPP-funded programs and activities are open to all otherwise qualified individuals and entities on an equal basis and without regard to any non-merit factors. The RAPP Participant shall publicize its program and make participation possible for commercial entities throughout the relevant commodity sector or, in the case of SRTGs, throughout the corresponding region. This includes providing to such commercial entities, upon request, a copy of any document in its possession

or control containing market information developed and produced under the terms of its RAPP agreement. The Participant may charge a fee not to exceed the costs for assembling, duplicating and distributing the materials. This paragraph (c) does not apply to any U.S. agricultural cooperative when implementing its own brand program.

(d) A RAPP Participant shall select U.S. agricultural industry representatives to participate in generic RAPP activities such as trade teams, sales teams, and trade fairs based on criteria that ensure participation on an equitable basis by a broad cross section of the U.S. industry. If requested by the CCC, a RAPP Participant shall submit such selection criteria to the CCC for approval.

(e) All RAPP Participants should endeavor to ensure fair and accurate fact-based advertising. Deceptive or misleading promotions may result in cancellation or termination of a Participant's RAPP agreement and the recovery of CCC funds related to such promotions from the Participant.

(f) The RAPP Participant must report any actions or circumstances that may have a bearing on the propriety of its RAPP program to the appropriate Attaché/Counselor, and its U.S. office shall report such actions or circumstances in writing to the CCC.

§ 1489.28 Contracting procedures.

(a) Neither the CCC nor any other agency of the U.S. Government nor any official or employee of the CCC, FAS, USDA, or the U.S. Government has any obligation or responsibility with respect to RAPP Participant contracts with third parties.

(b) A RAPP Participant shall comply with the procurement standards set forth in paragraphs (c) through (e) of this section when procuring goods and services and when engaging in construction to implement program agreements.

(c) Each RAPP Participant shall establish contracting procedures, for contracts that are funded, in whole or in part, with RAPP funds, that are open, fair, and competitive.

(d) Each RAPP Participant shall submit to the CCC, for CCC approval, written contracting guidelines for contracts that are funded, in whole or in part, with RAPP funds. The CCC will notify all new and existing RAPP Participants in writing in each Participant's approval letter and through the FAS website as to applicable submission dates for and dates for approvals of contracting guidelines. The CCC's approval of such contracting

guidelines will remain in place until the CCC retracts its approval in writing, or until new guidelines are approved that supersede them. Once approved by the CCC, these contracting guidelines shall govern all of a Participant's RAPP-funded contracting involving contracts with a minimum annual value that CCC will determine and announce in writing to all RAPP Participants via a RAPP notice issued on the FAS website. The CCC may, from time to time, set a different minimum value. In that case, the CCC will announce the new amount in writing to all RAPP Participants via a RAPP notice issued on the FAS website. The guidelines shall indicate the method for evaluating proposals received for all contract competitions, the method for monitoring and evaluating performance under contracts, and the method for initiating corrective action for unsatisfactory performance under contracts. The RAPP Participant may modify and resubmit these guidelines for re-approval at any time. In addition to the requirements in 2 CFR part 200, these guidelines shall include, at a minimum, the following:

(1) Procedures for developing and publicizing requests for proposals, invitations for bids, and similar documents that solicit third party offers to provide goods or services. Solicitations for professional and technical services shall be based on clear and accurate descriptions of and requirements related to the services to be procured. Such procedures must include a conflict-of-interest provision that states that no employee, officer, board member, or agent thereof of the RAPP Participant will participate in the review, selection, award or administration of a contract if a real or apparent conflict of interest would arise. Such a conflict would arise when an employee, official, board member, agent, or the employee's, officer's, board member's, agent's family, partners, or an organization that employs or is about to employ any of the parties indicated in this paragraph (d)(1), has a financial or other interest in the firm selected for an award. Procedures shall provide that officers, employees, board members, and agents thereof shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or subcontractors. Procedures shall also provide for disciplinary actions to be applied for violations of such standards by officers, employees, board members or agents thereof;

(2) Procedures for reviewing proposals, bids, or other offers to provide goods and services. Separate procedures shall be developed for various situations, including, but not

limited to: solicitations for highly technical services; solicitations for services that are not common in a specific market; solicitations that yield receipt of three or more bids; solicitations that yield receipt of fewer than three bids;

(3) Requirements to conduct all contracting in an openly competitive manner. Individuals who develop or draft specifications, requirements, statements of work, invitations for bids, and/or requests for proposals for procurement of any goods or services, and such individuals' families or partners, or an organization that employs or is about to employ any of the aforementioned, shall be excluded from competition for such procurement. RAPP Participants' written contracting guidelines may detail special situations where the prohibitions in this subparagraph do not apply, such as in situations involving highly specialized technical services or situations where the services are not commonly offered in a specific market;

(4) Requirements to perform and document in the procurement files some form of price or cost analysis, such as a comparison of price quotations to market prices or other price indicia, to determine the reasonableness of the offered prices in connection with every procurement action that is governed by the contracting guidelines;

(5) Requirements to conduct an appropriate form of competition every three years on all multi-year contracts that are governed by the contracting guidelines. However, contracts for in-country representation are not required to be re-competed after the initial award. Instead, the performance of in-country representation must be evaluated and documented by the RAPP Participant annually to ensure that the terms of the contract are being met in a satisfactory manner; and

(6) Requirements for written contracts with each provider of goods, services, or construction work. Such contracts shall require such providers to maintain adequate records to account for funds provided to them by the RAPP Participant.

(e) A RAPP Participant may undertake RAPP promotional activities directly or through a domestic or foreign third party. However, the RAPP Participant shall remain responsible and accountable to the CCC for all RAPP promotional activities and related expenditures undertaken by such third party and shall be responsible for reimbursing CCC for any funds that CCC determines should be refunded to the CCC in relation to such third party's promotional activities and expenditures.

§ 1489.29 Property standards.

The RAPP Participant shall insure all RAPP-funded property and equipment acquired in furtherance of program activities and safeguard such against theft, damage and unauthorized use. The Participant shall promptly report any loss, theft, or damage of property to the insurance company.

§ 1489.30 Anti-fraud requirements.

(a) *All RAPP Participants.* (1) All RAPP Participants shall submit to the CCC for approval a detailed fraud prevention program. The CCC will notify all new and existing RAPP Participants in writing in each Participant's approval letter and through the FAS website as to applicable submission dates for and dates for approvals of fraud prevention programs. RAPP Participants should review their fraud prevention programs annually. The fraud prevention program shall, at a minimum, include an annual review of physical controls and weaknesses, a standard process for investigating and remediation of suspected fraud cases, and training in risk management and fraud detection for all current and future employees. The RAPP Participant shall not conduct or permit any RAPP promotion activities to occur unless and until the CCC has communicated in writing approval of the RAPP Participant's fraud prevention program.

(2) The RAPP Participant, within five business days of receiving an allegation or information giving rise to a reasonable suspicion of misrepresentation or fraud that could give rise to a claim by CCC, shall report such allegation or information in writing to such USDA personnel as specified in the Participant's RAPP program agreement and/or approval letter. The RAPP Participant shall cooperate fully in any USDA investigation of such allegation or fraud and shall comply with any directives given by the CCC or USDA to the RAPP Participant for the prompt investigation of such allegation or occurrence.

(b) *RAPP Participants with brand programs.* (1) The RAPP Participant may charge a fee to brand participants to cover the cost of the fraud prevention program.

(2) The RAPP Participant shall repay to the CCC funds paid to a brand participant through the RAPP Participant on claims that the RAPP Participant or the CCC subsequently determines are unauthorized or otherwise non-reimbursable expenses within 30 days of the RAPP Participant's determination or CCC's

disallowance. The RAPP Participant shall repay CCC by submitting a check to CCC or by offsetting the RAPP Participant's next reimbursement claim. The RAPP Participant shall make such payment in U.S. dollars, unless otherwise approved in advance by CCC. A RAPP Participant operating a brand program in strict accordance with an approved fraud prevention program, however, will not be liable to reimburse CCC for RAPP funds paid on such claims if the claims were based on misrepresentations or fraud of the brand participant, its employees or agents, unless the CCC determines that the RAPP Participant was grossly negligent in the operation of the brand program regarding such claims. The CCC shall communicate any such determination to the RAPP Participant in writing.

§ 1489.31 Program income.

Any revenue or refunds generated from an activity, e.g., participation fees, proceeds of sales, refunds of value added taxes (VAT), the expenditures for which have been wholly or partially reimbursed with RAPP funds, shall be used by the RAPP Participant in furtherance of its approved RAPP activities in the budget period during which the RAPP funds are available for obligation by the RAPP Participant. The use of such revenue or refunds shall be governed by this part. Interest earned on funds advanced by the CCC is not program income.

§ 1489.32 Amendment.

A program agreement may be amended in writing with the written consent of the CCC and the RAPP Participant.

§ 1489.33 Noncompliance with an agreement or this part.

If a RAPP Participant fails to comply with any term in its program agreement or approval letter, or this part, the CCC may take one or more of the enforcement actions in 2 CFR part 200 and, if appropriate, initiate a claim against the RAPP Participant, following the procedures set forth in this part. The CCC may also initiate a claim against a RAPP Participant if program income or CCC-provided funds are lost due to an action or omission of the RAPP Participant.

§ 1489.34 Suspension, termination, and closeout of agreements.

A program agreement may be suspended or terminated in accordance with the suspension and termination procedures in 2 CFR part 200. If an agreement is terminated, the applicable regulations in 2 CFR part 200 will apply to the closeout of the agreement.

§ 1489.35 Paperwork reduction requirements.

The paperwork and record keeping requirements imposed by this part have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. The control number for this information collection is 0551-0049.

Marcus Graham,
Acting Executive Vice President, Commodity Credit Corporation.

[FR Doc. 2023-25015 Filed 11-16-23; 8:45 am]

BILLING CODE 3410-10-P

FEDERAL RESERVE SYSTEM**12 CFR Part 265**

[Docket No. R-1778]

RIN No. 7100-AG37

Rules Regarding Delegation of Authority

AGENCY: Board of Governors of the Federal Reserve System (Board).

ACTION: Final rule; correcting amendments.

SUMMARY: The Board is revising its Rules Regarding Delegation of Authority to add delegations of authority previously approved by the Board and make certain technical corrections.

DATE: Effective November 17, 2023.

FOR FURTHER INFORMATION CONTACT: Andrew Hartlage, Special Counsel, (202) 452-6483; Amory Goldberg, Senior Counsel, (202) 452-3124; or Leah Kazar, Legal Assistant/Attorney, (202) 452-4638, Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551. For users of TTY-TRS, please call 711 from any telephone, anywhere in the United States.

SUPPLEMENTARY INFORMATION: Section 11(k) of the Federal Reserve Act authorizes the Board to delegate, by published order or rule and subject to the Administrative Procedure Act, any of its functions, other than those related to rulemaking or pertaining principally to monetary and credit policies, to one or more administrative law judges, members or staff of the Board, or the Reserve Banks.¹ The Board has delegated authority to Board members (in their individual capacity and as chairs of committees of the Board), Board staff, and the Federal Reserve Banks to take certain actions under the various statutes that the Board

¹ 12 U.S.C. 248(k).

administers. The Board's Rules Regarding Delegation of Authority (delegation rules) implement section 11(k) of the Federal Reserve Act and enumerate the actions that the Board has determined to delegate. By delegating actions that do not raise significant legal, supervisory, or policy issues, the Board can respond more efficiently to applications, requests, and other matters.

The Board published a final rule in 2022 that comprehensively revised the delegation rules.² The Board is amending the delegation rules to publish delegations of authority previously approved by the Board and make certain technical corrections.

List of Subjects in 12 CFR Part 265

Authority delegations (Government agencies); Banks, Banking.

Authority and Issuance

For the reasons stated in the preamble the Board of Governors of the Federal Reserve System amends 12 CFR part 265 as follows:

PART 265—RULES REGARDING DELEGATION OF AUTHORITY

■ 1. The authority citation for part 265 continues to read as follows: 12 U.S.C. 248(i) and (k).

Subpart B—Delegations of Authority

■ 2. In § 265.6, in paragraph (d)(1), remove “12 CFR 238.6” and add, in its place, “12 CFR 238.96”.

■ 3. In § 265.7:

■ a. In paragraph (c)(7)(iii), remove “(12 U.S.C. 1843(m)); and” and add, in its place, “(12 U.S.C. 1843(m));”;

■ b. In paragraph (c)(7)(iv), remove “(12 U.S.C. 1843(m));” and add, in its place, “(12 U.S.C. 1843(m)); and”;

■ c. Add paragraph (c)(7)(v);

■ d. In paragraph (d)(7)(ii)(B)(3), remove “(§§ 252.146 and 252.158)” and add, in its place, “(12 CFR 252.146 and 252.158)”;

■ e. In paragraph (e)(5), remove the words “To exercise the functions described in § 265.20(e)(5), (11), and (12) (reductions in capital, issuance of subordinated debt, and early retirement of subordinated debt)” and add, in their place, the words “To exercise the functions described in §§ 265.20(e)(5) and (11) (reductions in capital and early retirement of subordinated debt)”;

■ f. In paragraph (j)(1)(viii), remove the words, “of receipt of receipt” and add, in their place, the words “of receipt”;

■ g. In paragraph (k)(1)(ii)(E), remove “and” at the end;

■ h. In paragraph (k)(1)(ii)(F), remove “soundness.” and add, in its place, “soundness;”;

■ i. Add paragraphs (k)(1)(ii)(G) and (k)(1)(ii)(H);

■ j. In paragraph (k)(7)(i), remove “II.A.1.c.ii.(2)” and add, in its place, “II.A.1.c.ii.(2)”;

■ k. Add paragraph (k)(8).

■ l. The additions read as follows:

§ 265.7 Functions delegated to the Director of the Division of Supervision and Regulation. [Amended]

* * * * *

(c) * * *

(7) * * *

(v) To acquire shares or assets pursuant to section 4(k) of the Bank Holding Company Act (12 U.S.C. 1843(k)) without prior Board approval up to the following thresholds:

(A) \$25 million in consideration for a single transaction;

(B) \$125 million in consideration over the past 12 months; and

(C) \$400 million in consideration over the entire period the financial holding company is subject to the agreement required by section 4(m) of the Bank Holding Company Act (12 U.S.C. 1843(m)).

* * * * *

(k) * * *

(1) * * *

(ii) * * *

(G) To approve a request by a Board-regulated institution to make or change an election, or a choice of treatment, under § 217.1(g)(2)(ii) of Regulation Q (12 CFR 217.1(g)(2)(ii)); and

(H) To review and adjust estimated total consolidated assets under the definition of “insurance bank holding company” or “insurance savings and loan holding company” in § 217.2 of Regulation Q (12 CFR 217.2) or under § 217.601(b)(2) of Regulation Q (12 CFR 217.601(b)(2)).

* * * * *

(8) *Delegations regarding the Building Block Approach in subpart J of Regulation Q (12 CFR part 217, subpart J).*

(i) [Reserved]

(ii) After consultation with the General Counsel:

(A) To require a supervised insurance organization to exclude all or a portion of a particular company capital element from building block available capital, to approve the inclusion on a permanent or temporary basis of a capital resource in building block available capital, to adjust the building block capital requirement and building block available capital of a supervised

insurance organization, or to require a supervised insurance organization to take certain actions to better reflect the risk profile of an inventory company or the supervised insurance organization, under § 217.601(d) of Regulation Q (12 CFR 217.601(d));

(B) To require a supervised insurance organization to apply an alternative treatment to a treatment otherwise required by subpart J of Regulation Q (12 CFR part 217 subpart J) under § 217.601(d)(4) of Regulation Q (12 CFR 217.601(d)(4));

(C) To approve a request to exercise a call option on an instrument under § 217.608(a)(1)(v)(A) or § 217.608(a)(2)(iv)(A) of Regulation Q (12 CFR 217.608(a)(1)(v)(A) or 217.608(a)(2)(iv)(A));

(D) To approve a request to redeem or repurchase an instrument under 217.608(a)(1)(vi) or § 217.608(a)(2)(v) of Regulation Q (12 CFR 217.608(a)(1)(vi) or 217.608(a)(2)(v)); and

(E) To approve a request to include in building block available capital an instrument issued by a company in a supervised insurance organization under § 217.608(g) of Regulation Q (12 CFR 217.608(g)).

* * * * *

■ 4. In § 265.8:

■ a. In paragraph (c)(2), remove “(15 U.S.C. 1693q),” and add, in its place, “(15 U.S.C. 1693q) and”; and

■ b. In paragraph (c)(3), remove “(15 U.S.C. 1691d(f))” and add, in its place, “(15 U.S.C. 1691d(f))”.

■ 5. In § 265.10:

■ a. Redesignate paragraph (b) as paragraph (c); and

■ b. Add new paragraph (b).

The addition reads as follows:

§ 265.10 Functions delegated to the Director of the Division of Monetary Affairs.

* * * * *

(b) *Regulation D.* With the concurrence of the General Counsel, to approve the annual indexation of the reserve requirement exemption amount and low reserve tranche amount under Regulation D (12 CFR part 204), so long as no change is proposed to any of the formulas by which these amounts are calculated.

* * * * *

By order of the Board of Governors of the Federal Reserve System, acting through the Secretary of the Board under delegated authority.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–25387 Filed 11–16–23; 8:45 am]

BILLING CODE 6201–01–P

² Rules Regarding Delegation of Authority, 87 FR 53988 (September 1, 2022).

FINANCIAL STABILITY OVERSIGHT COUNCIL

12 CFR Part 1310

Guidance on Nonbank Financial Company Determinations

AGENCY: Financial Stability Oversight Council.

ACTION: Final interpretive guidance.

SUMMARY: This final interpretive guidance describes the process the Financial Stability Oversight Council intends to undertake in determining whether to subject a nonbank financial company to prudential standards and supervision by the Board of Governors of the Federal Reserve System under section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

DATES: Effective January 16, 2024

FOR FURTHER INFORMATION CONTACT: Eric Froman, Office of the General Counsel, Treasury, at (202) 622–1942; Devin Mauney, Office of the General Counsel, Treasury, at (202) 622–2537; or Priya Agarwal, Office of the General Counsel, Treasury, at (202) 622–3773.

SUPPLEMENTARY INFORMATION:

I. Background

Section 111 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) established the Financial Stability Oversight Council (the Council).¹ The statutory purposes of the Council are “(A) to identify risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected bank holding companies or nonbank financial companies, or that could arise outside the financial services marketplace; (B) to promote market discipline, by eliminating expectations on the part of shareholders, creditors, and counterparties of such companies that the Government will shield them from losses in the event of failure; and (C) to respond to emerging threats to the stability of the United States financial system.”²

The Council’s duties under section 112 of the Dodd-Frank Act reflect the range of approaches the Council may consider to respond to potential threats to U.S. financial stability, which include collecting information from regulators, requesting data and analyses from the Office of Financial Research (OFR), monitoring the financial services

marketplace and financial regulatory developments, facilitating information sharing and coordination among regulators, recommending to the Council member agencies general supervisory priorities and principles, identifying regulatory gaps, making recommendations to the Board of Governors of the Federal Reserve System (Federal Reserve) or other primary financial regulatory agencies,³ and designating certain entities or payment, clearing, and settlement activities for additional regulation.

Section 113 of the Dodd-Frank Act authorizes the Council to determine that a nonbank financial company will be subject to supervision by the Federal Reserve and prudential standards and lists the considerations that the Council must take into account in making such a determination. Designation⁴ is authorized if the Council determines that either (1) material financial distress at the nonbank financial company could pose a threat to U.S. financial stability (referred to as the “first determination standard”), or (2) the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company could pose a threat to U.S. financial stability (the “second determination standard”).⁵ Under section 165 of the Dodd-Frank Act, the Federal Reserve is responsible for establishing the prudential standards that will be applicable to a nonbank financial company subject to a Council designation under section 113 of the Dodd-Frank Act.

The Council has previously issued rules, guidance, and other public statements regarding its process for evaluating nonbank financial companies for potential designation. On April 11, 2012, the Council issued a final rule at 12 CFR 1310.1 through 23 (the 2012 Rule) setting forth certain procedures related to designations under section 113 of the Dodd-Frank Act. Attached to the 2012 Rule as Appendix A was interpretive guidance (the 2012 Interpretive Guidance) setting forth

additional information regarding the manner in which the Council made determinations under section 113 (together with the 2012 Rule, the 2012 Rule and Guidance). On February 4, 2015, the Council adopted supplemental procedures (the 2015 Supplemental Procedures) to the 2012 Rule and Guidance.⁶ On March 13, 2019, the Council amended the 2012 Rule by adding a new provision at 12 CFR 1310.3.⁷ On December 30, 2019, the Council replaced the 2012 Interpretive Guidance with revised interpretive guidance (the 2019 Interpretive Guidance).⁸ In connection with the adoption of the 2019 Interpretive Guidance, the Council rescinded the 2015 Supplemental Procedures.⁹

On April 21, 2023, the Council approved proposed interpretive guidance (the Proposed Guidance) to revise and update the 2019 Interpretive Guidance.¹⁰ The comment period was initially set to close after 60 days; however, in response to public requests for additional time to review and comment on the Proposed Guidance, the Council extended the comment period by 30 days.¹¹ The comment period closed on July 27, 2023.

The Council received 47 comment letters in response to the Proposed Guidance, of which 13 were from various advocacy groups, 11 were from companies or trade associations in the investment management industry, six were from trade associations in the

⁶ Financial Stability Oversight Council, Supplemental Procedures Relating to Nonbank Financial Company Determinations (Feb. 4, 2015), available at <https://home.treasury.gov/system/files/261/Supplemental%20Procedures%20Related%20to%20Nonbank%20Financial%20Company%20Determinations%20%20%28February%204%2C%202015%29.pdf>. In addition, in June 2015, the Council published staff guidance with details regarding certain methodologies used in connection with the determination process under section 113. See Financial Stability Oversight Council, Staff Guidance Methodologies Relating to Stage 1 Thresholds (June 8, 2015), available at <https://home.treasury.gov/system/files/261/Staff%20Guidance%20Methodologies%20Relating%20to%20Stage%201%20Thresholds.pdf>.

⁷ 84 FR 8,958 (March 13, 2019).

⁸ 84 FR 71,740 (Dec. 30, 2019).

⁹ Minutes of the Council (Dec. 4, 2019), available at <https://home.treasury.gov/system/files/261/December-4-2019.pdf>. In addition, on May 22, 2012, the Council approved hearing procedures relating to the conduct of hearings before the Council in connection with proposed determinations regarding nonbank financial companies and financial market utilities and related emergency waivers or modifications under sections 113 and 804 of the Dodd-Frank Act, 12 U.S.C. 5323 and 5463; see 77 FR 31,855 (May 30, 2012). The hearing procedures were amended in 2013 (78 FR 22,546 (April 16, 2013)) and 2018 (83 FR 12,010 (March 19, 2018)). The following interpretive guidance does not amend the Council’s hearing procedures.

¹⁰ 88 FR 26,234 (April 28, 2023).

¹¹ 88 FR 41,510 (June 27, 2023).

³ “Primary financial regulatory agency” is defined in section 2(12) of the Dodd-Frank Act, 12 U.S.C. 5301(12). Primary financial regulatory agencies and home country supervisors are referred to collectively as “primary financial regulators” in this preamble.

⁴ Section 113 of the Dodd-Frank Act, 12 U.S.C. 5323, refers to a Council “determination” regarding a nonbank financial company. This preamble and the following interpretive guidance refer to “determination” and “designation” interchangeably for ease of reading.

⁵ For ease of reading, this preamble often refers to the first and second determination standards together as whether a company’s “material financial distress or activities” could pose a threat to financial stability.

¹ Dodd-Frank Act section 111, 12 U.S.C. 5321.

² Dodd-Frank Act section 112(a)(1), 12 U.S.C. 5322(a)(1).

insurance industry, seven were from other companies or trade associations, five were from current or former state or federal government officials, two were from groups of academics, and three were from other individuals.¹²

Having carefully considered the comments it received, at a public meeting on November 3, 2023, the Council adopted the final interpretive guidance below (the Final Guidance), which replaces in its entirety the 2019 Interpretive Guidance, found at Appendix A to 12 CFR part 1310. The Council's rules at 12 CFR 1310.1 through 23 remain in effect.

Also on November 3, 2023, the Council adopted a separate document explaining the Council's substantive approach to identifying, assessing, and responding to certain potential risks to U.S. financial stability (the Analytic Framework). The Analytic Framework describes the Council's analytic approach without regard to the origin of a particular risk, including whether the risk arises from widely conducted activities or from individual entities, and regardless of which of the Council's authorities may be used to address the risk. The Council approved a proposed version of the Analytic Framework (the Proposed Analytic Framework) on April 21, 2023.¹³ The public comment period for the Proposed Analytic Framework ran concurrently with the comment period for the Proposed Guidance, including the 30-day extension, and most of the comment letters noted above also addressed the Proposed Analytic Framework.

II. Overview of the Final Guidance

A. Overview

With the Final Guidance, the Council aims to establish a durable process for the Council's use of its nonbank financial company designation authority, maintain rigorous procedural protections for nonbank financial companies reviewed for potential designation, and remove unwarranted hurdles to designation imposed by the 2019 Interpretive Guidance. Congress created the designation authority based on lessons learned from the financial crisis in 2007–09, when financial distress at large, complex, highly interconnected, highly leveraged, and inadequately regulated nonbank financial companies devastated the financial system. While the financial system, market participants, and risks can rapidly evolve, it remains the

Council's statutory responsibility not only to monitor the financial services marketplace but to take action to respond to emerging threats to U.S. financial stability.¹⁴

Under the Final Guidance, the Council's designation process is built on transparency and engagement with a company under review and its existing primary financial regulator (if any) during the designation process. Through this process, any Council designation of a nonbank financial company will be based on data-driven analysis that reflects the distinctive aspects of the company, its market, and its existing regulation. Further, the approach adopted in the Final Guidance does not make designation the Council's default method of addressing risks to financial stability—and the Final Guidance does not eliminate the Council's use of an activities-based approach to address risks to financial stability when the Council finds it to be appropriate. Instead, the Final Guidance puts the Council's designation authority on equal footing with its other powers. The Council expects to continue addressing most risks through its collaboration with primary financial regulators.

B. Key Changes From the 2019 Interpretive Guidance

The Final Guidance removes three significant but inappropriate prerequisites to the exercise of the Council's nonbank financial company designation authority that were created by the 2019 Interpretive Guidance. In particular, the 2019 Interpretive Guidance stated that before considering a nonbank financial company for potential designation under section 113 of the Dodd-Frank Act, the Council would exhaust all available alternatives by prioritizing an "activities-based approach," perform a cost-benefit analysis, and assess a company's likelihood of material financial distress. As explained below, the Council has determined that these steps are not legally required, are not useful or appropriate, and would unduly hamper the Council's ability to use the statutory designation authority in relevant circumstances:

- By prioritizing other approaches to mitigating risks to financial stability, the 2019 Interpretive Guidance generally allowed the Council to consider a nonbank financial company for potential designation only after the Council completed a multi-step process in which the Council would wait for

existing regulators to address identified risks to financial stability, obstructing the Council's ability to respond to risks to financial stability in a timely fashion.

- Cost-benefit analysis is not in the list of considerations Congress specifically required the Council to consider in a designation, and due to the unpredictability of financial crises, such an analysis is not reasonably estimable, useful, or warranted in this context.

- Assessing a nonbank financial company's likelihood of material financial distress is not among the tasks Congress set for the Council and could undermine financial stability by spurring a run on a company that is designated or under review for potential designation.

Unlike the 2012 Interpretive Guidance and the 2019 Interpretive Guidance, the Final Guidance is focused on the Council's procedures for nonbank financial company designations. It therefore does not discuss the substantive analytic factors the Council applies in its assessments of nonbank financial companies. The Council has issued a separate document—the Analytic Framework—regarding its approach to identifying, assessing, and responding to potential risks to U.S. financial stability. The Analytic Framework provides additional public transparency into how the Council expects to consider any type of risk to financial stability, regardless of which of the Council's authorities may be used to address the risk.

Similarly, the Final Guidance does not include the 2019 Interpretive Guidance's definition of "threat to the financial stability of the United States" as requiring "severe damage on the broader economy."¹⁵ The Council has determined that this definition was overly restrictive and in conflict with the Council's statutory purpose "to respond to emerging threats to the stability of the United States financial system."¹⁶ Instead, as described in detail below, the Analytic Framework states that events or conditions that could substantially impair the financial system's ability to support economic activity would constitute a threat to financial stability.

With respect to the Council's procedures for nonbank financial company designations and annual reevaluations of designations, the Final

¹² The comment letters are available at <https://www.regulations.gov/docket/FSOC-2023-0002/comments>.

¹³ 88 FR 26,305 (April 28, 2023).

¹⁴ See Dodd-Frank Act sections 112(a)(1)(C), (a)(2)(C), and (a)(2)(H), 12 U.S.C. 5322(a)(1)(C), (a)(2)(C), and (a)(2)(H).

¹⁵ See 84 FR at 71,763 (Dec. 30, 2019). The definition of this term in the 2019 Interpretive Guidance imposed a higher threshold than the Council's previous interpretation of this term under the 2012 Interpretive Guidance.

¹⁶ Dodd-Frank Act section 112(a)(1)(C), 12 U.S.C. 5322(a)(1)(C).

Guidance makes only minor changes to the 2019 Interpretive Guidance. Among other things, the Final Guidance continues to provide for significant engagement and communication between the Council and a nonbank financial company under review for potential designation, and with the company's primary financial regulator. In addition to these pre-existing features, the Final Guidance provides further detail on how the Council expects to identify nonbank financial companies for preliminary evaluation to assess the risks they could pose to U.S. financial stability. The Council believes that under these procedures, the designation process will be rigorous and transparent.¹⁷

C. Process for Nonbank Financial Company Determinations

As described in the Final Guidance,¹⁸ the Council expects generally to follow a two-stage process in considering a nonbank financial company for potential designation under section 113 of the Dodd-Frank Act. This process is designed to enable substantial engagement with the company under consideration and its primary financial regulator,¹⁹ in recognition of the primary financial regulator's knowledge regarding the company and its market. The Final Guidance does not prioritize the designation authority above other approaches to mitigating risks to financial stability; instead, the Council's process explicitly contemplates that identified risks may be addressed through alternatives to designation, such as nonbinding recommendations to primary financial regulatory agencies. The Council does not expect that every company that comes under review will progress to a proposed or final designation, and it is the Council's goal

that companies will have ample opportunities to provide relevant information to and engage with the Council as part of a transparent and durable designation process.

The initial identification of companies that the Council may review in the first stage of the designation process (Stage 1) is a function of the Council's staff-level committees, which are responsible for monitoring and analyzing financial markets, financial companies, the financial system, and issues related to financial stability. These committees monitor the financial system and report to the Council's Deputies Committee²⁰ regarding potential risks to U.S. financial stability that they identify. If an identified risk relates to one or more nonbank financial companies that may merit review, the Council may review those companies in Stage 1. Alternatively, the Deputies Committee may direct a staff-level committee or working group to further assess the identified risks or direct the Council's Nonbank Financial Companies Designations Committee²¹ to conduct an initial analysis of one or more companies based on the risk-assessment approach described in the Analytic Framework. Following any such analysis, the Council may review one or more companies in Stage 1.

Stage 1 involves a preliminary analysis of nonbank financial companies to assess the risks they could pose to U.S. financial stability. Review in this stage is based on quantitative and qualitative information available to the Council primarily through public and regulatory sources and includes consultation with the company's primary financial regulator (if any), as appropriate. Among other procedural safeguards, the Final Guidance states that the company is notified of its consideration in Stage 1 at least 60 days before the Council votes on whether to evaluate the company further in the second stage of review (Stage 2). This provides the company with an opportunity voluntarily to submit relevant information to the Council and to meet with staff who are leading the Council's analysis. A nonbank financial

company that is identified for review in Stage 2 will receive an additional notice that it is being considered for a proposed designation. The Council wishes to underscore, as the Final Guidance notes, that its work in Stage 1 is preliminary. A decision to commence review of a company in Stage 1, or to continue a review in Stage 2, does not constitute a final decision regarding whether the company should be designated.

Stage 2 involves an in-depth review of a nonbank financial company using information collected directly from the company through the OFR, as well as public and regulatory information. Stage 2 involves significant engagement with the company under review and its primary financial regulator. Following notice of a Council decision to evaluate the company in Stage 2, the Council will submit to the company a request that it provide information that the Council deems relevant to the Council's evaluation. The nonbank financial company will also be provided an opportunity to submit any other written information it deems relevant. The Council will make staff representing its members available to meet with the representatives of any company that enters Stage 2, to explain the evaluation process and the framework for the Council's analysis, and the Council expects that its Deputies Committee will also grant a request to meet with a company in Stage 2. Further, communication during Stage 2 will be two-way: For example, if the analysis in Stage 1 has identified specific aspects of the company's operations or activities as the primary focus for the Council's evaluation, staff will notify the company of those specific aspects, enabling the company to understand and provide information relevant to those concerns. The Council will also notify any nonbank financial company in Stage 2 if the company ceases to be considered for a determination.

At the conclusion of Stage 2, the Council may consider whether to make a proposed determination with respect to the nonbank financial company (a Proposed Determination) through a process that emphasizes transparency through additional notice, engagement, and procedural safeguards. A Proposed Determination requires a vote of two-thirds of the voting members of the Council then serving, including an affirmative vote by the Chairperson of the Council, and cannot be delegated by the Council.²² Following a Proposed Determination, the Council will issue a written notice of the Proposed

¹⁷ Because the Final Guidance itself appears in narrative form and makes only minor changes to the designation process described in the Council's existing guidance—separate from the modification of the substantive analytic content discussed below—this preamble does not include a complete and detailed description of the designation process, which appears in the Final Guidance itself. Instead, the following overview focuses on the Council's reasons for adopting the Final Guidance, key changes from the 2019 Interpretive Guidance and the Proposed Guidance, and responses to comments received on the Proposed Guidance.

¹⁸ This discussion provides an abbreviated summary of the procedural steps of the Council's nonbank financial company designation process. The Final Guidance itself sets forth the process the Council expects to follow and should be consulted with respect to the elements of that process.

¹⁹ In each stage of the designation process, the Council may also consult with, request information from, or coordinate with other state or federal financial regulatory agencies that have jurisdiction over the nonbank financial company or its activities.

²⁰ The Council's Deputies Committee is composed of senior officials from each Council member and member agency. See Bylaws of the Deputies Committee of the Financial Stability Oversight Council, available at <https://fsoc.gov>.

²¹ The Nonbank Financial Companies Designations Committee supports the Council in fulfilling the Council's responsibilities to consider, make, and review Council determinations regarding nonbank financial companies under section 113 of the Dodd-Frank Act. See Charter of the Nonbank Financial Companies Designations Committee of the Financial Stability Oversight Council, available at <https://fsoc.gov>.

²² 12 CFR 1310.10(b).

Determination to the nonbank financial company, which will include an explanation of the basis of the Proposed Determination.²³ Promptly after the Council votes to make a Proposed Determination regarding a company, the Council will also provide the company's primary financial regulator with the written explanation of the basis of the Council's Proposed Determination (subject to appropriate protections for confidential information). A nonbank financial company that is subject to a Proposed Determination may request a hearing to contest the Proposed Determination in accordance with section 113(e) of the Dodd-Frank Act and applicable Council procedures.

After making a Proposed Determination and holding any written or oral hearing if requested, the Council may vote to make a final determination that the company will be subject to supervision by the Federal Reserve and prudential standards (a Final Determination). Like a Proposed Determination, a Final Determination requires a vote of two-thirds of the voting members of the Council then serving, including an affirmative vote by the Chairperson of the Council, and cannot be delegated by the Council.²⁴ If the Council makes a Final Determination, it will provide the company with a written notice of its Final Determination, including an explanation of the basis for the Council's decision.²⁵ The Council will also provide the company's primary financial regulator with the written explanation of the basis of the Council's Final Determination (subject to appropriate protections for confidential information) and will publicly release the explanation of the Council's basis for the Final Determination.²⁶

After the Council makes a Final Determination regarding a nonbank financial company, the Council intends to continue to encourage the company or its regulators to take steps to mitigate the potential risks identified in the Council's written explanation of the basis for its Final Determination. The

Council is required to reevaluate each Final Determination at least annually and to rescind the designation if the Council determines that the company no longer meets the statutory standards for designation under section 113 of the Dodd-Frank Act.²⁷ The annual reevaluation process is a key mechanism through which a company's designation may be rescinded if the company has mitigated the threat that its material financial distress or activities could pose to U.S. financial stability. Moreover, once every five years, each nonbank financial company subject to a Final Determination will have an opportunity for an oral hearing before the Council at which the company can contest the designation.

Numerous public comments on the Proposed Guidance supported the proposed approach of maintaining certain procedural steps that were set forth in the 2019 Interpretive Guidance, including the two-stage designation process, extensive engagement by the Council and staff with companies under review and their primary financial regulators, and the Council's annual reevaluations of previous designations. Some commenters stated that the two-stage process, including notice and opportunities for engagement between the Council and the company under review and its primary financial regulator, provides a balanced and transparent approach to designation. Others expressed support for specific aspects of the Proposed Guidance. For example, one commenter stated that the Council should retain the ability to consider companies and their subsidiaries either together or separately for designation because modern risk management emphasizes the importance of understanding and managing a firm's risks holistically, across the entire enterprise.

Some commenters noted that the Proposed Guidance would increase public transparency regarding how companies are identified for review for a potential designation under section 113 of the Dodd-Frank Act. As discussed above, the Final Guidance provides additional detail, compared to the 2019 Interpretive Guidance, on how the Council expects to identify nonbank financial companies for preliminary review in Stage 1.

Other commenters suggested procedural changes to the designation process in the Proposed Guidance. For example, commenters suggested accelerating the designation process by combining Stage 1 and Stage 2 or by

removing the opportunity in Stage 1 for a company under review to submit information to the Council. At least one commenter suggested adding a step in the process to determine whether existing regulation is insufficient to mitigate relevant threats to financial stability. Other commenters suggested expanding the notice periods provided in the Proposed Guidance, including a longer notice period in advance of a vote to commence Stage 2 or a 120-day period for a company to review all information before the Council²⁸ in advance of a Final Determination vote. The Council has declined to modify the stages or notice periods as proposed, which enable appropriate time periods for engaging with companies and their primary financial regulators while not unduly delaying the Council's ability to act to address a potential threat to U.S. financial stability. Further, the proposed two-stage process enables the Council gradually to intensify its review of a company, beginning with a review in Stage 1 based primarily on available information and potentially moving to in-depth engagement with the company and its primary financial regulator in Stage 2.

Some commenters requested that the Council further explain how companies under consideration in Stage 1 or Stage 2 can take steps that would avoid a designation. Others recommended that the guidance include language, found in the 2019 Interpretive Guidance, that the information the Council provides to a company during Stage 1 "may enable the company to act to mitigate any risks to financial stability and thereby potentially avoid becoming subject to a Council determination."²⁹ The Council agrees that its engagement with a company under review may enable the company to act to mitigate the threat its material financial distress or activities could pose to financial stability. Further, if the company were to mitigate those risks before a Final Designation such that its material financial distress or activities could not pose a threat to financial stability, designation would not be warranted. Accordingly, the Council has added the language quoted above to the Final Guidance.

²⁸ Some commenters also advocated providing the "full evidentiary record" to the company under review before a Council vote on a Final Determination. The Council appreciates the importance of transparency and dialogue with a company under review and will provide a company under review with a written explanation of the basis of any Proposed Determination as well as the opportunity for a hearing, among other opportunities to engage with the Council and staff representing Council members and member agencies.

²⁹ 84 FR at 71,767 (Dec. 30, 2019).

²³ Dodd-Frank Act section 113(e)(1), 12 U.S.C. 5323(e)(1).

²⁴ 12 CFR 1310.10(b).

²⁵ Dodd-Frank Act section 113(e)(3), 12 U.S.C. 5323(e)(3); see also 12 CFR 1310.21 and 1310.22.

²⁶ The Council is subject to statutory and regulatory requirements to maintain the confidentiality of certain information submitted to it by a nonbank financial company or its regulators. See Dodd-Frank Act section 112(d)(5), 12 U.S.C. 5322(d)(5); see also 12 CFR 1310.20(e). In light of these confidentiality obligations, such confidential information will be redacted from the materials that the Council makes publicly available, although the Council does not expect to restrict a company's ability to disclose such information.

²⁷ Dodd-Frank Act section 113(d), 12 U.S.C. 5323(d).

Nonetheless, while the Council expects to communicate to companies under review regarding potential risks to financial stability that have been identified, in light of the importance of acting promptly to mitigate potential threats to financial stability, the Council does not expect to advise companies on actions they may take, delay the designation process in connection with potential actions that a company considers taking, or refrain from a proposed or final designation based on actions that a company has proposed but not completed.

With respect to the transparency measures embedded in the designation process under the Proposed Guidance, several commenters voiced support, including noting that the Council has continued the procedural transparency provided for in the 2019 Interpretive Guidance. For example, some commenters noted that the opportunities for engagement with the Council and submission of relevant information to it would facilitate transparency for companies under review. Other commenters specifically noted the importance of the Proposed Guidance's commitment to publicly release the written explanation of the Council's basis for a Final Determination.

Several commenters raised other transparency-related suggestions. Some stated that more information regarding how the Council considers threats to financial stability could give companies additional insight and help mitigate risks and avoid designation. As noted above, the Final Guidance states that engagement with a company under review may enable the company to mitigate any risks to financial stability. The Council's Analytic Framework also provides additional transparency into how the Council considers risks to financial stability. The Council believes that the numerous transparency mechanisms in the Final Guidance, which provide opportunities for engagement with companies under review and their primary financial regulators in Stage 1, in Stage 2, after a Proposed Determination, and after a Final Determination, provide an appropriate level of transparency to companies regarding the Council's reviews. Some commenters also noted that the Federal Reserve's establishment of prudential standards and an applicable supervisory regime only after a company's designation leaves opaque the consequences of designation. However, the division of authority between the Council and the Federal Reserve is an element of the statutory structure Congress adopted, not the

Council's designation procedures. In developing prudential standards applicable to designated nonbank financial companies, the Federal Reserve is required to differentiate among companies on an individual basis or by category, taking into consideration their capital structure, riskiness, complexity, financial activities, size, and any other risk-related factors that the Federal Reserve deems appropriate.³⁰

Several commenters suggested the Council further emphasize the importance of the Council's engagement with primary financial regulators. The Proposed Guidance noted the Council's expectation of engagement with the primary financial regulator of a company under review at every stage of the designation process, and the Final Guidance maintains that commitment. The Council extensively engages with federal and state financial regulatory agencies to identify, assess, and respond to risks to financial stability. Nearly all the Council members represent such agencies. Many of the Council's statutory duties relate to promoting interagency collaboration, monitoring financial market developments, facilitating information sharing, and recommending that existing regulators address risks.³¹ These activities comprise the foundation of the Council's work, and under the Final Guidance the Council will continue to work with regulators to identify, assess, and respond to risks to financial stability.

Other commenters suggested that the Council should notify a company's primary financial regulator that the company is under consideration in Stage 1. The Proposed Guidance and Final Guidance provide that a company's primary financial regulator will receive notice that the company is under review no later than when the company receives notice, which occurs no later than 60 days before the Council votes on whether to evaluate the company in Stage 2. In some cases, the primary financial regulator may receive earlier notice, including if the Council has been engaging with the primary financial regulator in previous efforts, unrelated to a potential designation, to evaluate the potential threat to financial stability, or if the primary financial regulator is among the Council's member agencies. In general, however, the Council believes that receiving

notice simultaneously with the company during Stage 1 will enable the primary financial regulator appropriately to engage with the Council.³²

Other commenters suggested that the Council should not only engage with a company's primary financial regulator during the designation process, but should defer to the primary financial regulator's views. The Council firmly supports close engagement with primary financial regulators, but deferring to those regulators during a review under section 113 of the Dodd-Frank Act would not fulfill the Council's duty to determine whether a company under review meets the statutory standard for designation. The Council values the role of primary financial regulators due to their expertise regarding their regulated entities or markets, but Congress charged the Council with making determinations regarding threats to U.S. financial stability. The Council will engage with primary financial regulators and take their views into account, but ultimately the Council itself is responsible for determining whether a nonbank financial company meets the statutory standard for designation.

Some commenters called for additional clarity regarding the staff-level process for identifying nonbank financial companies for preliminary evaluation, or recommended that the Council adopt uniform quantitative thresholds, such as those in the 2012 Interpretive Guidance, to identify companies for review in Stage 1. The Council believes that the process set forth in the Final Guidance under "Identification of Company for Review in Stage 1" appropriately explains the Council's process. To the extent commenters seek information regarding the substantive analyses the Council and staff representing Council members expect to use in considering risks that relate to a company that may be considered in Stage 1, those analyses are described in the Analytic Framework. While quantitative thresholds such as those in the 2012 Interpretive Guidance³³ provide some clarity regarding companies that are most likely to come under review for potential designation, even that previous guidance noted that firms not captured

³² The Proposed Guidance refers to the notice provided to companies in Stage 1 in both section II.a, which provides an overview of the determination process, and section II.b, which describes Stage 1 in detail. The Final Guidance clarifies these references by specifying that the description in section II.a refers to the notice provided in section II.b.

³³ Uniform quantitative thresholds were not included in the 2019 Interpretive Guidance.

³⁰ Dodd-Frank Act section 165(a)(2)(A), 12 U.S.C. 5365(a)(2)(A).

³¹ See, e.g., Dodd-Frank Act sections 112(a)(2)(A), (C), (D), (E), (F), (I), and (K), 12 U.S.C. 5322(a)(2)(A), (C), (D), (E), (F), (I), and (K).

by the thresholds could also be reviewed. Further, the Council believes that in light of the distinct nature of nonbank financial companies in diverse sectors of the financial system, uniform quantitative thresholds do not adequately align with the range of risks that nonbank financial companies' material financial distress or activities could pose. Because the activities of nonbank financial companies continuously evolve, uniform thresholds that are applicable across the financial sector may also become obsolete or less relevant to specific risks. The Council believes the approach described in the Final Guidance and the Analytic Framework will be more conducive to identifying firms for consideration for designation than uniform quantitative thresholds such as those that the Council applied in Stage 1 under the 2012 Interpretive Guidance.

A few commenters recommended that the guidance prohibit the Council from delegating its authority to commence a review of a company in Stage 1.³⁴ Some commenters further contended that a Council vote on commencing Stage 1 is legally required by either the Dodd-Frank Act or the Administrative Procedure Act (APA). However, while the Dodd-Frank Act specifies that the Council may not delegate its vote to designate a company, it contains no such requirement regarding earlier steps in the process, such as commencing Stage 1. Indeed, the statute itself does not contemplate any procedural safeguards for companies under review prior to a Council vote on a Proposed Determination; Stage 1 and Stage 2 are investigatory processes the Council has voluntarily adopted to enhance its analytic rigor and to promote transparency. The APA likewise contains no requirement related to the delegation of authority to commence Stage 1, which involves only the interlocutory decision to initiate an investigatory process and does not determine any rights or obligations of any person or entity or cause any legal consequences. The Final Guidance does not prohibit a delegation of the vote to commence Stage 1, but it also does not mandate such a delegation. Moreover, under the Final Guidance the Council itself will vote multiple times during the designation process, including voting on commencing Stage 2, a Proposed

Designation, and a Final Designation, and potentially the determination that the administrative record in Stage 2 is complete.

D. Substantive Analyses

The Council has issued a separate document—the Analytic Framework—that describes in detail the Council's approach for identifying, assessing, and responding to potential risks to financial stability. The Analytic Framework explains how the Council analyzes risks to financial stability, regardless of both the origin of a particular risk (including whether the risk arises from widely conducted activities or from individual entities) and which of the Council's authorities may be used to address the risk. The Council believes that the Analytic Framework provides new public transparency into how the Council expects to consider risks to financial stability. Among other things, the Analytic Framework interprets terms that broadly frame the Council's work, including “financial stability” and “threat to financial stability.” Therefore, while the 2012 Interpretive Guidance and the 2019 Interpretive Guidance discussed both nonbank financial company designation procedures and also substantive analytic factors and standards the Council applies in its assessment of nonbank financial companies, the Final Guidance is limited to the Council's procedures related to nonbank financial company designations.³⁵ The substantive factors the Council considers in analyzing potential risks to financial stability are addressed in the Analytic Framework. The Council believes that publishing its procedures for nonbank financial company designations (the Final Guidance) separately from its explanation of how it substantively assesses potential financial stability risks (the Analytic Framework) enhances public transparency and

³⁵ The Final Guidance retains the 2019 Interpretive Guidance's interpretations of “company” and “material financial distress,” key terms in section 113 of the Dodd-Frank Act that are left undefined in the statute. The Final Guidance also includes the 2019 Interpretive Guidance's interpretation of “nonbank financial company supervised by the Board of Governors,” a term defined in the Dodd-Frank Act. The preamble to the Proposed Guidance noted the Council's proposal to retain its 2019 interpretation of this statutory term, and the Proposed Guidance contained language from the 2019 Interpretive Guidance regarding the practical implications of that interpretation. Consistent with the Proposed Guidance, the Final Guidance states that “the Council intends to interpret ‘nonbank financial company supervised by the Board of Governors’ as including any nonbank financial company that acquires, directly or indirectly, a majority of the assets or liabilities of a company that is subject to a final determination of the Council.”

provides clarity regarding the range of authorities the Council uses to respond to risks.³⁶

1. Analytic Factors

The 2019 Interpretive Guidance described both the Council's procedures and analytic factors that the Council expected to apply in nonbank financial company designations. For example, that guidance described channels the Council deemed most likely to facilitate the transmission of the negative effects of a nonbank financial company's material financial distress or activities to other financial firms and markets. These descriptions do not appear in the Final Guidance and will not be included in Appendix A to 12 CFR part 1310. Instead, a description of the analyses the Council expects to apply, both within and outside of the designation context, appears in its separately issued Analytic Framework.

Some commenters supported separating the Council's guidance on the nonbank financial company designation process from the discussion of the substantive analyses it uses to consider risks to financial stability, citing, among other things, the procedural nature of the Proposed Guidance (and by extension, the Final Guidance) and the benefits of establishing a unified framework for considering risks without regard to their origin. Additional commenters noted that adopting a broadly applicable Analytic Framework will help the Council and regulators take a consistent approach, regardless of the origin of a particular risk, and will provide transparency that may help nonbank financial companies identify and mitigate risks that might otherwise lead the firms to be considered for potential designation under the Final Guidance.

Other commenters argued that the Final Guidance should retain a description of the Council's analysis specifically applicable to nonbank financial company designations.³⁷ As explained above, the Council believes that issuing separate documents regarding the procedural aspects of the nonbank financial company designation process and the Council's substantive

³⁶ Comments on the Proposed Analytic Framework are addressed in the preamble to the Analytic Framework.

³⁷ At least one commenter stated that the Analytic Framework should be appended to the 2012 Rule—the Council's procedural rule on nonbank financial company designations—by incorporating it into the appendix to 12 CFR part 1310. The Analytic Framework explains how the Council approaches risks to financial stability generally, so it would not appropriately be appended to the 2012 Rule, which is focused exclusively on nonbank financial company designations.

³⁴ In accordance with the Council's Rules of Organization, the Council may delegate authority, including to its Deputies Committee, to implement and take any actions under the Final Guidance, except with respect to actions that are expressly nondelegable under the Dodd-Frank Act, the Council's Rules of Organization, or the Final Guidance.

analysis of risks to financial stability is the better approach. History illustrates that many factors, such as leverage, liquidity risk, and operational risk, regularly recur in different forms and under different conditions to generate risks to financial stability, and the Analytic Framework describes vulnerabilities that commonly generate or exacerbate risks to financial stability and the mechanisms by which negative effects can be transmitted more broadly.³⁸ The Council may consider those risk factors and transmission channels in activities-based reviews, entity-specific analyses, or other work.³⁹ Accordingly, the Council believes that describing these substantive analytic approaches broadly, rather than in a context limited to nonbank financial company designations, is most appropriate.

A number of commenters addressed the relationship between the statutory standards and statutory considerations for nonbank financial company designations, on one hand, and the vulnerabilities, sample metrics, and transmission channels described in the Analytic Framework, on the other hand. Some commenters questioned whether the Analytic Framework would displace the statutory standards and considerations established by section 113 of the Dodd-Frank Act, and other commenters asked for more detail regarding how the Council would apply the Analytic Framework's vulnerabilities, sample metrics, and transmission channels in the nonbank financial company designation context.

³⁸ As discussed in section II.G below, the "vulnerabilities" described in the Analytic Framework do not imply an intention to consider a company's likelihood of material financial distress. The vulnerabilities described in the Analytic Framework are characteristics that most commonly contribute to risks to financial stability. They are not meant to relate to the likelihood of a company's material financial distress. Although some commenters equated a company's "vulnerability" with the company's likelihood of material financial distress, that is not how the Council uses the term in the Analytic Framework or the Final Guidance.

³⁹ Consistent with its longstanding precedent, the identified transmission channels are non-exhaustive. See 2019 Interpretive Guidance, 84 FR at 71,763 (Dec. 30, 2019) ("The transmission channels . . . set forth below are not exhaustive and may not apply to all nonbank financial companies under evaluation. . . . The Council may also consider other relevant channels through which risks could be transmitted from a particular nonbank financial company and thereby pose a threat to U.S. financial stability."); see also 2012 Interpretive Guidance, 77 FR at 21,657 (April 11, 2012) ("The Council intends to continue to evaluate additional transmission channels and may, at its discretion, consider other channels through which a nonbank financial company may transmit the negative effects of its material financial distress or activities and thereby pose a threat to U.S. financial stability.").

Some commenters stated that the Proposed Analytic Framework and the Proposed Guidance did not provide enough detail on how the Council considers risks to financial stability.

With respect to nonbank financial company designations, the Dodd-Frank Act sets forth the standard for designations and certain specific considerations that the Council must take into account in making any determination under section 113. Consistent with the statutory requirements, the Council will apply the statutory standard and each of the 10 statutory considerations in evaluations of nonbank financial companies for potential designation.

At the same time, the Analytic Framework describes the Council's approach to evaluating potential risks to U.S. financial stability, including in the context of a review under section 113 of the Dodd-Frank Act. Accordingly, the vulnerabilities and transmission channels described in the Analytic Framework will inform the Council's assessment of the designation standard and mandatory considerations under section 113. As the Proposed Guidance and Final Guidance note, in the designation process, including to identify companies for potential review in Stage 1, the Council and its staff-level committees expect to consider the vulnerabilities, types of sample metrics, and transmission channels described in the Analytic Framework.

Other commenters asked for greater detail on how the Council would assess the vulnerabilities described in the Analytic Framework. As also discussed in the preamble to the Analytic Framework, the Council has addressed these requests by adding further details to several listed vulnerabilities in the Analytic Framework regarding the types of sample metrics the Council expects to use to assess them.

Some commenters noted that the vulnerabilities described in the Analytic Framework do not restate the 10 mandatory considerations in section 113 of the Dodd-Frank Act, and several objected to the vulnerabilities on that basis. A purpose of the Analytic Framework, however, is to provide transparency into how the Council considers risks to financial stability in general. Repetition of the statutory language applicable to nonbank financial company designations specifically would not further that goal. In the context of a review of a nonbank financial company under section 113 of the Dodd-Frank Act, the vulnerabilities and transmission channels described in the Analytic Framework clarify the statutory considerations. For example:

- The section 113 considerations of leverage and concentration are both listed as vulnerabilities in the Analytic Framework, and the Analytic Framework provides additional insight into these issues.

- The section 113 consideration of "the extent and nature of the transactions and relationships of the company with other significant nonbank financial companies and significant bank holding companies" may relate to the "interconnections" vulnerability and "exposures" transmission channel in the Analytic Framework, among others.

- The section 113 consideration of "the amount and types of the liabilities of the company, including the degree of reliance on short-term funding" may relate to a number of vulnerabilities in the Analytic Framework, including "leverage," "liquidity risk and maturity mismatch," "interconnections," and "inadequate risk management," as well as the "exposures" and "asset liquidation" transmission channels, among others.

- The section 113 considerations of "the importance of the company as a source of credit for households, businesses, and State and local governments and as a source of liquidity for the United States financial system" and "the importance of the company as a source of credit for low-income, minority, or underserved communities, and the impact that the failure of such company would have on the availability of credit in such communities" may relate to the "interconnections" and "concentration" vulnerabilities and "critical function" transmission channel in the Analytic Framework, among others.

- The section 113 consideration of "the extent to which assets are managed rather than owned by the company, and the extent to which ownership of assets under management is diffuse" may relate to the "interconnections" and "concentration" vulnerabilities in the Analytic Framework, among others, and each of the transmission channels.

- The section 113 consideration of "the degree to which the company is already regulated by 1 or more primary financial regulatory agencies" may relate to the vulnerability of "inadequate risk management," among others, and each of the transmission channels in the Analytic Framework.

Although the Analytic Framework provides transparency into how the Council considers risks in general, the Council stresses that any determination regarding a nonbank financial company under section 113 of the Dodd-Frank Act will be made based on the statutory

standard and considerations prescribed by Congress.

Several commenters suggested that the Council should state explicitly how it intends to weight the various statutory considerations or the vulnerabilities, including by stating whether some are more important than others. Some commenters stated that, unless the Council explains how it will consider relevant statutory considerations and vulnerabilities with sufficient detail to allow any nonbank financial company to avoid designation, the Final Guidance and Analytic Framework provide inadequate notice to companies under consideration. However, the Council must consider all of the mandatory considerations Congress set forth in section 113 of the Dodd-Frank Act, and the relevance of any particular consideration will depend on the relevant facts and circumstances. Thus, an explicit weighting scheme, determined outside the context of a specific designation, may not be suitable to analyze a range of companies or conditions. The Dodd-Frank Act itself provides notice to companies regarding the standards and considerations the Council will rely on to make determinations under section 113. Further, the Dodd-Frank Act provides that a nonbank financial company under consideration for designation must receive a written notice and an explanation of the basis of any Proposed Determination in advance of an opportunity for a hearing.⁴⁰ The Final Guidance (and Analytic Framework) go far beyond these statutory minimums to provide insight into how the Council considers risks in general and opportunities for a company under review to understand how the Council considers the threat the company's material financial distress or activities could pose to financial stability.

The Council notes that it routinely provides public transparency regarding how it assesses various particular financial stability risks. For example, since 2020, the Council has issued reports or statements regarding secondary mortgage market activities,⁴¹ money market mutual funds,⁴² climate-

related financial risk,⁴³ nonbank financial intermediation,⁴⁴ and digital assets,⁴⁵ in addition to its annual reports, all of which detail the Council's views about various risks to financial stability and in many cases recommend steps for mitigation.

2. "Threat" To Financial Stability

Under section 113 of the Dodd-Frank Act, the Council may designate a nonbank financial company if the Council determines that the company's material financial distress or activities "could pose a threat to the financial stability of the United States."⁴⁶ Under the Proposed Guidance, the Council proposed to evaluate a "threat to the financial stability of the United States" with reference to the description of "financial stability" provided in the Proposed Analytic Framework. In response to public comments on this approach, the Council has included, in the Analytic Framework as adopted in final form, an interpretation of "threat to financial stability"⁴⁷ that is based on

⁴³ Council Report on Climate-Related Financial Risk (Oct. 21, 2021), available at <https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf>; see also Fact Sheet: The Financial Stability Oversight Council and Progress in Addressing Climate-Related Financial Risk (July 28, 2022), available at https://home.treasury.gov/system/files/261/FSOC_20220728_Factsheet_Climate-Related_Financial_Risk.pdf.

⁴⁴ Council Statement on Nonbank Financial Intermediation (Feb. 4, 2022), available at https://home.treasury.gov/system/files/261/FSOC_Nonbank_Financial_Intermediation.pdf.

⁴⁵ Council Report on Digital Asset Financial Stability Risks and Regulation (Oct. 3, 2022), available at <https://home.treasury.gov/system/files/261/FSOC-Digital-Assets-Report-2022.pdf>.

⁴⁶ Dodd-Frank Act section 113(a)(1), 12 U.S.C. 5323(a)(1). The Dodd-Frank Act separately sets forth the same statutory standard for the designation of foreign nonbank financial companies. Dodd-Frank Act section 113(b)(1), 12 U.S.C. 5323(b)(1). In the context of foreign nonbank financial companies, section 113 also lists the considerations that the Council must take into account, which are similar to the considerations applicable to U.S. nonbank financial companies, in some cases limited to the foreign nonbank financial companies' U.S. business or activities. See Dodd-Frank Act section 113(b)(2), 12 U.S.C. 5323(b)(2). The Final Guidance and this preamble do not generally distinguish between U.S. nonbank financial companies and foreign nonbank financial companies, and the Council intends for the Final Guidance to apply in the same manner to both types of companies.

⁴⁷ The Council's statutory responsibilities related to financial stability are generally focused on the United States (see, e.g., Dodd-Frank Act section 112(a)(1)(A), 12 U.S.C. 5322(a)(1)(A) ("to identify risks to the financial stability of the United States"); 112(a)(1)(C), 5322(a)(1)(C) ("to respond to emerging threats to the stability of the United States financial system"); 112(a)(2)(A), 5322(a)(2)(A) ("to assess risks to the United States financial system"); 112(a)(2)(C), 5322(a)(2)(C) ("to identify potential threats to the financial stability of the United States"); 112(a)(2)(G), 5322(a)(2)(G) ("identify gaps in regulation that could pose risks to the financial stability of the United States"); 112(a)(2)(H),

the interpretation of "financial stability" set forth in the Analytic Framework.

A number of commenters stated that they supported the Council's interpretation of "threat to the financial stability of the United States" in the 2019 Interpretive Guidance and recommended that the Council define this term in the Final Guidance. Some commenters urged the Council to retain the interpretation of this term set forth in the 2019 Interpretive Guidance or to revert to the interpretation in the 2012 Interpretive Guidance.⁴⁸ The Council believes the interpretation of "threat to the financial stability of the United States" in the 2019 Interpretive Guidance imposed an inappropriately high threshold, as discussed below. One commenter stated that the interpretation of "financial stability" in the Proposed Analytic Framework was at odds with the Financial Stability Board's interpretation of the term. The Council agrees that coordination with international bodies is important, but this consideration cannot supersede the Council's statutorily specified duties. In contrast, a number of commenters expressed concern that the 2019 definition eroded the Council's preventative role in risk mitigation. Some commenters stated that the 2019 definition effectively precluded the Council from fulfilling its statutory duties to respond to potential or emerging threats to financial stability. Some commenters noted that while the Dodd-Frank Act calls on the Council to determine whether there "could" be a threat to financial stability, the 2019 definition required the Council to determine that the economy "would" be severely damaged.⁴⁹

The Council appreciates this feedback and agrees that providing an interpretation of "threat to financial stability" provides clarity to nonbank financial companies and other stakeholders. As commenters noted, providing such an interpretation helps companies understand the substantive analytic approach the Council will use

5322(a)(2)(H) ("require supervision by the Board of Governors for nonbank financial companies that may risks to the financial stability of the United States"). References to the United States may be omitted herein solely for ease of reading.

⁴⁸ The 2012 Interpretive Guidance stated the Council "will consider a 'threat to the financial stability of the United States' to exist if there would be an impairment of financial intermediation or of financial market functioning that would be sufficiently severe to inflict significant damage on the broader economy." 77 FR at 21,657 (April 11, 2012).

⁴⁹ See also Dodd-Frank Act section 112(a)(2)(H), 12 U.S.C. 5322(a)(2)(H) (setting forth the Council's duty to "require supervision . . . for nonbank financial companies that may pose risks to . . . financial stability" (emphasis added)).

⁴⁰ Dodd-Frank Act section 113(e), 12 U.S.C. 5323(e).

⁴¹ Council Statement on Activities-Based Review of Secondary Mortgage Market Activities (Sept. 25, 2020), available at <https://home.treasury.gov/system/files/261/Financial-Stability-Oversight-Councils-Statement-on-Secondary-Mortgage-Market-Activities.pdf>.

⁴² Council Statement on Money Market Fund Reform (June 11, 2021), available at https://home.treasury.gov/system/files/261/FSOC_Statement_6-11-21.pdf.

for designations under section 113 of the Dodd-Frank Act and provides an indication of the significance of a potential threat to financial stability that may warrant a designation under section 113.

The Proposed Analytic Framework interpreted “financial stability,” and the Council continues to view that interpretation as appropriate. The interpretation of “threat to financial stability” is, by its nature, closely related to the interpretation of “financial stability,” and can best be understood when considering these two terms together. Further, threats to financial stability will be evaluated within the framework of the Council’s efforts to identify, assess, and respond to potential risks to financial stability, as set forth in the Analytic Framework. Therefore, the Analytic Framework offers the opportunity to situate the Council’s interpretation of a threat to financial stability, whether posed by a nonbank financial company or originating from other sources, within the Council’s broader approach.

As noted above, many commenters expressed varying views regarding whether the Council should maintain the definition of “threat to the financial stability of the United States,” found in the 2019 Interpretive Guidance, as “the threat of an impairment of financial intermediation or of financial market functioning that would be sufficient to inflict severe damage on the broader economy.”⁵⁰ The Council views the 2019 definition as unwarranted, and, as many commenters noted, the 2019 definition contrasts sharply with the statutory standard under section 113 of the Dodd-Frank Act. In light of the Council’s statutory duty to act to address potential threats to financial stability, the purpose of the designation authority in mitigating the risks of financial crises, and the uncertainty inherent in predicting future market developments, requiring the Council to determine that a nonbank financial company’s material financial distress or activities could inflict “severe damage” on the broader economy creates an unduly high threshold for Council action. The Council must be able to address threats that may impair the financial system before they are realized. The nature of financial crises is that the precise severity of harm posed by emerging threats may not be apparent until it is too late.

Some commenters stated that the interpretation of “financial stability” in the Proposed Analytic Framework

would unduly lower the standard for designation under section 113 of the Dodd-Frank Act. The Council disagrees. The standard for designation is set forth in section 113 itself. The Analytic Framework’s interpretation of “financial stability” does not expand the statutory standard. Rather, the Analytic Framework describes how the Council considers financial stability and threats to it. However, in response to public comments, the Council has included in the Analytic Framework, as adopted in final form, an interpretation of “threat to financial stability” that is based on the proposed interpretation of “financial stability” and that includes an indication of the significance of a threat to financial stability: Events or conditions that could substantially impair the ability of the financial system to support economic activity would constitute a threat to financial stability. This approach clarifies that a designation under section 113 would not be justified if a nonbank financial company’s material financial distress or activities could only cause immaterial impairments of the financial system.

Some commenters indicated that the lack of concrete guidance on an interpretation of “threat to the financial stability of the United States” may dissuade nonbank financial companies from engaging in innovation and could lead to concentration risks. The Council notes that the definition of “threat to the financial stability of the United States” in the 2019 Interpretive Guidance did not specify particular activities or risk factors that could result in a designation under section 113 of the Dodd-Frank Act, but instead indicated the significance of a risk that could fall within the statutory standard for designation. The interpretation in the Analytic Framework, while reflecting different terminology than the 2019 Interpretive Guidance, maintains this type of approach. For nonbank financial companies that wish to understand the activities or business characteristics that could lead to a potential designation under section 113—or that wish to mitigate the risks their material financial distress or activities could pose to financial stability—the Council encourages those companies to consider how the vulnerabilities and transmission channels described in the Analytic Framework may apply to their companies.

3. Suitability of Designation

The Final Guidance sets forth the process the Council expects to follow when considering nonbank financial companies for potential designation. The Council’s analytic approach to

identifying, assessing, and responding to risks to financial stability and the substantive considerations it will take into account in determining whether to designate a company for prudential standards and supervision by the Federal Reserve are set forth in section 113 of the Dodd-Frank Act and the Analytic Framework. Neither the Proposed Guidance nor the Final Guidance addresses the suitability of designation with respect to any particular entity, sector, or circumstances. Nevertheless, the Council received a number of comments regarding the suitability of designation for certain sectors, entities, or circumstances as well as the merits and disadvantages of entity-based designation in general.

Several commenters stated that designation under section 113 of the Dodd-Frank Act is not generally a suitable response to a threat to financial stability. Some stated that designation would result in regulation that may be ill-fitting for some types of nonbank financial companies, their products or services, or for financial risk channels that are different from those of bank holding companies. Some commenters stated that designations under section 113 are generally inadvisable because they would distort or disrupt markets or increase burdens for the designated nonbank financial company. However, the Dodd-Frank Act authorizes the Council to designate nonbank financial companies if their material financial distress or activities could pose a threat to financial stability. Further, the statute requires the Federal Reserve to adopt regulatory requirements applicable to a designated nonbank financial company and provides for the Federal Reserve to differentiate “among companies on an individual basis or by category, taking into consideration their capital structure, riskiness, complexity, financial activities (including the financial activities of their subsidiaries), size, and any other risk-related factors that the Board of Governors deems appropriate.”⁵¹ Therefore, the Council will not reject in advance the use of its statutory authority and is adopting the Final Guidance to explain the process it would use in considering nonbank financial companies for designation.

As noted above, Congress created the designation authority based on lessons learned from the financial crisis in 2007–09, when financial distress at large, complex, highly interconnected, highly leveraged, and inadequately regulated nonbank financial companies

⁵⁰ 84 FR at 71,763 (Dec. 30, 2019).

⁵¹ Dodd-Frank Act section 165(a)(2)(A), 12 U.S.C. 5365(a)(2)(A).

devastated the financial system. Potential risks to financial stability may often be addressed by existing regulators; however, if one or more nonbank financial companies, though their material financial distress or activities, could pose a threat to financial stability, Congress determined that designation of the relevant companies for Federal Reserve supervision and prudential standards is an appropriate response.

Some commenters stated that the Proposed Guidance does not set forth with sufficient clarity the analyses the Council will conduct during the designation process or the prudential standards that will apply after designation. While the Council appreciates these comments, the Final Guidance does not address the substantive analytic factors to be used in designations because the Council has issued a separate document—the Analytic Framework—regarding its analytic approach for identifying and assessing potential risks to U.S. financial stability more broadly. Further, as noted above, Congress assigned responsibility to the Federal Reserve to determine the prudential standards that apply to a designated nonbank financial company, although the Council can recommend standards.

Other commenters stated that the Council should make climate-related financial risks a factor in the designation analysis of a nonbank financial company that may be subject to physical or transition climate-related risks. The Council appreciates these comments and has published a number of analyses regarding the emerging and increasing risks that climate change poses to the financial system. However, the Council believes that potential risks related to climate change may be assessed under the vulnerabilities, sample metrics, and transmission channels in the Analytic Framework. For example, to the extent that climate-related financial risks could result in defaults on a company's outstanding obligations, those risks may be considered, in part, through the "interconnections" vulnerability and the "exposures" transmission channel.

Some commenters requested that the Council tailor the Final Guidance to one or more particular industries. As noted above, the Final Guidance does not set forth the substantive analyses the Council intends to apply in designation determinations. Instead, the Analytic Framework explains how the Council expects to consider any type of risk to financial stability, regardless of which of the Council's authorities may be used to address the risk. This approach seeks

to strengthen the Council's ability to identify, assess, and respond to risks to U.S. financial stability, regardless of whether those risks originate from individual companies or widely conducted activities. The Council further notes that it expects to take into account relevant differences among various sectors, markets, or activities in the designation process, and to consult with a company's existing primary financial regulator. For example, the Council would take into account the extent to which assets are managed rather than owned by the company.⁵²

Finally, some commenters stated that entity-based designation is not suitable for their industry, including life insurers, property and casualty insurers, reinsurers, asset managers, nonbank mortgage lenders, nonbank mortgage servicers, mutual funds (including money market mutual funds), private funds, fintech companies (including certain payment providers), and issuers of asset-backed securities. These commenters indicated that the Council should exclude certain types of companies from potential review. As it did in the 2019 Interpretive Guidance, the Council declines to categorically exclude any particular financial sectors or types of nonbank financial companies from its assessment of potential threats to financial stability. The Council expects that any analysis of a nonbank financial company for potential designation will be tailored to reflect the unique attributes of the company and its existing regulatory framework, but assessing the suitability of designation of any class of nonbank financial companies would be premature. The substantive rigor under the Analytic Framework, the transparency under the Final Guidance, and the Council's adherence to the statutory requirements for designations will provide nonbank financial companies under review for potential designation with ample opportunities to raise risk-related factors during the Council's evaluation.

E. Activities-Based Approach

The Dodd-Frank Act gives the Council a range of authorities and broad discretion to determine how to respond to potential threats to U.S. financial stability, and the statute does not prioritize among the Council's authorities. For example, pursuant to section 113 of the Dodd-Frank Act, the Council may determine that an individual nonbank financial company will be subject to supervision by the Federal Reserve and prudential

standards if the Council determines that the company's material financial distress or activities could pose a threat to financial stability. The Dodd-Frank Act also gives the Council various authorities to make nonbinding recommendations to regulators.⁵³

The Council's response to a particular risk to financial stability depends on the nature of the risk. For example, vulnerabilities originating from activities that are widely conducted in a particular sector or market may be well-suited for activity-based or industry-wide regulation. In contrast, in cases where the financial system relies on the ongoing financial activities of a small number of entities, such that the impairment of one of the entities could threaten financial stability, or where a particular financial company's material financial distress or activities could pose a threat to financial stability, entity-based action may be appropriate.

The Council's history provides instructive examples of the Council's use of different authorities and approaches for different types of risks. For example, the Council has taken an activities-based approach in recommending actions to address risks relating to crypto-assets, climate-related financial risks, and other topics. In 2012, the Council used an activities-based approach in issuing for public comment proposed recommendations for money market mutual fund reforms. Further, all of the Council's annual reports have identified and recommended actions regarding various risks to U.S. financial stability,⁵⁴ many in the form of an activities-based approach. The Council has also used entity-specific approaches in designating eight financial market utilities in 2012 under Title VIII of the Dodd-Frank Act and in designating four nonbank financial companies in 2013 and 2014 under section 113 of the Dodd-Frank Act.

However, the statute does not contemplate that one of the Council's authorities takes precedence over others, or that the Council must make recommendations to existing regulators before commencing a review of a company for potential designation. Financial crises have illustrated the importance of ensuring that the Council can exercise its authorities as needed. For example, the 2007–09 financial crisis showed that material financial distress at a small number of large,

⁵³ See, e.g., Dodd-Frank Act sections 112(a)(2)(D), (F), (I), (K), and (N), 12 U.S.C. 5322(a)(2)(D), (F), (I), (K), and (N).

⁵² See Dodd-Frank Act section 113(a)(2)(F), 12 U.S.C. 5323(a)(2)(F).

⁵⁴ See, e.g., Council 2022 Annual Report, available at <https://home.treasury.gov/system/files/261/FSOC2022AnnualReport.pdf>.

interconnected, and highly leveraged nonbank financial companies could threaten the stability of the U.S. financial system. Many commenters cited the failure of American International Group (AIG), where regulators had not identified or addressed the risk the company ultimately posed to financial stability. In light of the experience during the financial crisis in 2007–09, the Dodd-Frank Act recognizes that relying on existing regulators is not sufficient in some circumstances. Congress did not structure the Dodd-Frank Act to deprioritize the Council's nonbank financial company designation authority.

Nonetheless, the 2019 Interpretive Guidance stated that the Council would identify, assess, and address potential risks and threats to U.S. financial stability through a process that began with what it called an “activities-based approach.” Under that guidance, the activities-based approach meant the Council would rely on existing regulators to address potential threats to financial stability before the Council could consider designating a nonbank financial company.⁵⁵ The 2019 Interpretive Guidance further generally limited the use of designations under section 113 of the Dodd-Frank Act to cases where a potential risk or threat could not be adequately addressed by existing regulators. The Council received many comments favoring the prioritization of an activities-based approach over entity-specific designation, and many other comments advocating for the removal of the prioritization. The Final Guidance does not include the statement that the Council will first rely on existing regulators to address risks to financial stability before considering a nonbank financial company for potential designation.

The Council believes that rescinding the prioritization of an activities-based approach will better enable the Council to respond to threats to financial stability irrespective of their source. The Council agrees with the many commenters that stated that the Council should work closely with federal and state regulators. As discussed above and below, the Council engages extensively with federal and state financial regulatory agencies to identify, assess, and respond to risks to financial stability. The Council appreciates the

expertise and experience, noted by many commenters, of primary financial regulators. The Council agrees with commenters that collaborating with existing regulators is critical. Under the Final Guidance, the Council will maintain its previous commitment to engaging extensively with existing regulators.

Some commenters noted that other bodies, including the Financial Stability Board, have focused in recent years on an activities-based approach, and encouraged the Council to do the same. Some commenters also stated that an activities-based approach is the most effective means of addressing risks to the financial system. The Council believes that the availability of its full range of authorities is important to enable it to address the full range of potential risks to financial stability. In many respects, the Council agrees with reasons identified by commenters for supporting efforts by existing regulators to address potential risks to financial stability. For example, as commenters noted, in appropriate circumstances such actions can enable the mitigation of risks that arise from the activities of numerous financial companies in a particular sector or from financial products that are offered on a widespread basis. Other commenters stated that addressing risks through generally applicable regulatory requirements may increase fairness and reduce competitive disadvantages by promoting consistent treatment across firms. Some commenters stated that action by existing regulators may also be quicker than a Council designation process followed by the adoption of prudential standards by the Federal Reserve. The Council appreciates these points.

Some commenters suggested that the prioritization of an activities-based approach is appropriate, in part, because the Council is not a primary financial regulator and should defer to the judgment of primary financial regulators. During any designation review, the Council will consider the “degree to which the company is already regulated by 1 or more primary financial regulatory agencies,”⁵⁶ but the statute does not prioritize this factor among the list of required considerations. While the Council engages routinely with primary financial regulators, as discussed above, Congress gave the Council itself the responsibility to reach judgments under the standard set forth in section 113 of

the Dodd-Frank Act regarding potential threats to financial stability.

Other commenters highlighted the benefits of nonbank financial company designations compared to other ways to respond to a potential threat to financial stability. Many commenters pointed out that designation may be more appropriate when a threat to U.S. financial stability arises from the material financial distress or activities of a particular nonbank financial company, and that in the event of such a risk, a designation may be a more targeted solution that does not impact all firms in the same market. Designation may also be more suitable when a large, complex, interconnected nonbank financial company is subject to varying levels of regulation across financial markets and regulatory jurisdictions. As some commenters stated, the potential impact of a nonbank financial company's material financial distress or activities on financial stability is frequently related to the interconnections and combination of financial risks across multiple business lines within a single company and the company's existing regulation and risk-management practices.

One commenter also noted more holistic benefits of nonbank financial company designations. Designation may be a more effective deterrent against companies' actions that increase potential risks to financial stability because some companies may be able to avoid activities-based rules through regulatory arbitrage. Moreover, one commenter noted that designation, whose resulting regulatory regime includes resolution-planning requirements, supports the success of the Orderly Liquidation Authority under Title II of the Dodd-Frank Act, which is designed to limit the consequences of insolvencies when they do occur. Commenters also noted that the Council's nonbank financial company designation process enables firms to respond quickly, and that the Council can reconsider a previous designation if there are changes that reduce the potential threat to financial stability.

Some commenters asserted that the Proposed Guidance indicates that the Council intends to prioritize an entity-based approach. This is incorrect. The Council does not intend to favor any of its statutory authorities over others. The Proposed Guidance and the Final Guidance focus on the nonbank financial company designation authority simply because the sole purpose of the guidance is to establish the Council's process for designating nonbank financial companies. Other Council

⁵⁵ One commenter cited an estimate from two former Chairpersons of the Council and two former Chairs of the Federal Reserve Board that the nonbank financial company designation process under the 2019 Interpretive Guidance would take six years or more.

⁵⁶ Dodd-Frank Act section 113(a)(2)(H), 12 U.S.C. 5323(a)(2)(H).

materials, including the Analytic Framework, describe how the Council may apply other authorities.

F. Cost-Benefit Analysis

Although the Dodd-Frank Act does not require a cost-benefit analysis prior to the designation of a nonbank financial company, the 2019 Interpretive Guidance stated that the Council would perform a quantitative cost-benefit analysis, whenever possible,⁵⁷ as a prerequisite to designation. Under the Proposed Guidance, the Council would not conduct a cost-benefit analysis prior to a designation of a nonbank financial company. The Council received and considered numerous comments both favoring retention of cost-benefit analysis as a step in the designation process and advocating its removal. As described below, the Council does not believe that a cost-benefit analysis of individual designation determinations is legally required or reasonably estimable, useful, or appropriate in this context. Therefore, the Final Guidance does not contemplate the Council conducting a cost-benefit analysis prior to a nonbank financial company designation.

Section 113 of the Dodd-Frank Act sets forth the standard for designation, which directs the Council to determine whether “material financial distress at [a] nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of [a] nonbank financial company, could pose a threat to the financial stability of the United States.”⁵⁸ The Dodd-Frank Act also sets forth the list of considerations “the Council shall consider” “[i]n making a determination” to designate a nonbank financial company under section 113.⁵⁹ Subsection 113(a)(2) lists 10 explicit and mandatory considerations—including the company’s leverage, transactions with other financial companies, assets under management, and existing regulation—as well as a permissive eleventh consideration: “any other risk-related factors that the Council deems appropriate.”⁶⁰

The designation standard and the statutory considerations are focused on

the threat a nonbank financial company’s material financial distress or activities could pose to U.S. financial stability. Section 113 establishes a structure for the Council’s evaluation of a company and the risks it could pose to financial stability. This statutory structure does not contain, nor does it require the Council to perform, a cost-benefit analysis. The statute instructs the Council to focus on potential threats to financial stability, not the costs of designation to the company under review or to others. The potential costs and benefits of designation depend, among other things, on financial conditions, market behaviors, and the risk and magnitude of potential future financial crises that are inestimable with reasonable precision. Congress determined that when a nonbank financial company meets the statutory standard, designation is justified. The Council declines to second-guess that legislative judgment.

Some commenters noted that neither the costs nor the benefits of designation appear in the considerations listed in section 113 of the Dodd-Frank Act, and that they are not similar to any of the listed considerations. The absence of a cost-benefit analysis requirement in section 113 contrasts with other provisions of the Dodd-Frank Act that do require cost-benefit analysis.⁶¹ As several commenters noted, this contrast demonstrates that Congress did not intend for the Council to perform a cost-benefit analysis when making determinations under section 113.

Further, some commenters noted that while Congress granted the Council discretion to consider other factors it “deems appropriate,” these too must be “risk-related.”⁶² Thus, under the text of section 113 of the Dodd-Frank Act, whether cost-benefit analysis is a prerequisite to designation depends on two inquiries: (1) is cost-benefit analysis a “risk-related factor,” and (2) does “the Council deem[] appropriate” the consideration of costs and benefits in a designation? The answer to both is no.

Having considered the public comments on the Proposed Guidance, the Council does not believe that cost-benefit analysis, or its results or components, are “risk-related factors,” and does not expect to consider them. The Council believes the statutory reference to “any other risk-related factors” should be interpreted, consistent with the statutory standard

for designation and the expressly enumerated considerations, as meaning a factor related to the risk to U.S. financial stability posed by a nonbank financial company’s material financial distress or activities.⁶³ Cost-benefit analysis is unlike any of the 10 explicit considerations the Council must take into account prior to designating a nonbank financial company. Each of the mandatory considerations—for example, a company’s leverage, off-balance-sheet exposures, and importance as a source of credit—all directly inform the threat a company’s material financial distress or activities could pose to U.S. financial stability. Analysis of the costs and benefits of designation does not have that character. The Council acknowledges that there would be costs to a designated nonbank financial company associated with the Federal Reserve’s prudential standards and supervision, but the Council does not believe that those costs would be “risk-related factors.”⁶⁴

Some commenters contended that the costs of designation could be so great as to increase the threat to financial stability that a company’s material financial distress or activities could pose. Thus, these commenters stated, the costs of designation should also be considered a risk-related factor. However, the Council does not believe that commenters on the Proposed Guidance identified a credible scenario in which the costs of designation could be relevant to the assessment of the threat a company’s material financial distress or activities could pose to financial stability.⁶⁵ That is, while commenters noted that costs of designation hypothetically could affect a company’s financial position, they did not convincingly demonstrate that such costs could affect the threat to financial stability posed by the company’s

⁶³ This interpretation is also consistent with how the word “risk” is used in surrounding provisions of the Dodd-Frank Act. See, e.g., Dodd-Frank Act sections 112, 115, 120, 121, and 123, 12 U.S.C. 5322, 5325, 5330, 5331, and 5333.

⁶⁴ Under section 165 of the Dodd-Frank Act, the Federal Reserve has authority to establish prudential standards applicable to designated nonbank financial companies, and the Council may recommend standards under section 115 of the Dodd-Frank Act. 12 U.S.C. 5325 and 5365.

⁶⁵ While, for the reasons described in this section, the Council does not expect to consider any anticipated costs of designation, under the Final Guidance a company under review may submit to the Council any information the company deems relevant to the Council’s evaluation under the statutory standard for designation. Consistent with section 113(a)(2)(K) of the Dodd-Frank Act, 12 U.S.C. 5323(a)(2)(K), the Final Guidance does not preclude the Council from considering any risk-related factors, including factors that the Council later determines to be risk-related, if the Council deems their consideration appropriate.

⁵⁷ The 2019 Interpretive Guidance further provided, “If such benefits or costs cannot be quantified in this manner, the Council will explain why such benefits or costs could not be quantified.” 84 FR at 71,765 (Dec. 30, 2019).

⁵⁸ Dodd-Frank Act sections 113(a)(1) (with respect to U.S. nonbank financial companies) and (b)(1) (with respect to foreign nonbank financial companies), 12 U.S.C. 5323(a)(1) and (b)(1).

⁵⁹ Dodd-Frank Act section 113(a)(2), 12 U.S.C. 5323(a)(2).

⁶⁰ *Id.*

⁶¹ See, e.g., Dodd-Frank Act sections 1013(d)(7)(A)(i)(IV) and 1022(b)(2)(A)(i), 12 U.S.C. 5493(d)(7)(A)(i)(IV) and 5512(b)(2)(A)(i).

⁶² See Dodd-Frank Act section 113(a)(2)(K), 12 U.S.C. 5323(a)(2)(K).

material financial distress, were it to occur, or activities. Moreover, the purpose of the prudential standards and Federal Reserve supervision applicable to a designated nonbank financial company is to mitigate the threat to financial stability that the company's material financial distress or activities could pose. For example, even if they were costly to implement, risk-based capital requirements, leverage limits, or liquidity requirements reduce risks posed by companies to the financial system. Notwithstanding the potential costs of a Council designation, Congress set out a process by which companies should be evaluated and, if they meet the statutory standard, subject to prudential standards and Federal Reserve supervision.

Other commenters contended that costs accruing to the market more generally (e.g., potential competitive harms) or the results of a cost-benefit analysis assessing the effect of designation on the broader economy could be "risk-related factors." However, the standard Congress chose for nonbank financial company designations indicates that such costs and cost-benefit analysis are not "risk-related factors." The Council does not believe that cost-benefit analysis indicates whether a company's material financial distress or activities "could pose a threat to the financial stability of the United States," the standard for designation under section 113. As noted above, in adopting this statutory standard, Congress determined that if a company meets the standard, based on the considerations Congress identified, the designation is justified.⁶⁶

Even if the cost of designation or the results of cost-benefit analysis were "risk-related factors," the Council does not deem appropriate their consideration as a prerequisite to designation. A cost-benefit analysis aimed at assessing the incremental costs resulting from a designation and the potential benefits from mitigating the threat a company's material financial distress or activities could pose to financial stability would be impossible to perform with reasonable precision. This is in part because, as some commenters noted, it is not feasible to estimate with any certainty the likelihood, magnitude, or timing of a future financial crisis. The costs to

financial stability arising from the material financial distress or activities of a nonbank financial company will depend on the state of the economy, the financial system, and innumerable other factors at the time. The costs of any particular future financial crisis, and thus the benefits of its prevention or mitigation through designation or other measures, cannot be predicted. Even estimates of the costs of past crises (which approximate the benefits of their avoidance), in terms of reductions in gross domestic product (GDP), greater government expenses, increases in unemployment, or other factors, vary widely on the order of trillions of dollars.⁶⁷

The costs of designation to the designated company, the market, or others are also likely to evade useful estimation. These costs will depend critically on the applicable regulatory regime, which the Dodd-Frank Act directs the Federal Reserve, not the Council, to adopt.⁶⁸ Generally, specific regulatory requirements for previously designated nonbank financial companies have been determined after the designation, in order to enable the requirements to be appropriately tailored to risks posed by the company. Moreover, those requirements, along with the company's behavior in response to them and relevant market conditions, may vary over time. As such, evaluating the potential costs and benefits of a designation with reasonable specificity is not possible before a designation, and it is unlikely that performing a cost-benefit analysis for a nonbank financial company designation would yield a useful assessment. As noted by commenters, the infrequency and heterogeneity of past financial crises, combined with the unpredictable nature of financial

markets and uncertain future evolution of financial firms and activities, do not provide a reliable basis for conducting an informative cost-benefit analysis. A cost-benefit analysis in this context is likely to produce results that are highly sensitive to discretionary assumptions and thus not helpful to decision-making. Accordingly, it is not surprising that Congress declined to prescribe a cost-benefit analysis as a prerequisite to designation.

Some commenters also asserted that a cost-benefit analysis before a designation is legally required by the district court's decision in *MetLife, Inc. v. Financial Stability Oversight Council (MetLife)*,⁶⁹ the Supreme Court's decision in *Michigan v. EPA*,⁷⁰ or the APA.⁷¹ The Council disagrees.

The district court in *MetLife* rescinded one of the Council's previous designations under section 113 of the Dodd-Frank Act because, among other reasons, the Council did not consider the costs of the designation. However, as the *MetLife* court noted: "This Court is one of 94 United States District Courts, comprising several hundred judges, and its Opinion is not binding on others; the Opinion stands on its own persuasive value, to the extent it has any."⁷² Furthermore, the *MetLife* court's

⁶⁹ 177 F. Supp. 3d 219, 239–42 (D.D.C. 2016).

⁷⁰ 576 U.S. 743 (2015).

⁷¹ One commenter also contended that a statement in the Proposed Guidance acknowledging that the guidance was subject to the procedures described in Executive Order 12866 (E.O. 12866), which generally directs agencies to consider the relevant costs and benefits of "regulations" and "regulatory actions," undermines the Council's view that cost-benefit analysis is not a requirement of the designation process. However, E.O. 12866 defines "regulation" to mean "an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency," and defines "regulatory action" as "any substantive action by an agency . . . that promulgates or is expected to lead to the promulgation of a final rule or regulation." E.O. 12866 sections 3(e) and (f). The Council's designation determinations under section 113 of the Dodd-Frank Act are neither "regulations" nor "regulatory actions." Determinations under section 113 are thus not subject to E.O. 12866.

⁷² *MetLife v. Financial Stability Oversight Council*, Order, Dkt. No. 129,15–cv–45 (D.D.C. Feb. 28, 2018) (declining to vacate portion of opinion rescinding *MetLife*'s designation); see also *Pears v. Mobile Cnty.*, 645 F. Supp. 2d 1062, 1076 (S.D. Ala. 2009) ("It is black-letter law that the decision of one federal district court is not binding on another federal district court, or even on the same judge in another case.") (collecting cases). The *MetLife* decision has limited significance even for *MetLife* itself. In the final settlement agreement between the Council and *MetLife* in 2018, the Council maintained that its designation of *MetLife* complied with applicable law, and *MetLife* expressly waived any right to argue that the cost-benefit portion of the district court's opinion had any preclusive effect in any future proceeding before the Council or in any subsequent litigation.

⁶⁶ See also Dodd-Frank Act section 112(a)(2)(H), 12 U.S.C. 5322(a)(2)(H) (providing that "[t]he Council shall . . . require supervision by the Board of Governors for nonbank financial companies that may pose risks to the financial stability of the United States in the event of their material financial distress or failure, or because of their activities pursuant to section 113" (emphasis added)).

⁶⁷ One study cited by a commenter estimated the costs of a recent financial crisis to exceed an entire year of GDP. See Josh Bivens, "Why is recovery taking so long—and who's to blame?," Economic Policy Institute (Aug. 11, 2016), <https://www.epi.org/publication/why-is-recovery-taking-so-long-and-who-is-to-blame> (estimating the cumulative output gap in the economy at 133% of GDP). Other commenters cited a study that describes the large range of financial-crisis cost estimates, often differing by trillions of dollars, and notes the unsuitability of cost-benefit analysis for regulation aimed at improving financial stability. See John Coates IV, "Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications," *The Yale Law Journal* (Jan.-Feb. 2015), <https://www.yalelawjournal.org/article/cost-benefit-analysis-of-financial-regulation>.

⁶⁸ One commenter cited an estimate that AIG would have faced annual compliance costs between \$100 million and \$150 million related to its previous designation. The Council takes no position on the accuracy of this estimate, but notes that it is orders of magnitude smaller than the likely costs of a financial crisis.

holding appears to rely, in part, on its assessment that a company's likelihood of material financial distress was a required consideration under the Council's guidance in effect at that time.⁷³ As discussed below, the Final Guidance makes clear that the Council does not expect to consider the likelihood of a nonbank financial company's material financial distress; as a result, to the extent *MetLife's* reasoning relied on that requirement, it would not apply. In addition, while the court in *MetLife* viewed costs as a risk-related factor, it failed to take into account that the Council did not "deem" the cost of designation an appropriate risk-related factor to consider. Consistent with section 113(a)(2)(K) of the Dodd-Frank Act, because the Council did not deem cost appropriate to consider, its consideration was not required for the statutory reasons described above.

Other commenters stated that *Michigan v. EPA* requires the Council to perform cost-benefit analyses of its designations. In *Michigan*, the Supreme Court considered whether cost-benefit analysis was required by a provision of the Clean Air Act directing the EPA to regulate certain hazardous emissions only if EPA found that "such regulation is appropriate and necessary."⁷⁴ The Court held that the requirement to determine that the regulation was "appropriate and necessary" requires at least some attention to cost.⁷⁵ Notably, the Court stated that it was not concluding the statute required EPA "to conduct a formal cost-benefit analysis."⁷⁵

While section 113 of the Dodd-Frank Act also uses the word "appropriate," the context is entirely different. First, the phrase "any other risk-related factors that the Council deems appropriate" is permissive, not mandatory.⁷⁶ Unlike the EPA, which was directed to act only when it found that regulation was "appropriate and necessary,"⁷⁷ under the Dodd-Frank

Act, the Council has clear statutory authority to choose which "other risk-related factors" to consider by deeming them appropriate, or not. Second, section 113's permissive reference to "appropriate" is limited to "risk-related factors," rather than other considerations that could conceivably influence agency decision-making, such as cost-benefit analysis. This interpretation of section 113 is consistent with the Supreme Court's decision in *Michigan v. EPA*, in which it noted that "[t]here are undoubtedly settings in which the phrase 'appropriate and necessary' does not encompass cost."⁷⁸ Similarly, and more recently, the Court of Appeals for the D.C. Circuit has rejected the claim that the word "appropriate" necessarily requires consideration of economic costs, in part, because the Supreme Court in *Michigan v. EPA* "was careful to emphasize that its reading of 'appropriate' was dependent on the statutory context"⁷⁹

Several commenters argued that the APA's general prohibition on arbitrary and capricious agency action could require the Council to perform cost-benefit analysis, regardless of the standard and requirements set forth in the Dodd-Frank Act. However, the APA contains no such mandate, and the Supreme Court has long held that the APA's text sets forth the "maximum procedural requirements" courts may impose.⁸⁰ Reading additional requirements into the APA "would violate the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure."⁸¹

A number of commenters stated that cost-benefit analysis is generally a helpful agency practice because it disciplines agency decision-making and leads to better policy outcomes. The Council takes no view on these propositions in general, but as discussed above, does not believe cost-benefit analysis would generally be appropriate in the context of nonbank financial company designations such that it should be a prerequisite to designation. Under the Analytic Framework, the Council anticipates that its analyses, including in the context of a designation

under section 113 of the Dodd-Frank Act, will be rigorous, data-driven, and transparent. Other commenters contended that cost-benefit analysis is necessary to ensure that designation will promote U.S. financial stability or generally do more good than harm. The Council disagrees. Under the statutory standard in section 113, the Council has authority to designate a nonbank financial company only if the company's material financial distress or activities could pose a threat to U.S. financial stability. Thus, the promotion of U.S. financial stability is already embedded in the designation standard.

In addition, these commenters did not acknowledge the fact that the prudential standards will be developed by the Federal Reserve, and some presume it would regulate nonbank financial companies in a way that actually increases risks to financial stability. However, under its statutory mandate, the Federal Reserve would seek to establish prudential standards that would "prevent or mitigate risks to the financial stability of the United States."⁸² The Federal Reserve will also take into consideration companies' "capital structure, riskiness, complexity, financial activities (including the financial activities of their subsidiaries), size, and any other risk-related factors that the Board of Governors deems appropriate."⁸³

G. Likelihood of Material Financial Distress

As part of the evaluation of a company being considered for designation, the 2019 Interpretive Guidance provided that "the Council will assess the likelihood of the company's material financial distress."⁸⁴ The Final Guidance removes this "likelihood assessment" from the Council's designation procedures.⁸⁵

⁷³ See *MetLife*, 177 F. Supp. 3d 219, 239–42 (D.D.C. 2016) (discussing company's argument that "imposing billions of dollars in cost could actually make MetLife more vulnerable to distress" and citing Council's "own Guidance" as obligating the Council to consider associated "risk").

⁷⁴ See *Michigan v. EPA*, 576 U.S. 743, 747, 751 (2015); 42 U.S.C. 7412.

⁷⁵ *Id.* at 759.

⁷⁶ Dodd-Frank Act section 113(a)(2)(K), 12 U.S.C. 5323(a)(2)(K); see also *Webster v. Doe*, 486 U.S. 592, 600 (1988) (statutory grant of agency authority to "deem" actions "necessary or advisable" "fairly exudes deference to [the agency]," "appears to . . . foreclose" judicial review, and "strongly suggests that [the statute's] implementation 'was committed to agency discretion by law.'").

⁷⁷ See *Michigan v. EPA*, 576 U.S. 743, 747, 751 (2015).

⁷⁸ *Id.* at 752.

⁷⁹ *Murray Energy Corp. v. EPA*, 936 F.3d 597, 622 (D.C. Cir. 2019).

⁸⁰ *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 100, 102 (2015) ("Beyond the APA's minimum requirements, courts lack authority 'to impose upon an agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good.'") (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978)).

⁸¹ *Id.* at 102.

⁸² Dodd-Frank Act section 165(a)(1), 12 U.S.C. 5365(a)(1).

⁸³ Dodd-Frank Act section 165(a)(2)(A), 12 U.S.C. 5365(a)(2)(A).

⁸⁴ 84 FR at 71,766–67 (Dec. 30, 2019).

⁸⁵ The Council for many years consistently expressed the view that neither the Dodd-Frank Act nor the 2012 Interpretive Guidance contemplated the consideration of the likelihood of a nonbank financial company's material financial distress. The district court in *MetLife* held that, notwithstanding the Council's arguments to the contrary, the 2012 Interpretive Guidance required an assessment of the likelihood of a company's material financial distress. The 2019 Interpretive Guidance altered the Council's approach by stating that the Council would consider this factor. The Final Guidance conforms to the Council's previous understanding that this factor should not be taken into account. To the extent that the 2012 Interpretive Guidance could reasonably be interpreted as committing the Council to consider this factor, the Council is now

The Council believes that assessing the likelihood of a company's material financial distress (referred to by some commenters as a company's "vulnerability" to financial distress) is neither required nor appropriate. As described below, such an assessment does not appear in relevant provisions of the Dodd-Frank Act, fits poorly with the statutory standard for designation, compromises the preventative nature of the designation authority, and could cause the very financial instability that a designation is intended to avert. Further, history provides myriad examples of the futility of predicting, years in advance, the likelihood of any specific financial company's material financial distress. Accordingly, the Council unequivocally declines to include any requirement to assess a company's likelihood of, or vulnerability to, material financial distress before a designation under section 113 of the Dodd-Frank Act.

Congress authorized the Council to designate a company under section 113 of the Dodd-Frank Act if it "determines that material financial distress at the U.S. nonbank financial company . . . could pose a threat to the financial stability of the United States."⁸⁶ This standard (one of two statutory designation standards under section 113) instructs the Council to determine whether a company's material financial distress could pose a threat to financial stability—not to assess how likely such distress is to occur. Thus, under section 113, the Council presupposes a company's material financial distress, and then evaluates what consequences for U.S. financial stability could follow.⁸⁷ If those consequences "could pose a threat" to U.S. financial stability, designation is warranted. The first determination standard, thus, does not require or contemplate an assessment of how likely a company is to experience material financial distress. Put differently, the assessment under the first designation standard is binary. If a company's material financial distress,

clarifying that it does not interpret the Dodd-Frank Act, the Final Guidance, or the Analytic Framework to contemplate an assessment of the likelihood of a company's material financial distress.

⁸⁶ Dodd-Frank Act section 113(a)(1), 12 U.S.C. 5323(a)(1). See also Dodd-Frank Act section 113(b)(1) (with respect to foreign nonbank financial companies), 12 U.S.C. 5323(b)(1).

⁸⁷ Some commenters suggested that the Council should define "material financial distress." Both the Proposed Guidance and Final Guidance provide that the Council intends to interpret the term "material financial distress" as a nonbank financial company being in imminent danger of insolvency or defaulting on its financial obligations. This interpretation is unchanged from both the 2012 Interpretive Guidance and the 2019 Interpretive Guidance.

were it to occur, could pose a threat to financial stability, then the company meets the standard for designation; if not, the first standard for designation is not met. The likelihood of the company's material financial distress is not relevant to the statutory standard for designation.

Moreover, none of the 10 statutory considerations the Council must consider in making a determination under section 113 includes such a likelihood assessment. As some commenters pointed out, the Council's designation determinations take into account these statutory considerations, not the probability of material financial distress. Further, the 10 statutory considerations inform the Council's determination whether the statutory standard has been met; they do not alter the statutory standard.

Some commenters contended that the 10 considerations in section 113 of the Dodd-Frank Act imply that the Council must consider a nonbank financial company's likelihood of material financial distress. As noted above, the 10 considerations do not contain any language relating to such a likelihood assessment. Moreover, reading such a requirement into the statute would conflict, in different ways, with each of the two alternative statutory standards for designation. As noted above, the first designation standard turns on whether a company's material financial distress could pose a threat to financial stability, not how likely such distress is to occur. Section 112 of the Dodd-Frank Act underscores that the Council's duty is to designate "nonbank financial companies that may pose risks to the financial stability of the United States in the event of their material financial distress or failure."⁸⁸ By assigning the duty to designate nonbank financial companies that may pose risks "in the event" of their material financial distress or failure, section 112 emphasizes that the Council takes material financial distress or failure as a given and assesses what risks could flow from it.

In contrast, the second designation standard under section 113 provides for designation of a company if the Council determines that "the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the U.S. nonbank financial company, could pose a threat to the financial stability of the United States."⁸⁹ This second standard does

not take into account or depend on the effects of a company's material financial distress, much less an assessment of its likelihood. For that reason, the 2019 Interpretive Guidance specified that the Council would undertake a likelihood assessment only under the first designation standard—not when the Council considers a company under the second designation standard.⁹⁰ But the 10 statutory considerations apply to the second designation standard as well as the first designation standard. Therefore, to interpret the 10 statutory considerations as requiring the Council to assess a company's likelihood of material financial distress would contradict the plain meaning of section 113 by collapsing the two statutory designation standards—the second of which is not related to a company's material financial distress—into one.

A number of commenters supported the Council's interpretation as proposed. Some commenters stated that proceeding with a designation only after a determination that the company's material financial distress is likely would alter the statutory standard—authorizing designation only when a company's material financial distress "does threaten" financial stability, rather than when it "could pose a threat" to financial stability.

Further, the designation authority is preventative and is meant to "respond to emerging threats to the stability of the United States financial system," consistent with the Council's purpose.⁹¹ As some commenters underscored, permitting designation to occur only when the Council determines that a company is likely to fail, or has a reasonable or foreseeable likelihood of failure, would be damaging to financial stability. Waiting to act until there is an estimable likelihood of a company's failure would negate the purpose of the Council's designation authority, which is to mitigate risks before they actually threaten financial stability. The designation process under the Final Guidance will be a time-intensive exercise, and even once a company is designated, the Federal Reserve may then need to develop and implement prudential standards for the company. Such prudential standards, which may include capital and liquidity requirements, risk-management standards, and the development of resolution plans, are intended to prevent or mitigate risks to financial

113(b)(1) (with respect to foreign nonbank financial companies), 12 U.S.C. 5323(b)(1).

⁹⁰ See 84 FR at 71,754 and 71,767 (Dec. 30, 2019).

⁹¹ See Dodd-Frank Act section 112(a)(1)(C), 12 U.S.C. 5322(a)(1)(C).

⁸⁸ Dodd-Frank Act section 112(a)(2)(H), 12 U.S.C. 5322(a)(2)(H).

⁸⁹ Dodd-Frank Act section 113(a)(1), 12 U.S.C. 5323(a)(1). See also Dodd-Frank Act section

stability. For these tools to be most effective, they must be in place well before material financial distress appears on the horizon.

Some commenters argued that a likelihood assessment will help the Council identify which companies are suitable for designation. But there are good reasons that Congress chose not to require the Council to consider the likelihood of a nonbank financial company's material financial distress, and the Council does not believe it would be a useful consideration. As other commenters noted, companies that seem unlikely to experience financial distress may nonetheless experience material financial distress and rapidly threaten financial stability. A financial company can go from seemingly healthy to in danger of imminent collapse in a matter of months, weeks, or even days. For example, on September 10, 2008, Lehman Brothers reported shareholder equity—which is a measure of solvency—of \$28 billion as of the end of August.⁹² Two days later, on September 12, 2008, “experts from the country’s biggest commercial investment banks . . . could not agree whether or not” Lehman Brothers was solvent.⁹³ The next business day, Monday, September 15, 2008, Lehman Brothers declared bankruptcy. The collapse of Long-Term Capital Management in 1998, which one commenter attributed to significant leverage and a lack of regulation, was similarly rapid.⁹⁴ For designation to strengthen the financial system, it must be deployed early enough that companies have time to take actions to bolster their safety and soundness, which in turn supports financial stability—something that can take several years. Several commenters noted that even without the undue hurdles to designation imposed by the 2019 Interpretive Guidance, the designation process will likely remain lengthy, and stated that it is unrealistic to expect the Council to estimate the likelihood of a company's material financial distress potentially years in advance. The Council agrees.

Finally, if the Council can only designate a company by taking into account the likelihood of the company's material financial distress, public awareness of a designation (or its mere

possibility) could create a perception that the Council views the company as relatively likely to fail, causing a run on the company by its creditors and counterparties.⁹⁵ This is an important reason why bank supervisory ratings are confidential, in acknowledgement of the risk that the disclosure of material issues at a company could trigger a run on the company. Thus, a designation that includes an assessment of the likelihood of material financial distress at the company could accelerate the company's demise and thereby threaten financial stability.

Some commenters interpreted a discussion of this issue in the preamble to the Proposed Guidance as indicating that designation under any procedures could cause a run on the nonbank financial company under consideration or otherwise give rise to material financial distress or financial instability. Some suggested that the Council should always consider the potential for designation itself to lead to material financial distress at the company. That is not the Council's view. Rather, the Council believes that its evaluation of a company's likelihood of material financial distress, or determination regarding the likelihood of a company's material financial distress as part of a designation, could trigger a run on the company. As evidenced by the four previous examples of the Council's use of the nonbank financial company designation authority, designation is unlikely to have that effect in the absence of a likelihood assessment; instead, designation leads to the establishment of prudential requirements and supervision by the Federal Reserve, which serve to mitigate the risks arising from material financial distress at the designated company.

Some commenters contended that the Council must assess a company's likelihood of material financial distress because a company with no likelihood of distress could not possibly “pose a threat” to financial stability. These commenters misread the first designation standard. As noted above, that standard presupposes material financial distress at the company under consideration. Congress instructed the Council to take material financial distress as a given and assess the consequences. That a company might

have a low likelihood of material financial distress does not change the inquiry under the statutory standard.

Furthermore, the contention that a likelihood assessment is necessary because some companies are immune to material financial distress rests on a factual assumption the Council rejects. As discussed above, and as some commenters noted, there is little ability to predict, years in advance, the likelihood of any specific financial company's material financial distress, and history has revealed that even financial companies viewed as strong and stable can rapidly weaken and fail.⁹⁶ Moreover, material financial distress may arise unpredictably from shocks generated outside of the financial system. For example, even companies with excellent financial risk management may experience material financial distress as a result of operational risks such as cyberattacks or other information technology failures.⁹⁷

Some commenters stated that, in the absence of a likelihood assessment, two companies that have vastly different probabilities of material financial distress (or of threatening financial stability) will receive equivalent treatment in the designation process. These concerns are misplaced. In a designation process, the Council determines whether a company's material financial distress or activities could pose a threat to financial stability. The supervisory regime and prudential requirements to mitigate that threat are established by the Federal Reserve, generally following the designation. As noted above, in developing prudential standards applicable to designated

⁹⁶ Expected default frequencies (EDF) from Moody's Credit Edge and Kamakura default probability (KDP) are two off-the-shelf metrics of the likelihood of default. During the 2007–09 financial crisis, both metrics provided little lead time ahead of material financial distress. EDFs rose above 5 percent for Fannie Mae and Freddie Mac in February 2008, about seven months before they were put into conservatorship. Lehman Brothers' EDF rose above 5 percent in June 2008, roughly two months before its bankruptcy. AIG's EDF remained below 5 percent until the day the Federal Reserve stepped in to rescue the firm. Similar patterns were observed at commercial banks. As summarized by the Federal Deposit Insurance Corporation (FDIC), “Throughout 2006, only about one-half of 1 percent of banks were on the problem list, the lowest percentage for any year for which these data are available (1980–2017), suggesting, incorrectly as it turned out, that the risk profile of the banking industry was at a historic low.” FDIC, *Crisis and Response: An FDIC History, 2008–2013*, at 106 (2017).

⁹⁷ Operational risks associated with inadequate or failed internal processes, people, and systems, or from external events, are inherent in most financial company products, activities, processes, and systems. An operational failure could result in material financial distress at a company if the failure impedes the company's ability to provide key products or services.

⁹² Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report* at 324 (2011), available at <https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf>.

⁹³ *Id.*

⁹⁴ The more recent failures of Silicon Valley Bank and Signature Bank in March 2023 further underscore how quickly and unexpectedly a financial company can become insolvent.

⁹⁵ While a likelihood assessment would presumably not be treated differently than other elements of the designation process with respect to the Council's confidentiality procedures, a company under consideration for designation may publicly disclose that it is under review, either voluntarily or pursuant to otherwise applicable disclosure requirements. Further, under the Final Guidance the Council will publicly announce all Final Determinations.

nonbank financial companies, the Federal Reserve is required to differentiate among companies on an individual basis or by category, taking into consideration their capital structure, riskiness, complexity, financial activities, size, and any other risk-related factors that the Federal Reserve deems appropriate.⁹⁸

Other commenters stated that the Council must assess a company's likelihood of material financial distress under the first designation standard because, in their view, the court's decision in *MetLife* requires it. As noted in section II.F above, as a district court opinion, *MetLife* is not binding on any other court or the Council (outside of the specific orders entered in that proceeding). More fundamentally, the court in *MetLife* held that the Council's failure to assess the likelihood of *MetLife*'s material financial distress was contrary to the 2012 Interpretive Guidance, which the court interpreted to require a likelihood assessment.⁹⁹ The *MetLife* court did not hold that a likelihood assessment was required by the Dodd-Frank Act or any other source of law beyond the 2012 Interpretive Guidance. Because the Final Guidance unequivocally eliminates any statement that the Council will assess a company's likelihood of material financial distress, this element of the *MetLife* decision does not apply.

Some commenters contended that the vulnerabilities or other factors described in the Proposed Analytic Framework implied an obligation to consider a company's likelihood of financial distress. The Council disagrees and does not intend to interpret the Analytic Framework in that manner. The Analytic Framework does not add to or modify the standard for designation. Rather, the Analytic Framework describes how the Council considers risks to financial stability generally, regardless of the tool used to address those risks. The "vulnerabilities" described in the Analytic Framework do not imply an intention to consider a company's likelihood of material financial distress.

Some commenters argued that in the absence of a likelihood assessment, the Council will inappropriately designate companies without considering all of the relevant factors or any mitigation by the company or its regulators, and in circumstances such that designation will harm economic growth or impair financial stability. Some commenters argued that because designation is an

important action, the Council should read into the statutory standard additional requirements, including the likelihood assessment, that Congress did not expressly adopt. For the reasons described above, the Council does not view a likelihood assessment as relevant to the statutory standard, related to the statutory considerations, or appropriate in a designation analysis.

H. Other Comments Received

The public comments on the Proposed Guidance were largely focused on the relatively small number of topics addressed above. However, the Council received and considered some comments addressing other issues. For example, one commenter stated that the Council should not designate nonbank financial companies during any period in which Congress is considering legislation related to financial stability. The Council believes that, pending any future legislation, the Council has a current statutory duty to carry out its responsibilities as directed by existing law.

Another commenter suggested that following the failures of certain banks in the first half of 2023, the Council should table the Proposed Guidance and instead prioritize the identification and assessment of risks potentially affecting banks. The Council believes that the recent stress in the banking sector underscores the importance of actionable, durable, and transparent procedures for addressing potential threats to financial stability, consistent with the Final Guidance and the Analytic Framework.

Some commenters who are commissioners of Council member agencies, but are not their chairs, expressed concern that only the chairs of their respective agencies are members of the Council. The Council appreciates the contributions of member agencies that are led by multi-member bodies, and notes that the composition of the Council is dictated by the Dodd-Frank Act.

One commenter stated that any Council member's public comments about potential designations could suggest prejudgment of the outcome before required procedural steps have occurred. The Council notes that it has reached no conclusions regarding the analysis of any nonbank financial company under the Final Guidance and the Analytic Framework and notes that the procedures in the Final Guidance are designed to provide many opportunities for companies under consideration to engage with staff of Council members and member agencies and to present relevant information to

inform the views of the Council and its members.

Several commenters expressed general support for the Proposed Guidance. Their reasons included that the changes proposed would help curb risks at nonbank entities, demonstrate the Council's commitment to promoting financial innovation while safeguarding financial stability, and restore the Council's ability to fulfill its mission. Commenters who expressed general opposition to the Proposed Guidance largely focused on changes from the 2019 Interpretive Guidance, arguing that the Council should retain elements of the 2019 Guidance that the proposal omitted. These points are discussed in the sections above.

Other commenters expressed support for the Proposed Guidance while also urging the Council to take immediate steps to respond to perceived risks to financial stability. The Council believes the Final Guidance provides the Council with the ability to use its statutory designation authority in applicable circumstances while providing important procedural safeguards and ample opportunities for engagement with companies under review and their primary financial regulators.

III. Legal Authority of the Council and Status of the Final Guidance

The Council has numerous authorities and tools under the Dodd-Frank Act to carry out its statutory purposes.¹⁰⁰ The Council expects that its response to any potential risk or threat to U.S. financial stability will be based on an assessment of the circumstances. As the agency charged by Congress with broad-ranging responsibilities under sections 112 and 113 of the Dodd-Frank Act, the Council has the inherent authority to promulgate interpretive guidance under those provisions that explains and interprets the steps the Council intends to take in the determination process.¹⁰¹ The Council also has authority to issue procedural rules¹⁰² and policy

¹⁰⁰ See, for example, Dodd-Frank Act sections 112(a)(2), 113, 115, 120, and 804, 12 U.S.C. 5322(a)(2), 5323, 5325, 5330, and 5463.

¹⁰¹ Courts have recognized that "an agency charged with a duty to enforce or administer a statute has inherent authority to issue interpretive rules informing the public of the procedures and standards it intends to apply in exercising its discretion." See, for example, *Prod. Tool v. Employment & Training Admin.*, 688 F.2d 1161, 1166 (7th Cir. 1982). The Supreme Court has acknowledged that "whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices." *U.S. v. Mead*, 533 U.S. 218, 227 (2001).

¹⁰² See Dodd-Frank Act section 111(e)(2), 12 U.S.C. 5321(e)(2).

⁹⁸ Dodd-Frank Act section 165(a)(2)(A), 12 U.S.C. 5365(a)(2)(A).

⁹⁹ 177 F. Supp. 3d at 233–39.

statements.¹⁰³ The Final Guidance provides transparency to the public as to how the Council intends to exercise its statutory grant of discretionary authority. Except to the extent that the Final Guidance sets forth rules of agency organization, procedure, or practice, the Council has concluded that the Final Guidance does not have binding effect and does not impose duties on, or alter the rights or interests of, any person. Further, the Final Guidance does not change the statutory standards for the Council's actions and does not relieve the Council of the need to make entity-specific determinations in accordance with section 113 of the Dodd-Frank Act. The Final Guidance also does not limit the ability of the Council to take emergency action under section 113(f) of the Dodd-Frank Act if the Council determines that such action is necessary or appropriate to prevent or mitigate threats posed by a nonbank financial company to U.S. financial stability. As a result, the Council has concluded that the notice and comment requirements of the APA would not apply.¹⁰⁴ However, in the Council's rule codified at 12 CFR 1310.3, the Council voluntarily committed that it would not amend or rescind Appendix A to 12 CFR part 1310 without providing the public with notice and an opportunity to comment in accordance with the procedures applicable to legislative rules under 5 U.S.C. 553.¹⁰⁵ Consequently, the Council followed those procedures with respect to the Final Guidance.

It is the Council's intention that each portion of the Final Guidance, and the rescission of the 2019 Interpretive Guidance, should continue in effect if all or any other portion of the Final Guidance is held unlawful or otherwise set aside by a court. Further, if any portion of the Analytic Framework is held unlawful or otherwise set aside by a court, the Council intends that each portion of the Final Guidance that is not also held unlawful or otherwise set aside by a court should continue in effect. While the Final Guidance as a whole sets forth the process the Council intends to follow when considering a nonbank financial company for designation under section 113 of the

Dodd-Frank Act, the Council would expect to follow any of the Final Guidance's remaining portions if other portions were no longer in effect, and for the reasons described above would not expect to follow any aspect of the 2019 Interpretive Guidance (other than with respect to those aspects of the Final Guidance that are identical to the 2019 Interpretive Guidance). Similarly, the Council would expect to apply the Analytic Framework even if the Final Guidance, or any part of it, were no longer in effect.

IV. Paperwork Reduction Act

The collection of information contained in the Final Guidance has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995¹⁰⁶ under control number 1505-0244. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

The collection of information under the Final Guidance is found in 12 CFR 1310.20–23.

The hours and costs associated with preparing data, information, and reports for submission to the Council constitute reporting and cost burdens imposed by the collection of information. The estimated total annual reporting burden associated with the collection of information in the Final Guidance is 1,000 hours. We estimate the cost associated with this information collection to be \$562,500.

In making this estimate, the Council estimates that due to the nature of the information likely to be requested, approximately 75 percent of the burden in hours will be carried by financial companies internally at an average cost of \$500 per hour, and the remainder will be carried by outside professionals retained by financial companies at an average cost of \$750 per hour. In addition, in determining these estimates, the Council considered its obligation under 12 CFR 1310.20(b) to, whenever possible, rely on information available from the OFR or any Council member agency or primary financial regulatory agency that regulates a nonbank financial company before requiring the submission of reports from such nonbank financial company. The Council expects that its collection of information under the Final Guidance would be performed in a manner that attempts to minimize burdens for affected financial companies. The

aggregate burden will be subject to the number of financial companies that are evaluated in the determination process, the extent of information regarding such companies that is available to the Council through existing public and regulatory sources, and the amount and types of information that financial companies provide to the Council.

The Proposed Guidance requested comment on the estimates and other assumptions in the proposed collection of information, but the Council received no comments in response to the questions presented.

V. Executive Orders 12866, 13563, and 14094

Executive Orders 12866, 13563 and 14094 direct certain agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Pursuant to section 3(f) of Executive Order 12866, as amended by Executive Order 14094, the Office of Information and Regulatory Affairs within the Office of Management and Budget has determined that the Final Guidance is a "significant regulatory action." Accordingly, the Office of Management and Budget has reviewed the Final Guidance.

VI. Congressional Review Act

Pursuant to the Congressional Review Act,¹⁰⁷ the Office of Information and Regulatory Affairs designated this rule as a major rule as defined by 5 U.S.C. 804(2).

List of Subjects in 12 CFR Part 1310

Brokers, Investments, Securities.

The Financial Stability Oversight Council is amending 12 CFR part 1310 as follows:

PART 1310—AUTHORITY TO REQUIRE SUPERVISION AND REGULATION OF CERTAIN NONBANK FINANCIAL COMPANIES

■ 1. The authority citation for part 1310 continues to read as follows:

Authority: 12 U.S.C. 5321; 12 U.S.C. 5322; 12 U.S.C. 5323.

■ 2. Appendix A is revised to read as follows:

¹⁰³ See *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710 (D.C. Cir. 2015).

¹⁰⁴ See 5 U.S.C. 553(b)(A).

¹⁰⁵ Section 1310.3 does not apply to the Council's issuance of rules, guidance, procedures, or other documents that do not amend or rescind Appendix A. Thus, other Council materials, including documents that are referred to in but are not a part of the Final Guidance, such as the Council's separately issued Analytic Framework, hearing procedures, bylaws, and committee charters, are not subject to section 1310.3's requirements.

¹⁰⁶ 44 U.S.C. 3507(d).

¹⁰⁷ 5 U.S.C. 801 *et seq.*

Appendix A to Part 1310—Financial Stability Oversight Council Guidance for Nonbank Financial Company Determinations

I. Introduction

Section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) ¹ authorizes the Financial Stability Oversight Council (the Council) to determine that a nonbank financial company will be supervised by the Board of Governors of the Federal Reserve System (the Federal Reserve Board) and be subject to prudential standards, in accordance with Title I of the Dodd-Frank Act, if either (1) the Council determines that material financial distress at the nonbank financial company could pose a threat to U.S. financial stability, or (2) the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company could pose a threat to U.S. financial stability. Section 113 of the Dodd-Frank Act lists the considerations that the Council must take into account in making a determination. This guidance supplements the Council's rule regarding nonbank financial company determinations.²

Section II of this appendix outlines a two-stage process that the Council generally expects to follow when determining whether to subject a nonbank financial company to Federal Reserve Board supervision and prudential standards.³ Section III sets forth the process the Council expects to follow in conducting reevaluations of its previous determinations.

II. Process for Nonbank Financial Company Determinations

Under section 113 of the Dodd-Frank Act, the Council may evaluate a nonbank financial company⁴ for an entity-specific determination. This section describes the

process the Council expects to follow in general for those reviews.

a. Overview of the Determination Process

As described in detail below, the Council expects generally to follow a two-stage process of evaluation and analysis when evaluating a nonbank financial company under section 113 of the Dodd-Frank Act. During the first stage of the process (Stage 1), a nonbank financial company identified for review will be notified as provided below and subject to a preliminary analysis, based on quantitative and qualitative information available to the Council primarily through public and regulatory sources. During Stage 1, the Council will permit, but not require, the company to submit relevant information. The Council will also consult with the company's primary financial regulatory agency⁵ or home country supervisor, as appropriate. This approach will enable the Council to fulfill its statutory obligation to rely whenever possible on information available through the Office of Financial Research (the OFR), Council member agencies, or the nonbank financial company's primary financial regulatory agency before requiring the submission of reports from any nonbank financial company.⁶

Following Stage 1, any nonbank financial company that is selected for additional review will receive notice that it is being considered for a proposed determination that the company will be supervised by the Federal Reserve Board and be subject to prudential standards under Title I of the Dodd-Frank Act (a Proposed Determination) and that the company will be subject to in-depth evaluation during the second stage of review (Stage 2). Stage 2 will also involve the evaluation of additional information collected directly from the nonbank financial company. At the end of Stage 2, the Council may consider whether to make a Proposed Determination with respect to the nonbank financial company. If the Council makes a Proposed Determination, the nonbank financial company may request a hearing in accordance with section 113(e) of the Dodd-Frank Act and § 1310.21(c) of the Council's rule regarding nonbank financial company determinations.⁷ After making a Proposed Determination and holding any written or oral hearing if requested, the Council may vote to make a final determination (a Final Determination).

b. Stage 1: Preliminary Evaluation of Nonbank Financial Companies

Stage 1 involves a preliminary analysis of nonbank financial companies to assess the risks they could pose to U.S. financial stability. In light of the preliminary nature of a review in Stage 1, the Council expects that

not all companies reviewed in Stage 1 will proceed to Stage 2 or a Final Determination. Identification of Company for Review in Stage 1

The Council may evaluate one or more individual nonbank financial companies for an entity-specific determination under section 113 of the Dodd-Frank Act. The Council's staff-level committees are responsible for monitoring and analyzing financial markets, financial companies, the financial system, and issues related to financial stability. These committees monitor a broad range of asset classes, institutions, and activities, as described in the Council's Analytic Framework for Financial Stability Risk Identification, Assessment, and Response (the Analytic Framework), and as reflected in the Council's annual reports. In assessing potential risks, these committees consider the vulnerabilities, types of metrics, and transmission channels described in the Analytic Framework. These committees, in the course of their duties, will monitor each sector of the financial system at least annually and will report to the Deputies Committee⁸ regarding potential risks to U.S. financial stability that they identify. With respect to these monitoring and reporting activities, the Council's Systemic Risk Committee is responsible for monitoring and reporting on each financial sector, including information on identified firms and activities that may pose risks that merit further review, unless another Council committee or working group provides such updates to the Deputies Committee on a particular sector. The updates to the Deputies Committee will use applicable metrics as described in the Analytic Framework. The Deputies Committee is responsible for directing, coordinating, and overseeing the work of the Systemic Risk Committee and all of the Council's other staff-level committees and working groups in accordance with this guidance. If an identified risk relates to one or more financial companies that may merit review in the context of a potential determination under section 113, the Council may review those companies in Stage 1. Alternatively, the Deputies Committee may direct a staff-level committee or working group to further assess the identified risks, including consideration of whether the risks could be addressed by a designation under section 113 or by use of a different Council authority, such as recommendations to existing regulators. The Deputies Committee may also direct the Council's Nonbank Financial Companies Designations Committee (the Nonbank Designations Committee)⁹ to conduct an initial analysis of

¹ 12 U.S.C. 5323.

² See 12 CFR part 1310.

³ The Council may waive or modify this process in its discretion if it determines that emergency circumstances exist, including if necessary or appropriate to prevent or mitigate threats posed by a nonbank financial company to U.S. financial stability in accordance with section 113(f) of the Dodd-Frank Act, 12 U.S.C. 5323(f).

⁴ The Council intends to interpret the term "company" to include any corporation, limited liability company, partnership, business trust, association, or similar organization. See Dodd-Frank Act section 102(a)(4), 12 U.S.C. 5311(a)(4). In addition, the Council intends to interpret "nonbank financial company supervised by the Board of Governors" as including any nonbank financial company that acquires, directly or indirectly, a majority of the assets or liabilities of a company that is subject to a final determination of the Council. As a result, if a nonbank financial company subject to a final determination of the Council sells or otherwise transfers a majority of its assets or liabilities, the acquirer will succeed to, and become subject to, the Council's determination. As discussed in section III of this appendix A, a nonbank financial company that is subject to a final determination of the Council may request a reevaluation of the determination before the next required annual reevaluation, in an appropriate case. Such an acquirer can use this reevaluation process to seek a rescission of the determination upon consummation of its transaction.

⁵ See Dodd-Frank Act section 2(12), 12 U.S.C. 5301(12). In each stage of the Council's process under section 113 of the Dodd-Frank Act, the Council may also consult with, solicit information from, or coordinate with other state or federal financial regulatory agencies that have jurisdiction over the nonbank financial company or its activities.

⁶ See Dodd-Frank Act section 112(d)(3), 12 U.S.C. 5322(d)(3).

⁷ See 12 CFR 1310.21(c).

⁸ The Council's Deputies Committee is composed of senior officials from each Council member and member agency. See Bylaws of the Deputies Committee of the Financial Stability Oversight Council, available at <https://fsoc.gov>.

⁹ The Nonbank Designations Committee supports the Council in fulfilling the Council's responsibilities to consider, make, and review Council determinations regarding nonbank financial companies under section 113 of the Dodd-Frank Act. See Charter of the Nonbank Financial Companies Designations Committee of the Financial Stability Oversight Council, available at <https://fsoc.gov>.

the companies based on the risk-assessment approach described in the Analytic Framework. The purpose of such an analysis by the Nonbank Designations Committee would be to further inform the determination regarding whether one or more companies should be reviewed in Stage 1, if needed. Following any such analysis by the Nonbank Designations Committee, the Council may review one or more companies in Stage 1. Any Council committee's identification, reporting, direction, analysis, or recommendation described in this paragraph will be made in accordance with such committee's bylaws or charter.

When evaluating the potential risks associated with a nonbank financial company, the Council may consider the company and its subsidiaries separately or together. This approach enables the Council to consider potential risks arising across the entire organization, while retaining the ability to make a determination regarding either the parent or any individual nonbank financial company subsidiary (or neither), depending on which entity the Council determines could pose a threat to financial stability.

Engagement With Company and Regulators in Stage 1

The Council will provide a notice to any nonbank financial company under review in Stage 1 no later than 60 days before the Council votes on whether to evaluate the company in Stage 2. In Stage 1, the Council will consider available public and regulatory information. In order to reduce the burdens of review on the company, the Council will not require the company to submit information during Stage 1; however, a company under review in Stage 1 may submit to the Council any information relevant to the Council's evaluation and may, upon request, meet with staff of Council members and member agencies who are leading the Council's analysis. The Council may request a page-limited summary of the company's submissions. In addition, staff representing the Council will, upon request, provide the company with a list of the primary public sources of information being considered during the Stage 1 analysis, so that the company has an opportunity to understand the information the Council may rely upon during Stage 1. In addition, during discussions in Stage 1 with the company, the Council intends for representatives of the Council to indicate to the company potential risks that have been identified in the analysis. However, any potential risks identified at this stage are preliminary and may continue to develop until the Council makes a Final Determination. Through this engagement, the Council seeks to provide the company under review an opportunity to understand the focus of the Council's analysis, which may enable the company to act to mitigate any risks to financial stability and thereby potentially avoid becoming subject to a Council determination.

The Council will also consider in Stage 1 information available from relevant existing regulators of the company. Under the Dodd-Frank Act, the Council is required to consult with the primary financial regulatory agency, if any, for each nonbank financial company

or subsidiary of a nonbank financial company that is being considered for a determination before the Council makes any Final Determination with respect to such company.¹⁰ For any company under review in Stage 1 that is regulated by a primary financial regulatory agency or home country supervisor, the Council will notify the regulator or supervisor that the company is under review no later than the time the company is notified. The Council will also consult with the primary financial regulatory agency, if any, of each significant subsidiary of the nonbank financial company, to the extent the Council deems appropriate in Stage 1. The Council will actively solicit the regulator's views regarding risks at the company and potential mitigants or aggravating factors. In order to enable the regulator to provide relevant information, the Council will share its preliminary views regarding potential risks at the company, if any and to the extent practicable, and request that the regulator provide information regarding those specific risks, including the extent to which the risks are adequately mitigated by factors such as existing regulation or the company's business practices. During the determination process, the Council will encourage the regulator to address any risks to U.S. financial stability using the regulator's existing authorities; if the Council believes regulators' or the company's actions have adequately addressed the potential risks to U.S. financial stability the Council has identified, the Council may discontinue its consideration of the company for a potential determination under section 113 of the Dodd-Frank Act.

Based on the preliminary evaluation in Stage 1, the Council, on a nondelegable basis, may vote to commence a more detailed analysis of the company by advancing the company to Stage 2, or it may decide not to evaluate the company further. If the Council votes not to advance a company that has been reviewed in Stage 1 to Stage 2, the Council will notify the company in writing of the Council's decision. The notice will clarify that a decision not to advance the company from Stage 1 to Stage 2 at that time does not preclude the Council from reinitiating review of the company in Stage 1.

c. Stage 2: In-Depth Evaluation

Stage 2 involves an in-depth evaluation of a nonbank financial company that the Council has determined merits additional review.

In Stage 2, the Council will review a nonbank financial company using information collected directly from the company, through the OFR, as well as public and regulatory information. The review will focus on whether material financial distress¹¹ at the nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the company, could pose a threat to U.S. financial stability. The Analytic

Framework describes the Council's approach to evaluating potential risks to U.S. financial stability, including in the context of a review under section 113 of the Dodd-Frank Act.

Engagement With Company and Regulators in Stage 2

A nonbank financial company to be evaluated in Stage 2 will receive a notice (a Notice of Consideration) that the company is under consideration for a Proposed Determination. The Council also will submit to the company a request that the company provide information that the Council deems relevant to the Council's evaluation, and the nonbank financial company will be provided an opportunity to submit written materials to the Council.¹² This information will generally be collected by the OFR.¹³ Before requiring the submission of reports from any nonbank financial company that is regulated by a Council member agency or a primary financial regulatory agency, the Council, acting through the OFR, will coordinate with such agencies and will, whenever possible, rely on information available from the OFR or such agencies. Council members and their agencies and staffs will maintain the confidentiality of such information in accordance with applicable law. During Stage 2, the company may also submit any other information that it deems relevant to the Council's evaluation. Information that may be considered by the Council includes details regarding the company's financial activities, legal structure, liabilities, counterparty exposures, resolvability, and existing regulatory oversight. Information requests likely will involve both qualitative and quantitative information. Information relevant to the Council's analysis may include confidential business information such as detailed information regarding financial assets, terms of funding arrangements, counterparty exposure or position data, strategic plans, and interaffiliate transactions.

The Council will make staff representing Council members available to meet with the representatives of any company that enters Stage 2, to explain the evaluation process and the framework for the Council's analysis. In addition, the Council expects that its Deputies Committee will grant a request to meet with a company in Stage 2 to allow the company to present any information or arguments it deems relevant to the Council's evaluation. If the analysis in Stage 1 has identified specific aspects of the company's operations or activities as the primary focus for the evaluation, staff will notify the company of those specific aspects, although the areas of analytic focus may change based on the ongoing analysis.

During Stage 2 the Council will also seek to continue its consultation with the company's primary financial regulatory agency or home country supervisor in a timely manner before the Council makes a Proposed or Final Determination with respect to the company. The Council will continue to encourage the regulator during the determination process to address any risks to

¹⁰ Dodd-Frank Act section 113(g), 12 U.S.C. 5323(g).

¹¹ The Council intends to interpret the term "material financial distress" as a nonbank financial company being in imminent danger of insolvency or defaulting on its financial obligations.

¹² See 12 CFR 1310.21(a).

¹³ See Dodd-Frank Act section 112(d), 12 U.S.C. 5322(d).

U.S. financial stability using the regulator's existing authorities; as noted above, if the Council believes regulators' or the company's actions adequately address the potential risks to U.S. financial stability the Council has identified, the Council would expect to discontinue its consideration of the company for a potential determination under section 113 of the Dodd-Frank Act.

Before making a Proposed Determination regarding a nonbank financial company, the Council will notify the company when the Council believes that the evidentiary record regarding the company is complete.¹⁴ The Council will notify any nonbank financial company in Stage 2 if the company ceases to be considered for a determination. Any nonbank financial company that ceases to be considered at any time in the Council's determination process may be considered for a potential determination in the future at the Council's discretion, consistent with the processes described above.

d. Proposed and Final Determinations

Proposed Determination

Based on the analysis performed in Stage 2, a nonbank financial company may be considered for a Proposed Determination. A Proposed Determination requires a vote, on a nondelegable basis, of two-thirds of the voting members of the Council then serving, including an affirmative vote by the Chairperson of the Council.¹⁵ Following a Proposed Determination, the Council will issue a written notice of the Proposed Determination to the nonbank financial company, which will include an explanation of the basis of the Proposed Determination.¹⁶ Promptly after the Council votes to make a Proposed Determination regarding a company, the Council will provide the company's primary financial regulatory agency or home country supervisor with the nonpublic written explanation of the basis of the Council's Proposed Determination (subject to appropriate protections for confidential information).

Hearing

A nonbank financial company that is subject to a Proposed Determination may request a nonpublic hearing to contest the Proposed Determination in accordance with section 113(e) of the Dodd-Frank Act and § 1310.21(c) of the Council's rule regarding nonbank financial company determinations.¹⁷ If the nonbank financial company requests a hearing in accordance with the procedures set forth in § 1310.21(c), the Council will set a time and place for such hearing. The Council has published hearing procedures on its website.¹⁸ In light of the statutory timeframe for conducting a hearing, and the fact that the purpose of the hearing is to benefit the company, if a company

requests that the Council waive the statutory deadline for conducting the hearing, the Council may do so in appropriate circumstances.

Final Determination

After making a Proposed Determination and holding any requested written or oral hearing, the Council, on a nondelegable basis, may, by a vote of not fewer than two-thirds of the voting members of the Council then serving (including an affirmative vote by the Chairperson of the Council), make a Final Determination that the company will be subject to supervision by the Federal Reserve Board and prudential standards. If the Council makes a Final Determination, it will provide the company with a written notice of the Council's Final Determination, including an explanation of the basis for the Council's decision.¹⁹ The Council will also provide the company's primary financial regulatory agency or home country supervisor with the nonpublic written explanation of the basis of the Council's Final Determination (subject to appropriate protections for confidential information). The Council expects that its explanation of the basis for any Final Determination will highlight the key risks that led to the determination and include guidance regarding the factors that were important in the Council's determination. When practicable and consistent with the purposes of the determination process, the Council will provide a nonbank financial company with notice of a Final Determination at least one business day before publicly announcing the determination pursuant to § 1310.21(d)(3), § 1310.21(e)(3), or § 1310.22(d)(3) of the Council's rule.²⁰ In accordance with the Dodd-Frank Act, a nonbank financial company that is subject to a Final Determination may bring an action in U.S. district court for an order requiring that the determination be rescinded.²¹

The Council does not intend to publicly announce the name of any nonbank financial company that is under evaluation prior to a Final Determination with respect to such company. However, if a company that is under review in Stage 1 or Stage 2 publicly announces the status of its review by the Council, the Council intends, upon the request of a third party, to confirm the status of the company's review. In addition, the Council will publicly release the explanation of the Council's basis for any Final Determination or rescission of a determination, following such an action by the Council. The Council is subject to statutory and regulatory requirements to maintain the confidentiality of certain information submitted to it by a nonbank financial company or its regulators.²² In light of these confidentiality obligations, such confidential information will be redacted from the materials that the Council makes

publicly available, although the Council does not expect to restrict a company's ability to disclose such information.

III. Annual Reevaluations of Nonbank Financial Company Determinations

After the Council makes a Final Determination regarding a nonbank financial company, the Council intends to encourage the company or its regulators to take steps to mitigate the potential risks identified in the Council's written explanation of the basis for its Final Determination. Except in cases where new material risks arise over time, if the potential risks identified in writing by the Council at the time of the Final Determination and in subsequent reevaluations have been adequately addressed, generally the Council would expect to rescind its determination regarding the company.

For any nonbank financial company that is subject to a Final Determination, the Council is required to reevaluate the determination at least annually, and to rescind the determination if the Council determines that the company no longer meets the statutory standards for a determination.²³ The Council may also consider a request from a company for a reevaluation before the next required annual reevaluation, in the case of an extraordinary change that materially affects the Council's analysis.

The Council will apply the same standards of review in its annual reevaluations as the standards for an initial determination regarding a nonbank financial company: either material financial distress at the company, or the nature, scope, size, scale, concentration, interconnectedness, or the mix of the company's activities, could pose a threat to U.S. financial stability. If the Council determines that the company does not meet either of those standards, the Council will rescind its determination.

The Council's annual reevaluations will generally assess whether any material changes since the previous reevaluation and since the Final Determination justify a rescission of the determination. The Council expects that its reevaluation process will focus on whether any material changes that have taken effect—including changes at the company, changes in its markets or its regulation, changes in the impact of relevant factors, or otherwise—result in the company no longer meeting the standards for a determination. In light of the frequent reevaluations, the Council's analyses will generally focus on material changes since the Council's previous review, but the ultimate question the Council will seek to assess is whether changes in the aggregate since the Council's Final Determination regarding the company have caused the company to cease meeting either of the statutory standards for a determination.

During the Council's annual reevaluation of a determination regarding a nonbank financial company, the Council will provide the company with an opportunity to meet with representatives of the Council to discuss the scope and process for the review and to

¹⁴ See 12 CFR 1310.21(a)(3).

¹⁵ 12 CFR 1310.10(b).

¹⁶ See Dodd-Frank Act section 113(e)(1), 12 U.S.C. 5323(e)(1).

¹⁷ See 12 CFR 1310.21(c).

¹⁸ Financial Stability Oversight Council Hearing Procedures for Proceedings Under Title I or Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, available at <https://fsoc.gov>.

¹⁹ Dodd-Frank Act section 113(e)(3), 12 U.S.C. 5323(e)(3); see also 12 CFR 1310.21(d)(2) and (e)(2).

²⁰ See 12 CFR 1310.21(d)(3) and (e)(3) and 1310.22(d)(3).

²¹ See Dodd-Frank Act section 113(h), 12 U.S.C. 5323(h).

²² See Dodd-Frank Act section 112(d)(5), 12 U.S.C. 5322(d)(5); see also 12 CFR 1310.20(e).

²³ Dodd-Frank Act section 113(d), 12 U.S.C. 5323(d).

present information regarding any change that may be relevant to the threat the company could pose to financial stability. In addition, during an annual reevaluation, the company may submit any written information to the Council the company deems relevant to the Council's analysis. During annual reevaluations, a company is encouraged to submit information regarding any changes related to the company's risk profile that mitigate the potential risks previously identified by the Council. Such changes could include updates regarding company restructurings, regulatory developments, market changes, or other factors. If the company or its regulators have taken steps to address the potential risks previously identified by the Council, the Council will assess whether the risks have been adequately mitigated to merit a rescission of the determination regarding the company. If the company explains in detail and in a timely manner potential changes it could make to its business to address the potential risks previously identified by the Council, representatives of the Council will endeavor to provide their feedback on the extent to which those changes may address the potential risks.

If a company contests the Council's determination during the Council's annual reevaluation, the Council will vote on whether to rescind the determination and provide the company, its primary financial regulatory agency or home country supervisor, and the primary financial regulatory agency of its significant subsidiaries with a notice explaining the primary basis for any decision not to rescind the determination. If the Council does not rescind the determination, the written notice provided to the company will address the most material factors raised by the company in its submissions to the Council contesting the determination during the annual reevaluation. The written notice from the Council will also explain why the Council did not find that the company no longer met the standard for a determination under section 113 of the Dodd-Frank Act. In general, due to the sensitive, company-specific nature of its analyses in annual reevaluations, the Council generally would not publicly release the written findings that it provides to the company, although the Council does not expect to restrict a company's ability to disclose such information.

Finally, the Council will provide each nonbank financial company subject to a Council determination an opportunity for an oral hearing before the Council once every five years at which the company can contest the determination.

Nellie Liang

Under Secretary for Domestic Finance.

[FR Doc. 2023-25053 Filed 11-16-23; 8:45 am]

BILLING CODE 4810-AK-P-P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 231114-0268]

RIN 0694-AJ47

Entity List Removal

AGENCY: Bureau of Industry and Security, Department of Commerce.

ACTION: Final rule.

SUMMARY: In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) by removing one entity under the destination of the People's Republic of China (China).

DATES: This rule is effective November 16, 2023.

FOR FURTHER INFORMATION CONTACT:

Chair, End-User Review Committee, Office of the Assistant Secretary for Export Administration, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482-5991, Email: ERC@bis.doc.gov.

SUPPLEMENTARY INFORMATION:

Background

The Entity List (supplement no. 4 to part 744 of the EAR (15 CFR parts 730-774)) identifies entities for which there is reasonable cause to believe, based on specific and articulable facts, that the entities have been involved, are involved, or pose a significant risk of being or becoming involved in activities contrary to the national security or foreign policy interests of the United States, pursuant to § 744.11(b). The EAR impose additional license requirements on, and limit the availability of, most license exceptions for exports, reexports, and transfers (in-country) when a listed entity is a party to the transaction. The license review policy for each listed entity is identified in the "License Review Policy" column on the Entity List, and the impact on the availability of license exceptions is described in the relevant **Federal Register** document that added the entity to the Entity List. The Bureau of Industry and Security (BIS) places entities on the Entity List pursuant to parts 744 (Control Policy: End-User and End-Use Based) and 746 (Embargoes and Other Special Controls) of the EAR.

The End-User Review Committee (ERC), composed of representatives of the Departments of Commerce (Chair), State, Defense, Energy and, where appropriate, the Treasury, makes all decisions regarding additions to, removals from, or other modifications to

the Entity List. The ERC makes all decisions to add an entry to the Entity List by majority vote and makes all decisions to remove or modify an entry by unanimous vote.

Entity List Decisions

Removal From the Entity List

The ERC determined to remove the Ministry of Public Security's Institute of Forensic Science of China from the Entity List pursuant to a removal proposal and review that the ERC conducted in accordance with procedures described in supplement no. 5 to part 744 of the EAR. Prior to removal from the Entity List by this rule, the Ministry of Public Security's Institute of Forensic Science of China was listed under the destination of China.

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA) (50 U.S.C. 4801-4852). ECRA provides the legal basis for BIS's principal authorities and serves as the authority under which BIS issues this rule.

Rulemaking Requirements

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

2. Notwithstanding any other provision of law, no person is required to respond to or be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves an information collection approved by OMB under control number 0694-0088, Simplified Network Application Processing System. BIS does not anticipate a change to the burden hours associated with this collection as a result of this rule. Information regarding the collection, including all supporting materials, can be accessed at <https://www.reginfo.gov/public/do/PRAMain>.

3. This rule does not contain policies with federalism implications as that term is defined in Executive Order 13132.

4. Pursuant to section 1762 of the Export Control Reform Act of 2018, this action is exempt from the Administrative Procedure Act (5 U.S.C.

553) requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date.

5. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

List of Subjects in 15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

Accordingly, part 744 of the Export Administration Regulations (15 CFR parts 730–774) is amended as follows:

PART 744—CONTROL POLICY: END-USER AND END-USE BASED

■ 1. The authority citation for part 744 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of November 8, 2022, 87 FR 68015, 3 CFR, 2022 Comp., p. 563; Notice of September 7, 2023, 88 FR 62439 (September 11, 2023).

■ 2. Supplement no. 4 is amended by removing the entry for “Ministry of Public Security’s Institute of Forensic Science of China” under CHINA, PEOPLE’S REPUBLIC OF.

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 2023–25557 Filed 11–16–23; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0052]

RIN 1625–AA00

Safety Zone; Hurricanes, Tropical Storms, and Other Storms With High Winds; Captain of the Port Zone Sector North Carolina

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing a safety zone to be enforced in the event of hurricanes and tropical storms in the Sector North Carolina Captain of the Port (COTP) Zone. This action is necessary to ensure the safety of the waters of the Sector North Carolina COTP Zone. This rule establishes actions to be completed by industry and vessels in the COTP Zone prior to landfall of hurricanes and tropical storms threatening the State of North Carolina.

DATES: This rule is effective December 18, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG–2023–0052 in the search box and click “Search.” Next, in the Document Type column, select “Supporting & Related Material.”

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email Petty Officer Ken Farah, Waterways Management Division, U.S. Coast Guard; telephone 910–772–2221, email ncmarineevents@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

North Carolina has the potential to be affected by hurricanes and tropical storms on a yearly basis, especially between the months of June and November. The Sector North Carolina Captain of the Port (COTP) proposed establishing a safety zone to provide for the safety of life and for the protection of port infrastructure and of the environment during such storms. In

response, on July 14, 2023, the Coast Guard published a notice of proposed rulemaking (NPRM) titled “Safety Zone; Hurricanes and Tropical Storms in Captain of the Port Zone North Carolina” (88 FR 45123). There we stated why we issued the NPRM and invited comments on our proposed regulatory action related to this safety zone. During the comment period that ended August 14, 2023, we received no comments.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The COTP of Sector North Carolina has determined that the establishment of a safety zone to be enforced in case of hurricanes and heavy weather in North Carolina is necessary to ensure the safety of the waters of the COTP Zone Sector North Carolina. This safety zone establishes actions to be completed by local industry and vessels in the COTP zone prior to landfall of hurricanes and heavy weather threatening the State of North Carolina. The safety zone consists of all navigable waters of the United States in the Sector North Carolina COTP Zone, as defined in 33 CFR 3.25–20. Portions of the safety zone may be activated at different times, as conditions dictate.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received no comments on our NPRM published July 14, 2023. While there were no comments to the proposed rule, the following change was made to this rule. The name of the rule was changed to “Safety Zone; Hurricanes and Heavy Weather in Captain of the Port Zone Sector North Carolina” in order to harmonize this to similar rules within U.S. Coast Guard District 5. There are no changes in the regulatory text of this rule from the proposed rule in the NPRM.

This action is necessary to ensure the safety of the waters of the COTP Zone Sector North Carolina as it establishes actions to be completed by local industry and vessels in the COTP zone prior to landfall of hurricanes and tropical storms threatening the State of North Carolina. This safety zone consists of all navigable waters of the United States in the Sector North Carolina COTP Zone, as defined in 33 CFR 3.25–20. Portions of the safety zone may be activated at different times, as conditions dictate.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and

Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a “significant regulatory action,” under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the necessity to protect life and port infrastructure during hurricanes and tropical storms. The scope of the regulation is narrow and will only apply when a hurricane or tropical storm impacts the navigable waters of the Sector North Carolina Captain of the Port Zone. These events are infrequent and of relatively short duration. Regulatory restrictions will be lifted as soon as practicable following the passage of a named storm.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions

concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency’s responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

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

we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone that prohibits entry in certain waters of the Sector North Carolina COTP Zone for the duration needed to ensure safe transit of vessels and industry post-hurricane, post-storm, and post-emergency. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

Marine safety, Navigation, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051, 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 165.562 to read as follows:

§ 165.562 Safety Zone; Hurricanes, Tropical Storms, and other Storms with High Winds; Captain of the Port Zone Sector North Carolina.

(a) *Regulated Areas.* All navigable waters of the United States within

Sector North Carolina COTP Zone as described in 33 CFR 3.25–20, during specified port conditions. Port conditions and safety zone activation may vary for different regions of the regulated area at different times, based on storm conditions and projected track.

(b) *Definitions.* (1) *Captain of the Port* means the Commander, Coast Guard Sector North Carolina.

(2) *Representative* means any Coast Guard commissioned, warrant, or petty officer or civilian employee who has been authorized to act on the behalf of the Captain of the Port.

(3) *Port Condition WHISKEY* means a condition set by the COTP when National Weather Service (NWS) weather advisories indicate sustained gale force winds (39–54 mph/34–47 knots) from a tropical or hurricane force storm are predicted to make landfall at the Port of Wilmington or Port of Morehead City within 72 hours.

(4) *Port Condition X–RAY* means a condition set by the COTP when NWS weather advisories indicate sustained gale force winds (39–54 mph/34–47 knots) from a tropical or hurricane force storm are predicted to make landfall at the port within 48 hours.

(5) *Port Condition YANKEE* means a condition set by the COTP when NWS weather advisories indicate that sustained gale force winds (39–54 mph/34–47 knots) from a tropical or hurricane force storm are predicted to make landfall at the port within 24 hours.

(6) *Port Condition ZULU* means a condition set by the COTP when NWS weather advisories indicate that sustained gale force winds (39–54 mph/34–47 knots) from a tropical or hurricane force storm are predicted to make landfall at the port within 12 hours.

(7) *Port Condition RECOVERY* means a condition set by the COTP when NWS weather advisories indicate that sustained gale force winds (39–54 mph/34–47 knots) from a tropical or hurricane force storm are no longer predicted for the designated area. This port condition remains in effect until the regulated areas are deemed safe and reopened to normal operations.

(c) *Regulations—(1) Port Condition WHISKEY.* All vessels must exercise due diligence in preparation for potential storm impacts. Ports and waterfront facilities are encouraged to remove all debris and secure potential flying hazards. All self-propelled oceangoing vessels over 500 gross tons (GT), all oceangoing tank barges and their supporting tugs, and all tank barges over 200 GT wishing to remain

in port should seek approval from the COTP prior to Port Condition X–RAY.

(2) *Port Condition X–RAY.* All vessels and port facilities are encouraged to ensure potential flying debris and hazardous materials are removed or secured. All self-propelled oceangoing vessels over 500 gross tons (GT), all oceangoing tank barges and their supporting tugs, and all tank barges over 200 GT without COTP approval to remain in port must depart prior to the setting of Port Condition Yankee. Vessels with COTP permission to remain in port must implement their approved mooring arrangement.

(3) *Port Condition YANKEE.* Affected ports are closed to all inbound vessel traffic. All self-propelled oceangoing vessels over 500 gross tons (GT), all oceangoing tank barges and their supporting tugs, and all tank barges over 200 GT must have departed designated ports within the Sector North Carolina COTP zone unless they have received COTP approval to remain in port.

(4) *Port Condition ZULU.* Affected ports and waterways are closed to all vessel traffic unless specifically authorized by the COTP or representative. Cargo operations are suspended, including bunkering and lightering. The COTP may grant cargo transfer waivers unless a Cargo of Particular Hazard or Certain Dangerous Cargo is involved.

(5) *Port Condition RECOVERY.* Designated areas are closed to all commercial traffic and recreational vessels 65-feet in length and greater. Based on assessments of channel conditions, navigability concerns, and hazards to navigation, the COTP may permit vessel movements with restrictions. Restrictions may include, but are not limited to, preventing or delaying vessel movements, imposing draft, speed, size, horsepower or daylight restrictions, or directing the use of specific routes. Vessels permitted to transit the regulated area shall comply with the lawful orders or directions given by the COTP or designated representative.

(6) *Safety Zones Notice.* Coast Guard Sector North Carolina will attempt to notify the maritime community of periods during which these safety zones will be in effect via Broadcast Notice to Mariners, Marine Safety Information Broadcast, or by on-scene designated representatives.

(7) *Regulated Area Notice.* The Coast Guard will provide notice of the regulated area via Broadcast Notice to Mariners, Marine Safety Information Broadcast, or by on-scene designated representatives.

(8) *Exception.* This regulation does not apply to authorized law enforcement agencies operating within the regulated area.

Timothy J. List,

Captain, U.S. Coast Guard, Captain of the Port, Sector North Carolina.

[FR Doc. 2023–25461 Filed 11–16–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0902]

RIN 1625–AA87

Security Zones; Corpus Christi Ship Channel, Corpus Christi, TX

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing four temporary, 500-yard radius, moving security zones within the Corpus Christi Ship Channel and the La Quinta Channel. The temporary security zones are needed to protect certain vessels carrying cargoes which pose such risks that they require an elevated level of security, the cargoes themselves, and the surrounding waterway from terrorist acts, sabotage, or other subversive acts, accidents, or other events of a similar nature. Entry of vessels or persons into these zones is prohibited unless specifically authorized by the Captain of the Port Sector Corpus Christi or a designated representative.

DATES: This rule is effective without actual notice from November 17, 2023 until November 24, 2023. For the purposes of enforcement, actual notice will be used from November 10, 2023, until November 17, 2023.

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email Lieutenant Commander Anthony Garofalo, Sector Corpus Christi Waterways Management Division, U.S. Coast Guard; telephone 361–939–5130, email Anthony.M.Garofalo@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port Sector Corpus Christi
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable. The Coast Guard must establish these security zones by November 10, 2023 to ensure security of these vessels and lacks sufficient time to provide a reasonable comment period and consider those comments before issuing the rule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be contrary to the public interest because immediate action is needed to provide for the security of these vessels.

III. Legal Authority and Need for Rule

The Coast Guard may issue security zone regulations under authority in 46 U.S.C. 70051 and 70124. The Captain of the Port, Sector Corpus Christi (COTP) has determined that potential hazards associated with the transit of the Motor Vessel (M/V) BONITO LNG, M/V CLEAN RESOLUTION, M/V INNOVATOR and M/V PILAARGAS, when loaded, will be a security concern within a 500-yard radius of each vessel. This rule is needed to provide for the safety and security of the vessels, their cargo, and the surrounding waterway from terrorist acts, sabotage or other subversive acts, accidents, or other events of a similar nature while they are transiting within Corpus Christi, TX.

IV. Discussion of the Rule

The Coast Guard is establishing four 500-yard radius, temporary, moving security zones around M/V BONITO LNG, M/V CLEAN RESOLUTION, M/V INNOVATOR and M/V PILAARGAS. To facilitate compliance with requirements of the security zones, the vessel names will be clearly marked on the port, starboard, and stern. The zones for the vessels will be effective and enforced from November 10, 2023, through November 24, 2023, to protect the

vessels, their cargo, and the surrounding waterways from terrorist acts, sabotage, or other subversive acts, accidents, or other events of a similar nature while the vessels are traveling within the La Quinta and Corpus Christi Ship Channels. No vessel or person will be permitted to enter the security zones without obtaining permission from the COTP or a designated representative.

Entry into these security zones is prohibited unless authorized by the COTP or a designated representative, who will be on scene to enforce the security zone. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard (USCG) assigned to units under the operational control of USCG Sector Corpus Christi. Persons or vessels desiring to enter or pass through each zone must request permission from the COTP or a designated representative on VHF-FM channel 16 or by telephone at 361-939-0450. If permission is granted, all persons and vessels shall comply with the instructions of the COTP or designated representative. The COTP or a designated representative will inform the public through Broadcast Notices to Mariners (BNMs), Local Notices to Mariners (LNMs), and/or Marine Safety Information Bulletins (MSIBs) as appropriate for the enforcement times and dates for each security zone.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a “significant regulatory action,” under Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, duration, and location of the security zones. This rule will impact a small, designated area of 500-yards around the moving vessels in the Corpus Christi Ship Channel and La Quinta Ship Channel as the vessels transit the channel over an fifteen day period. Moreover, the rule allows other

vessels to seek permission to enter the zones.

B. Impact on Small Entities

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

While some owners or operators of vessels intending to transit the temporary security zones may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency’s responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship

between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves moving security zones lasting for the duration of time that the M/V BONITO LNG, M/V CLEAN RESOLUTION, M/V INNOVATOR and M/V PILAARGAS are within the Corpus Christi Ship Channel and La Quinta Channel while loaded with cargo. It will prohibit entry within a 500-yard radius of M/V BONITO LNG, M/V CLEAN RESOLUTION, M/V INNOVATOR and M/V PILAARGAS while the vessels are transiting loaded within Corpus Christi Ship Channel and La Quinta Channel. It is categorically excluded from further review under

L60(d) in Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C 70034, 70051; 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 165.T08–0902 to read as follows:

§ 165.T08–0902 Security Zones; Corpus Christi Ship Channel. Corpus Christi, TX.

(a) *Location.* The following areas are moving security zones: All navigable waters encompassing a 500-yard radius around the M/V BONITO LNG, M/V CLEAN RESOLUTION, M/V INNOVATOR and M/V PILAARGAS while the vessels are in the Corpus Christi Ship Channel and the La Quinta Ship Channel.

(b) *Effective period.* This section will be in effect, and subject to enforcement, from November 10, 2023, through November 24, 2023.

(c) *Regulations.* (1) The general regulations in § 165.33 of this part apply. Entry into the zones is prohibited unless authorized by the Captain of the Port Sector Corpus Christi (COTP) or a designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard assigned to units under the operational control of USCG Sector Corpus Christi.

(2) Persons or vessels desiring to enter or pass through the zones must request

permission from the COTP Sector Corpus Christi on VHF–FM channel 16 or by telephone at 361–939–0450.

(3) If permission is granted, all persons and vessels shall comply with the instructions of the COTP or designated representative.

(d) *Information broadcasts.* The COTP or a designated representative will inform the public through Broadcast Notices to Mariners (BNMs), Local Notices to Mariners (LNMs), and/or Marine Safety Information Bulletins (MSIBs) as appropriate of the enforcement times and dates for these security zones.

Dated: November 9, 2023.

Jason Gunning,

Captain, U.S. Coast Guard, Captain of the Port, Sector Corpus Christi.

[FR Doc. 2023–25457 Filed 11–16–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0286]

RIN 1625–AA00

Safety Zone; Shrewsbury River, S–32 Bridge, Boroughs of Rumson and Sea Bright, NJ

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the navigable waters of the Shrewsbury River, within a 100-yard radius of the center point of the S–32 Bridge on County Route 520 (Rumson Road), in the boroughs of Rumson and Sea Bright, New Jersey. The safety zone will include the East and West navigational channels and will temporarily close down a portion of the Shrewsbury River under and adjacent to the S–32 Bridge. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards associated with the bridge construction. When enforced, entry of vessels or persons into this zone during the enforcement periods is prohibited unless specifically authorized by the Captain of the Port New York or a designated representative.

DATES: This rule is effective from December 1, 2023, through December 31, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG–2023–0286 in the search box and click “Search.” Next, in the Document Type column, select “Supporting & Related Material.”

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call, or email MST1 Melanie Hughes, Waterways Management Division, U.S. Coast Guard; telephone 718–354–4352, email Melanie.A.Hughes1@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port New York
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

On March 15, 2023, the Coast Guard received notification from WSP USA Inc. requesting to close a portion of the Shrewsbury River for the replacement of the S–32 Bridge on County Route 520 (Rumson Road) over the Shrewsbury River in the Boroughs of Rumson and Sea Bright, NJ; Federal Project No. STBGP–0520(300); NJDOT Job No. 6700352. In response, on May 23, 2023, the Coast Guard published a notice of proposed rulemaking (NPRM) titled “Safety Zone; Shrewsbury River, S–32 Bridge, Boroughs of Rumson and Sea Bright, NJ” (88 FR 33054). There we stated why we issued the NPRM and invited comments on our proposed regulatory action related to this safety zone. During the comment period that ended June 22, 2023, we received one comment, that is discussed in section IV below.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action is needed to respond to the potential safety hazards associated with replacement of the S–32 Bridge that will impact navigation along the Shrewsbury River.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port New York (COTP) has determined that potential hazards associated with the bridge construction would be a safety concern for anyone within a 100-yard radius of the center

point of the bridge. The purpose of this rulemaking is to protect personnel, vessels, and the marine environment from potential hazards created by the S–32 Bridge construction activities within a 100-yard radius.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received one comment on our NPRM published May 23, 2023. The comment is in favor of the rule, however identified a variety of concerns including channel reduction and impact on velocity of current, on scene management of vessel traffic, project background, and the time of year for a portion of the waterway closures. Additionally, as you will notice as we address the comments below, we have made a change to the effective dates of the rule to account for a delay in the start date.

The commenter expressed concerns with the reduced horizontal clearance of 37 feet and increasing the velocity of the current and vessels losing steerage and causing collisions and distress calls. The commenter stated that they lost steerage transiting the present draw bridge with an oncoming vessel, spun a full 180-degrees and hit the bridge fender system to avoid a collision. They also recommended a safety watch during the height of the summer season.

Coast Guard is working closely with affected stake holders to ensure the full and partial channel closures will occur outside the peak recreational boating season. We will notify USCG Station Sandy Hook and New Jersey State Marine Police Carteret Station for their awareness during patrols. Also, the Coast Guard will ensure adequate notice and of this safety zone to mariners through dissemination of information through the Local Notice to Mariners. NOAA has also included the “Bridge under construction” label on Chart 12325 at <<https://charts.noaa.gov/PDFs/12325.pdf>> to increase awareness among mariners.

The commenter stated there should be a safety presence directing marine traffic and not just a bridge tender who is worried about the bridge operation. The Coast Guard does not have the physical assets to provide a daily on scene presence during the enforcement periods. We will notify USCG Station Sandy Hook and New Jersey State Marine Police Carteret Station for their awareness during patrols.

The commenter stated this rulemaking proposal did not start on March 15, 2023, with the request for waterway restrictions, nor in the past 75 days.

The commenter also stated it is not a good idea for even a partial channel closure for a majority of the boating season and should occur after November 30 and before April 1.

The Coast Guard proceeded with the rulemaking request once sufficient information was provided, as required by 33 CFR 165.5 establishment procedures.

The commenter stated “there is multiple 180-foot by 64-foot crane barge spudded down in the channel while conducting heavy lift operations each week at the new bridge. We are not building the Tappan Zee Bridge here.” The Coast Guard is receiving regular updates regarding the project’s construction timelines. The current project schedule calls for one, 180-foot by 64-foot crane barge to spud down in the channel for five days. The Coast Guard does not determine the type of machinery used on construction projects.

There are two updates to the information shared in the NPRM about the project. First, The Coast Guard is receiving regular updates regarding the project’s scheduled timelines. The Coast Guard will publish any changes to the full channel closure dates in the Local Notice to Mariners. The public is urged to visit <https://www.rumsonseabrightbridge.com/> for the most up to date information on timelines. Second, the half-channel closure horizontal clearance will be 37 feet 6 inches instead of the originally published 37 feet.

As noted above there is one change to the regulatory text of this rule from the proposed rule in the NPRM. The Coast Guard is publishing this rulemaking to now be effective and enforceable from December 1, 2023, to account for delays, through December 31, 2024, as originally stated. This rule now establishes a safety zone from December 1, 2023, through December 31, 2024, but will only be enforced during periods when heavy lift operations are in progress. The first full channel closure is anticipated to take place sometime between January 2024 and March 2024. The Federal navigation channel closure is due to a 180-foot by 64-foot crane barge spudded down in the channel while conducting heavy lift operations.

The remainder of the bridge construction activities will partially close the channel allowing marine traffic to pass on either the east half or the west half of the channel. During these partial closures, the channel will be reduced to a width of 37 feet, 6 inches. The Coast Guard is working closely with stakeholders to ensure full and partial closures will occur outside

of the peak recreational boating season. The safety zone covers all navigable waters of the Shrewsbury River within 100 yards of the center point of the S-32 Bridge. The duration of the zone is intended to ensure the safety of personnel, vessels, and these navigable waters during the bridge construction. During periods of heavy lift operations, no vessel or person would be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a “significant regulatory action,” under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, duration and time-of-day of the safety zone. This rule may affect owners or operators of vessels intending to transit the Shrewsbury River within a 100-yard radius of the center point of the S-32 Bridge, some of which might be small entities. However, this safety zone will not have a significant economic impact on a substantial number of these entities because it is temporarily enforced, allows for deviation requests, and does not impact vessel transit significantly. Regarding the enforcement period, although this safety zone will be in effect from December 1, 2023, through December 31, 2024, vessels will only be prohibited from the regulated zone during periods of heavy lift operations in correspondence to the period of enforcement. Vessels will also be able to request deviation from this rule to transit through the safety zone during enforcement periods. Such requests would be considered on a case by-case basis and may be authorized by the COTP or a designated representative. For these reasons, the Coast Guard expects any impact of this rulemaking establishing a temporary safety zone on

Shrewsbury River within a 100-yard radius of the center point of the S-32 Bridge to be minimal and have no significant economic impact on small entities. The Coast Guard will notify the public of the enforcement periods of this rule through appropriate means, which may include, but are not limited to, publication in the Local Notice to Mariners and Broadcast Notice to Mariners via VHF-FM marine channel 16.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V.A. above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency’s responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves establishing a safety zone on all navigable waters of the Shrewsbury River, within a 100-yard radius of the center point of the S-32 Bridge, on County Route 520 (Rumson Road) in the Boroughs of Rumson and Sea Bright,

New Jersey. It is categorically excluded from further review under paragraph L60 (a) of Appendix A, Table 1 of DHS Instruction Manual 023-01-001-01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

- 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051, 70124; 33 CFR 1.05-1, 6.04-1, 6.04-6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

- 2. Add § 165.T01-0286 to read as follows:

§ 165.T01-0286 **Safety Zone; Shrewsbury River, S-32 Bridge, Boroughs of Rumson and Sea Bright, NJ.**

(a) *Location.* The following area is a safety zone: All navigable waters of the Shrewsbury River, within a 100-yard radius of the center point of the S-32 Bridge, County Route 520 (Rumson Road) in the boroughs of Rumson and Sea Bright, New Jersey.

(b) *Definitions.* As used in this section, *Designated Representative* means a Coast Guard Officer, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port New York (COTP) in the enforcement of the safety zone.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, no person or vessel may enter the safety zone described in paragraph (a) of this section unless authorized by the Captain of the Port (COTP) or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative via VHF channel 16 or by phone at (718) 354-4353 (Sector New York Command Center). Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period.* This section is effective from December 1, 2023, through December 31, 2024, but will only be enforced during periods when heavy lift operations at the new bridge are in progress.

Zeita Merchant,

Captain, U.S. Coast Guard, Captain of the Port New York.

[FR Doc. 2023-25447 Filed 11-16-23; 8:45 am]

BILLING CODE 9110-04-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 16

[EPA-HQ-OMS-2019-0371; FRL-10082-04-OMS]

Privacy Act Regulations for EPA-83

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA or Agency) is taking direct final action to revise the Agency's Privacy Act regulations to exempt a modified system of records, EPA-83, the Personnel Security System (PSS) 2.0, from certain requirements of the Privacy Act because of the data sensitivity contained within an insider threat inquiry. A lack of protection of these data could jeopardize the insider threat inquiry or additional investigations if warranted.

DATES: This rule is effective on January 16, 2024, without further notice unless EPA receives adverse comment by December 18, 2023. If EPA receives adverse comment, it will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OMS-2019-0371, at <https://www.regulations.gov/>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other

information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: John Goldsby, Personnel Security Branch, Environmental Protection Agency, William Jefferson Clinton North Building, Mail code 3206A, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number, (202) 564-1569; email address, Goldsby.John@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Why is EPA using a direct final rule?

The EPA is publishing this rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment. However, in the "Proposed Rules" section of this issue of the **Federal Register**, we are publishing a separate document that will serve as the proposed rule to exempt a new system of records, EPA-83, the Personnel Security System (PSS) 2.0, from certain requirements of the Privacy Act if adverse comments are received on this direct final rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document.

If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. We would address all public comments in any subsequent final rule based on the proposed rule.

II. General Information

The EPA published a Privacy Act system of records notice for PSS 2.0 (85 FR 32380, May 29, 2020) to replace PSS 1.0, which was a module of the Office of Administrative Services Information System (OASIS, EPA-41), and create a stand-alone system. The Personnel Security Branch (PSB) plans to update

PSS with a new module focused on providing the agency with insider threat inquiry management and coordination capabilities. The PSS 2.0 supports the PSB with tracking the documentation associated with background investigations for Federal and non-Federal personnel working for EPA. This includes reporting requirements that meet the Security Executive Agent Directive (SEAD) 3, which establishes reporting requirements for all “covered individuals” who have access to classified information or who hold a sensitive position. Access to the system is restricted to authorized users and PSS is maintained in a secure, password protected computer system, in secure areas and buildings with physical access controls and environmental controls. In the performance of their official duties, EPA federal personnel must input and manage Sensitive Personally Identifiable Information (such as social security number) and Personally Identifiable Information (such as home address and email address). All personnel are required to take annual Information Technology Security and Privacy Training to ensure the proper handling and management of Sensitive Personally Identifiable Information (SPII) and Personally Identifiable Information (PII). The data is required in the system to start the onboarding process and to manage personnel through lifecycle activity at EPA (such as background investigations). PSS 2.0 displays a reminder about the appropriate PII and SPII handling procedures every time a user begins to enter data for a new background investigation. Additionally, PSS will include a module dedicated specifically for insider threat inquiry management and coordination. This module will contain details of insider threat inquiries, including the names and identifiers of personnel involved in such inquiries.

Pursuant to 5 U.S.C. 552a(k)(2) and (k)(5), an individual’s request for access to his or her record may be exempt from specific access and accounting provisions of the Privacy Act where the “investigatory material [was] compiled for law enforcement purposes”. See 40 CFR 16.12. Note that the (k)(5) exemption applies only to access requests for background investigation records that would identify a confidential source. Under 5 U.S.C. 552a(k)(1), (k)(2), and (k)(5), EPA is proposing to exempt the PSS 2.0 from the following provisions of the Privacy Act of 1974 as amended; 5 U.S.C. 552a; (d); (e)(1); (e)(4) (G), (H), and (I); and (f)(2) through (5) for the following reasons:

(1) From subsection 552a(c)(3), because making available to a named individual an accounting of disclosures of records concerning him/her/them could reveal investigative interest on the part of EPA and/or the Department of Justice. This could allow record subjects to impede the investigation, *e.g.*, destroy evidence, intimidate potential witnesses, or flee the area to avoid inquiries or apprehension by law enforcement personnel. Further, such a disclosure could reveal the identity of a confidential source and hamper the Agency’s investigation.

(2) From subsection 552a(c)(4), which concerns providing notice to others regarding corrections or disputed information in accordance with subsection (d) of the Privacy Act, because no access to these records is available under subsection (d) of the Act.

(3) From subsection 552a(d), which requires an agency to permit an individual to access, contest or request amendment of records pertaining to him/her/them, because the records contained in this system relate to official Federal investigations. Individual access to these records could compromise ongoing investigations, reveal confidential informants and/or sensitive investigative techniques used in particular investigations, or constitute unwarranted invasions of the personal privacy of third parties who are involved in a certain investigation.

(4) From subsections 552a(e)(1) and (e)(5), which require an agency to collect/maintain only accurate and relevant information about an individual, because the accuracy or relevance of information obtained in the course of a law enforcement investigation is not always known when collected. Material that may seem unrelated, irrelevant, or incomplete when collected may take on added meaning or significance as the investigation progresses. Also, in the interest of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of criminal activity. Therefore, it would impede the investigative process if it were necessary to assure the relevance, accuracy, timeliness and completeness of all information obtained.

(5) From subsections 552a(e)(4)(G) and (H), which require an agency to publish—in the **Federal Register**—procedures concerning access to records, because no access to these records is available under subsection (d) of the Privacy Act, for the reasons explained above in the discussion of subsection (d).

(6) From subsections 552a(f)(2), (f)(3), (f)(4), and (f)(5), concerning agency rules for obtaining access to records under subsection (d), because this system is exempt from the access and amendment provisions of subsection (d). Since EPA is claiming that this system of records is exempt from subsection (d) of the Act, concerning access to records, the requirements of subsections (f)(2) through (5) of the Act, concerning agency rules for obtaining access to such records, are inapplicable and are exempted to the extent that this system of records is exempted from subsection (d) of the Act.

(7) From subsection 552a(I), concerning agency rules for use of records from another agency under a matching program. Such documents are owned by and the responsibility of the source agency, and only that source agency can share or release the information.

Note that the (k)(5) exemption applies only to access requests for background investigation records that would identify a confidential source.

III. 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 was submitted to the Office of Management and Budget (OMB) for review and reviewed without comment.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. This action contains no provisions constituting a collection of information under the PRA.

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.

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.

E. Executive Order 13132 (Federalism)

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

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

This action does not have tribal implications as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

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

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

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

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

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

K. The Congressional Review Act

This rule is exempt from the Congressional Review Act (CRA) because it is a rule of agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties.

List of Subjects in 40 CFR Part 16

Environmental protection, Administrative practice and procedure, Confidential business information, Government employees, Privacy.

Kimberly Y. Patrick,

*Principal Deputy Assistant Administrator,
Office of Mission Support.*

For the reasons stated in the preamble, title 40, chapter I, part 16 of the Code of Federal Regulations is amended as follows:

PART 16—IMPLEMENTATION OF PRIVACY ACT OF 1974

■ 1. The authority citation for part 16 continues to read as follows:

Authority: 5 U.S.C. 301, 552a (as revised).

■ 2. Amend § 16.12 by:

■ a. Revising paragraphs (a)(1), (a)(4)(i) and (iii), (a)(5) introductory text, and (b)(1);

■ b. Adding paragraph (b)(4)(iii); and

■ c. Revising paragraph (b)(5) introductory text.

The revisions and additions read as follows:

§ 16.12 Specific exemptions.

(a) * * *

(1) *Systems of records affected.* (i) EPA–17 Online Criminal Enforcement Activities Network (OCEAN).

(ii) EPA–21 External Compliance Case Tracking System (EXCATS).

(iii) EPA–30 Inspector General Enterprise Management System (IGEMS) Hotline Module.

(iv) EPA–40 Inspector General Enterprise Management System (IGEMS) Investigative Module.

(v) EPA–63 eDiscovery Enterprise Tool Suite.

(vi) EPA–79 NEIC Master Tracking System.

(vii) EPA–83 Personnel Security System (PSS) 2.0.

* * * * *

(4) * * *

(i) EPA systems of records 17, 30, 40, 63, and 79 are exempted from the following provisions of the PA, subject to the limitations set forth in 5 U.S.C. 552a(k)(2): 5 U.S.C. 552a(c)(3); (d);

(e)(1), (4)(G) and (4)(H); and (f)(2) through (5). EPA system of records 21 is exempt from the following provisions of the PA, subject to limitations set forth in 5 U.S.C. 552a(k)(2): 5 U.S.C. 552a(c)(3), (d), and (e)(1). EPA system of records 83 is exempt from the following provisions of the PA, subject to the limitations set forth in 5 U.S.C. 552a(k)(2): 5 U.S.C. 552a(d); (e)(1);

(e)(4)(G), (4)(H) and (4)(I); and (f)(2) through (5).

* * * * *

(iii) EPA–83 Personnel Security System (PSS) 2.0 is exempted under 5 U.S.C. 552a(k)(2).

(5) *Reasons for exemption.* EPA systems of records 17, 21, 30, 40, 63, 79, and 83 are exempted from the provisions of the PA in paragraph (a)(4) of this section for the following reasons:

* * * * *

(b) * * *

(1) *Systems of records affected.* (i) EPA 36 Research Grant, Cooperative Agreement, and Fellowship Application Files.

(ii) EPA 40 Inspector General’s Operation and Reporting (IGOR) System Personnel Security Files.

* * * * *

(4) * * *

(iii) EPA 83 is exempted from the following provisions of the PA, subject to the limitations of 5 U.S.C.

552(a)(k)(5); 5 U.S.C. 552a(d); (e)(1); (e)(4)(G), (4)(H) and (4)(I); and (f)(2) through (5).

(5) *Reasons for exemption.* EPA 36, 40, 83, and 100 are exempted from the above provisions of the PA for the following reasons:

* * * * *

[FR Doc. 2023–24669 Filed 11–16–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 424 and 455

[CMS–6084–F]

RIN 0938–AU90

Medicare and Medicaid Programs; Disclosures of Ownership and Additional Disclosable Parties Information for Skilled Nursing Facilities and Nursing Facilities; Medicare Providers’ and Suppliers’ Disclosure of Private Equity Companies and Real Estate Investment Trusts

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

ACTION: Final rule.

SUMMARY: This final rule will implement portions of section 6101 of the Patient Protection and Affordable Care Act (Affordable Care Act), which require the disclosure of certain ownership, managerial, and other information regarding Medicare skilled nursing facilities (SNFs) and Medicaid nursing

facilities. It will also finalize definitions of private equity company and real estate investment trust for Medicare provider enrollment purposes.

DATES: These regulations are effective on January 16, 2024.

FOR FURTHER INFORMATION CONTACT:

Frank Whelan, (410) 786–1302 or via email at Frank.Wheeler@cms.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Executive Summary and Background

A. Executive Summary

1. Background and Purpose

Section 6101(a) of the Affordable Care Act (Pub. L. 111–148) added a new section 1124(c) to the Social Security Act (the Act). This provision established requirements for the disclosure of information about the owners and operators of Medicare SNFs and Medicaid nursing facilities. (Except as otherwise indicated, these Medicare and Medicaid providers will be collectively and occasionally referenced as “nursing facilities,” “nursing homes,” or simply “facilities” or “providers”).

In a proposed rule published in the **Federal Register** on February 15, 2023 titled “Medicare and Medicaid Programs; Disclosures of Ownership and Additional Disclosable Parties Information for Skilled Nursing Facilities and Nursing Facilities” (88 FR 9820), we proposed to implement portions of section 1124(c) of the Act. As we explained in detail in the February 15, 2023 proposed rule, we are engaging in rulemaking that is required under section 1124(c) of the Act. Furthermore, we have recently received information regarding particular categories of nursing facility owners (including, but not limited to, private equity companies (PECs) and real estate investment trusts (REITs)) that has generated concerns about the quality of care that nursing facility residents receive. We stated that having sufficient data on these owners could help CMS better monitor and hold accountable their nursing facilities. We accordingly believed that implementing the data collection requirements in section 1124(c) of the Act (albeit with isolated exceptions) would assist us in achieving this aim.

We also proposed in the February 15, 2023 proposed rule to establish definitions of PEC and REIT in 42 CFR 424.502. The purpose was to assist SNFs in identifying on their Form CMS–855A enrollment applications (Medicare Enrollment Application—Institutional Providers; OMB Control No.: 0938–0685) which entities listed in Section 5

of said application are PECs or REITs.¹ In addition, in the Fiscal Year 2024 Inpatient Prospective Payment System Long-Term Care Hospital Prospective Payment System proposed rule that appeared in the May 1, 2023 **Federal Register** (88 FR 26658) (hereinafter referred to as the FY 2024 IPPS/LTCH PPS proposed rule), we proposed to apply the aforementioned PEC and REIT definitions to all providers and suppliers that complete the Form CMS–855A, not merely SNFs.²

2. Summary of the Major Finalized Provisions

There are three principal categories of provisions that we are finalizing in this rule.

a. Data To Be Reported

We are finalizing our proposals that nursing homes must disclose the following information to CMS or, for Medicaid nursing facilities, the applicable state Medicaid agency (hereafter occasionally referenced as “state” or “state agency”):

- Each member of the facility’s governing body, including the name, title, and period of service of each member.
- Each person or entity who is an officer, director, member, partner, trustee, or managing employee of the facility, including the name, title, and period of service of each such person or entity.
- Each person or entity who is an additional disclosable party of the facility.
- The organizational structure of each additional disclosable party of the facility and a description of the relationship of each such additional disclosable party to the facility and to one another.

To the extent that a Medicare SNF must already report some of this data via the Form CMS–855A, we are finalizing our proposal that the SNF need not report the same data required under section 1124(c) of the Act more than once on the same application

¹ We proposed on December 15, 2022 to revise the Form CMS–855A application in a Paperwork Reduction Act submission (87 FR 76626) to require all owning and managing entities listed on any provider’s or supplier’s Form CMS–855A submission to disclose whether they are a PEC or a REIT.

² “Medicare Program; Proposed Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System and Policy Changes and Fiscal Year 2024 Rates; Quality Programs and Medicare Promoting Interoperability Program Requirements for Eligible Hospitals and Critical Access Hospitals; Rural Emergency Hospital and Physician-Owned Hospital Requirements; and Provider and Supplier Disclosure of Ownership.”

submission. (States will have the option of adopting a similar policy with respect to the required Medicaid nursing facility data.) In general, this rule should be construed towards disclosure and, if in doubt about whether additional information should be released, SNFs should disclose it.

We will also make the information provided per section 1124(c) of the Act publicly available within 1 year as required under section 6101(b) of the Affordable Care Act.

b. Timing of Reporting

We are finalizing our proposal that the nursing facility must report the foregoing information upon initially enrolling in Medicare or Medicaid (which, for purposes of this requirement, includes changes of ownership under 42 CFR 489.18) and when revalidating their Medicare or Medicaid enrollment. Moreover, a Medicare SNF, once enrolled, must disclose any changes to this information within the current timeframes specified in § 424.516(e) for reporting changes in enrollment data.

Consistent with 42 CFR 424.515, SNFs must revalidate their Medicare enrollment every 5 years. However, CMS under § 424.515(d) can perform off-cycle revalidations; that is, we can revalidate a provider or supplier at any time and need not wait until the arrival of the provider’s or supplier’s 5-year revalidation cycle. As finalized, CMS will accordingly reserve the right and indeed plans to conduct off-cycle revalidations of SNFs to collect the data required under section 1124(c) of the Act beginning when the revisions to the Form CMS–855A are finalized. .

c. Definitions

To explain some of the terminology associated with these reporting requirements, we proposed several new definitions. These included, but were not limited to, private equity company, real estate investment trust, additional disclosable party, and organizational structure.

Concerning the PEC and REIT definitions we proposed in the February 15, 2023 and FY 2024 IPPS/LTCH PPS proposed rules, we are finalizing the PEC definition with one minor clarification, as discussed in section III. of this final rule. Due to concerns raised by commenters, we are not finalizing our proposed REIT definition. However, we are finalizing a definition of REIT that commenters recommended that: (1) we believe is more consistent with current federal law and industry practice; and (2) will still enable us to collect the information we need

regarding REIT ownership of nursing homes.

We are also finalizing without modification: (1) all other definitions we proposed in the February 15, 2023 proposed rule; and (2) our proposal in the FY 2024 IPPS/LTCH PPS proposed rule to apply the PEC and REIT definitions (though as modified in this final rule) to all providers and suppliers that complete the Form CMS–855A.

d. Effective Date

This final rule will become effective 60 days after the date it is published in the **Federal Register**. Yet Medicare SNFs will not have to disclose the data required under section 1124(c) of the Act until the Form CMS–855A is: (1) revised to collect this data; and (2) publicly available for use. For Medicaid nursing facilities, the required data will not need to be reported until the applicable state Medicaid agency has established means to collect it. CMS expects state Medicaid agencies to promptly: (1) establish such data collection mechanisms; and (2) begin requiring Medicaid nursing facilities to provide this data once these collection means are established.

3. Summary of Costs and Benefits

Sections IV. and V. of this final rule outline the impacts that our proposals will have on affected entities and beneficiaries. The principal impact will involve the disclosure of the required data by nursing facilities. As explained in section IV. of this final rule, we project a total annual information collection burden on Medicare and Medicaid nursing facilities in reporting this data of 26,974 hours at a cost of \$2,216,128.

We have determined that this final rule is not 3(f)(1) significant. See section IV. of this final rule for a detailed discussion.

B. Legislative and Regulatory Authority

There are three principal categories of legal authorities for our provisions:

- Section 1124(c) of the Act requires Medicare and Medicaid nursing facilities to disclose certain information about their ownership and management.
- Section 1866(j) of the Act furnishes specific authority regarding the enrollment process for providers and suppliers.
- Sections 1102 and 1871 of the Act provide general authority for the Secretary to prescribe regulations for the efficient administration of the Medicare program.

C. Overview of Provider Enrollment

1. Medicare

Section 1866(j)(1)(A) of the Act requires the Secretary to establish a process for the enrollment of providers and suppliers into the Medicare program. The overarching purpose of the enrollment process is to confirm that providers and suppliers seeking to bill Medicare for services and items furnished to Medicare beneficiaries meet all applicable Federal and State requirements to do so. The process is, to an extent, a “gatekeeper” that prevents unqualified and potentially fraudulent individuals and entities from entering and inappropriately billing Medicare. Since 2006, we have undertaken rulemaking efforts to outline our enrollment procedures. These regulations are generally codified in 42 CFR part 424, subpart P (hereafter occasionally referenced as simply “subpart P”). They address, among other things, requirements that providers and suppliers must meet to obtain and maintain Medicare billing privileges.

As outlined in § 424.510, one such requirement is that the provider or supplier complete, sign, and submit to its assigned Medicare Administrative Contractor (MAC) the appropriate enrollment form, typically the Form CMS–855 (OMB Control No. 0938–0685). The Form CMS–855 collects important information about the provider or supplier. Such data includes, but is not limited to, general identifying information (for example, legal business name), licensure and/or certification data, and practice locations. The application is used for a variety of provider enrollment transactions, including the following:

- Initial enrollment—The provider or supplier is—(1) enrolling in Medicare for the first time; (2) enrolling in another Medicare contractor’s jurisdiction; or (3) seeking to enroll in Medicare after having previously been enrolled.
- Change of ownership—The provider or supplier is reporting a change in its ownership.
- Revalidation—The provider or supplier is revalidating its Medicare enrollment information in accordance with § 424.515.
- Reactivation—The provider or supplier is seeking to reactivate its Medicare billing privileges after it was deactivated in accordance with § 424.540.
- Change of information—The provider or supplier is reporting a change in its existing enrollment information in accordance with § 424.516.

After receiving the provider’s or supplier’s initial enrollment application, CMS or the MAC reviews and confirms the information thereon and determines whether the provider or supplier meets all applicable Medicare requirements. We believe this screening process has greatly assisted CMS in executing its responsibility to prevent Medicare fraud, waste, and abuse.

As previously mentioned, over the years we have issued various final rules pertaining to provider enrollment. These rules were intended not only to clarify or strengthen certain components of the enrollment process but also to enable us to take further action against providers and suppliers: (1) engaging (or potentially engaging) in fraudulent or abusive behavior; (2) presenting a risk of harm to Medicare beneficiaries or the Medicare Trust Funds; or (3) that are otherwise unqualified to furnish Medicare services or items.

2. Medicaid

States have considerable flexibility in how they administer their Medicaid programs within a broad federal framework, and programs vary from state to state. In operating Medicaid, states historically have permitted the enrollment of providers who meet the state requirements for program enrollment as well as any applicable federal requirements. State enrollment requirements must be consistent with section 1902(a)(23) of the Act and implementing regulations at § 431.51.

Part 455 of title 42 includes federal Medicaid provider enrollment requirements to which states must adhere. These include, but are not limited to, the following:

- Requiring providers to disclose information regarding ownership, business transactions, certain criminal convictions, and affiliations (§§ 455.104 through 455.107).
 - Screening providers consistent with the procedures in part 455, subpart E (§ 455.410).
 - Revalidating a provider’s enrollment at least every 5 years (§ 455.414).
 - Performing site visits and criminal background checks in certain circumstances (§§ 455.432 and 455.434).
- Although required to comply with the foregoing federal requirements, states have the discretion to, for instance: (1) undertake stricter screening of providers; and (2) require providers to submit data beyond that identified in §§ 455.104 through 455.107. Except as otherwise noted therein, the provisions in 42 CFR part 455 are thus the minimum requirements for states, not the maximum.

D. Publication of the Proposed Rules

We received approximately 75 timely pieces of correspondence in response to the February 15, 2023 proposed rule. We received approximately 10 timely pieces of correspondence in response to our PEC and REIT proposals in the FY 2024 IPPS/LTCH PPS proposed rule (88 FR 27190). This final rule will summarize and respond to all of these comments and address our finalized provisions stemming from both the February 15, 2023 proposed rule and our PEC and REIT proposals from the FY 2024 IPPS/LTCH PPS proposed rule.

II. Provisions of the February 15, 2023 and FY 2024 IPPS/LTCH PPS Proposed Rules

A. February 15, 2023 Proposed Rule

1. Background

a. Statutory and Regulatory History

Section 6101(a) of the Affordable Care Act added a new section 1124(c) to the Act. It established requirements for the disclosure of information about nursing facility ownership and oversight. Under section 1124(c)(2)(A)(ii) of the Act, a nursing facility enrolling or enrolled in Medicare or Medicaid must disclose—

- The name, title, and period of service of each member of the facility's governing body;
- The name, title, and period of service of each person or entity who is an officer, director, member, partner, trustee, or managing employee of the facility; and
- Each person or entity who is an additional disclosable party of the facility.

Section 1124(c)(5)(A) of the Act defines "additional disclosable party" as a person or entity that—

- Exercises operational, financial, or managerial control over the facility or a part thereof, or provides policies or procedures for any of the facility's operations, or provides financial or cash management services to the facility;
- Leases or subleases real property to the facility, or owns a whole or part interest equal to or exceeding 5 percent of the total value of such real property; or
- Provides management or administrative services, management or clinical consulting services, or accounting or financial services to the facility.

In addition, section 1124(c)(2)(A)(iii) of the Act requires the nursing facility to disclose: (1) the organizational structure of each additional disclosable party of the facility; and (2) a description of the relationship of each such additional disclosable party to the

facility and to one another. Section 1124(c)(5)(D) of the Act defines "organizational structure" as meaning, in the case of—

- A corporation—The officers, directors, and shareholders of the corporation who have an ownership interest in the corporation which is equal to or exceeds 5 percent;
- A limited liability company—The members and managers of the limited liability company (including, as applicable, what percentage each member and manager has of the ownership interest in the limited liability company);
- A general partnership—The partners of the general partnership;
- A limited partnership—The general partners and any limited partners of the limited partnership who have an ownership interest in the limited partnership which is equal to or exceeds 10 percent;
- A trust—The trustees of the trust;
- An individual—Contact information for the individual; and
- Any other person or entity, such information as the Secretary determines appropriate.

2. Concerns About Nursing Facility Ownership

We initially included provisions to implement section 1124(c) of the Act as part of the May 6, 2011 proposed rule titled "Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities; Disclosures of Ownership and Additional Disclosable Parties Information" (76 FR 26364). We did not finalize those proposed disclosure provisions in the subsequent final rule, published on August 8, 2011,³ however, due to the need for more time to consider the comments received, though we stated that we would address our provisions in a separate final rule in early 2012. After reviewing the comments, we did not publish a final rule or finalize our proposals. Yet CMS's concerns about the quality of care and operations of nursing facilities, including (though by no means exclusively) those owned by private equity and other types of investment firms, have increased since 2011 and we thus released a new proposed rule in February 2023. We addressed these concerns in detail in the proposed rule and restate them here.

As of 2021, roughly 70 percent of nursing homes were for-profit facilities; this includes those owned by PECs, which comprised approximately 11

percent of all nursing homes (although estimates vary).⁴ Reports have circulated that nursing facility quality has declined under private equity and similar owners. For example, in February 2021 the National Bureau of Economic Research (NBER) published an analysis titled "Does Private Equity Investment in Healthcare Benefit Patients? Evidence from Nursing Homes." The report stated: "Our estimates show that private equity (PE) ownership increases the short-term mortality of Medicare patients by 10%, implying 20,150 lives lost due to PE ownership over our twelve-year sample period. This is accompanied by declines in other measures of patient well-being, such as lower mobility, while taxpayer spending per patient episode increases by 11%."⁵ A November 2021 analysis published in the *Journal of the American Medical Association* contained similar findings concerning PEC-owned nursing facilities. Titled "Association of Private Equity Investment in US Nursing Homes with the Quality and Cost of Care for Long-Stay Residents," the report stated that PECs seek annual returns of 20% or more; with this pressure to generate high short-term profits, private-equity-owned nursing homes might reduce staffing, services, supplies, or equipment, which could adversely affect quality of care.⁶ The analysis concluded that: (1) private equity acquisition of nursing facilities was associated with higher costs and increases in emergency department visits and hospitalizations for ambulatory sensitive conditions; and (2) per the study's findings, more stringent oversight and reporting on private equity ownership of nursing homes may be warranted.⁷ The previously mentioned concerns about nursing home ownership are not limited to PECs. Other types of private ownership, such as REITs, have generated similar concerns.⁸

⁴ Medicare Payment Advisory Commission, "Congressional Request: Private Equity and Medicare," June 2021. [jun21_ch3_medpac_report_to_congress_sec.pdf](#).

⁵ Atul Gupta, Sabrina T. Howell, Constantine Yannelis, and Abhinav Gupta, *Does Private Equity Investment in Healthcare Benefit Patients? Evidence from Nursing Homes*, 2021, p. i.

⁶ Robert Tyler Braun, Hye-Young Jung, Lawrence Casalino, et al., JAMA Health Forum, November 19, 2021.

⁷ Ibid.

⁸ Robert Tyler Braun et al., *The Role Of Real Estate Investment Trusts In Staffing US Nursing Homes*, Health Affairs, January 25, 2023, *The Role Of Real Estate Investment Trusts In Staffing US Nursing Homes | Health Affairs The Role Of Real Estate Investment Trusts In Staffing US Nursing Homes | Health Affairs*.

³ "Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 2012; Final Rule" (76 FR 48485).

The Biden-Harris Administration's concerns about nursing facility quality of care and private equity ownership led to its announcement on February 28, 2022, of a series of initiatives designed to improve care and accountability at such facilities. In its fact sheet titled "Protecting Seniors by Improving Safety and Quality of Care in the Nation's Nursing Homes," the White House stated that "(f)or too long, corporate owners and operators have not been held to account for poor nursing home performance."⁹ The fact sheet also stated that CMS would "implement Affordable Care Act requirements regarding transparency in corporate ownership of" nursing facilities, including the "collect[ion] and public reporting [of] more robust corporate ownership and operating data."¹⁰

Government oversight bodies, too, have studied the issue of nursing facility quality across the board, regardless of the precise type of ownership involved. The Government Accountability Office (GAO) published an analysis on January 14, 2022 titled "Health Care Capsule: Improving Nursing Home Quality and Information" (GAO-22-105422). This document summarized past GAO reports that expressed continued concern about the level of care that SNF beneficiaries receive. Problems that the GAO cited in this analysis and in prior studies included infection prevention and control, ensuring that the nursing home environment is free from accidents, and food safety.¹¹ In a September 2020 report titled "National Background Check Program for Long-Term Care Providers: Assessment of State Programs Concluded in 2019" (OEI-07-20-00180), the U.S. Department of Health and Human Services' Office of Inspector General (OIG) noted that patient abuse, patient neglect, and misappropriation of property have been identified as widespread problems harming beneficiaries receiving long-term care. Of particular significance was the OIG's statement that, per various studies, some nurse aides who were convicted of abuse, neglect, or theft had previous criminal convictions that could have been found through background checks.¹² The OIG added that such background checks can help protect long-term care beneficiaries.¹³

All of the foregoing emphasizes the importance of CMS' efforts to: (1) improve the quality of care provided in nursing facilities; and (2) facilitate greater transparency regarding nursing facilities' owners and operators, whether they be PECs, REITs, or otherwise. We believe nursing homeowners and operators are in a position to address some of the problems referenced in the aforementioned analyses and reports and make operational improvements. Knowing who these parties are through their disclosures on the Form CMS-855A and to states and the data publication under section 6101(b) of the Affordable Care Act will: (1) provide additional transparency that may assist CMS and other regulators in holding nursing facilities accountable; and (2) create increased competition between nursing homes to improve quality by allowing consumers to select facilities with better knowledge of their owners and operators.

3. Proposed Provisions

To this end, we proposed the following provisions in the February 15, 2023 proposed rule:

a. Medicare

(1) Update to § 424.516

We proposed to add new paragraph (g)(1) to § 424.516 outlining the following information to be reported as part of a SNF's Form CMS-855A initial enrollment or revalidation application (including off-cycle revalidation applications). These data elements would be designated as paragraphs (g)(1)(i) through (iv), respectively, and would be in addition to (and not in lieu of) all other reporting requirements in part 424 subpart P:

- Each member of the facility's governing body, including the name, title, and period of service of each such member.
- Each person or entity who is an officer, director, member, partner, trustee, or managing employee of the facility, including the name, title, and period of service of each such person or entity.
- Each person or entity who is an additional disclosable party of the facility.
- The organizational structure of each additional disclosable party of the facility and a description of the relationship of each such additional disclosable party to the facility and to one another.

(We also proposed in the introductory paragraph of (g)(1) that initial applications include, strictly for

purposes of paragraph (g)'s applicability, changes of ownership under 42 CFR 489.18. This means that the SNF's new owner, like an initially enrolling SNF, would have to disclose on its Form CMS-855A the data required per § 424.516(g). This would help ensure that CMS has sufficient data on the facility's new ownership and operators.)

The four data elements in paragraphs (g)(1)(i) through (iv) are identical to those in section 1124(c)(2)(A)(ii) and (iii) of the Act. Some of this information is already captured on the Form CMS-855A application. To avoid duplicate reporting and thus ease the burden on SNFs, we proposed in paragraph (g)(2) that the data in paragraphs (g)(1)(i) through (iv) need not be disclosed more than once on the same application submission. To illustrate, and consistent with sections 1124(a) and 1124A of the Act, an organizational provider or supplier (including a SNF) must currently report in Section 5 of the Form CMS-855A all entities with a partnership interest in the provider or supplier and, in Section 6, all of the provider's or supplier's managing employees. While proposed paragraph (g)(1)(ii) also would require SNFs to disclose this data, the SNF would not have to report it twice on the same Form CMS-855A submission: once per section 1124(a) of the Act and again per section 1124(c) of the Act.

New paragraph (g)(3) would state that the SNF must report any change to any of the information described in paragraphs (g)(1)(i) through (iv) within the current timeframes in § 424.516(e) for reporting changes in enrollment data—specifically, 30 days for changes in ownership or control and 90 days for all other changes. This is to ensure that CMS has accurate and updated information on the SNF.

(2) Definitions

To clarify some of the terminology used in § 424.516(g)(1), we proposed to add several definitions to § 424.502.

First, we proposed to define "additional disclosable party" consistent with the definition of the same term in section 1124(c)(5)(A) of the Act.

Second, § 424.502 currently defines "managing employee" consistent with the definition of the same term in section 1126(b) of the Act. Section 1124(c)(5)(C) of the Act, too, defines "managing employee," though only for purposes of nursing facilities under section 1124(c) of the Act. This latter definition is slightly broader and encompasses more individuals than section 1126(b) of the Act. Since the two

⁹ <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-protecting-seniors-and-people-with-disabilities-by-improving-safety-and-quality-of-care-in-the-nations-nursing-homes/>.

¹⁰ Ibid.

¹¹ GAO-22-105422, p. 1.

¹² OEI-07-20-00180, p. 1.

¹³ Ibid.

definitions are not precisely the same, we cannot use the section 1126(b) of the Act definition for nursing facilities. Accordingly, we proposed to add to the end of § 424.502's definition of "managing employee" a separate definition of "managing employee" that mirrors section 1124(c)(5)(C) of the Act and applies only to SNFs and the requirements in § 424.516(g). It would mean an individual (including a general manager, business manager, administrator, director, or consultant) who directly or indirectly manages, advises, or supervises any element of the practices, finances, or operations of the facility.

Third, we proposed to define "organizational structure" as the term is defined in section 1124(c)(5)(D) of the Act.

Fourth, we have added data elements to the Form CMS-855A via which all providers and suppliers must identify whether an entity it has disclosed on its application is a PEC or a REIT. To assist stakeholders in understanding the meaning of these terms for provider enrollment purposes, we proposed to add definitions thereof to § 424.502. We proposed to define a PEC as a publicly traded or non-publicly traded company that collects capital investments from individuals or entities (that is, investors) and purchases an ownership share of a provider (for example, SNF, home health agency, etc.). We proposed to define a REIT as a publicly traded or non-publicly traded company that owns part or all of the buildings or real estate in or on which the provider operates. We solicited comment on the propriety of our proposed definitions and welcomed any suggested revisions thereto; we particularly solicited comment on whether our proposed definition of PEC should include publicly traded PECs. We also welcomed public feedback regarding any other types of private ownership besides PECs and REITs about which CMS should consider collecting information from SNFs as part of the enrollment process.

b. Medicaid

We proposed to revise our Medicaid enrollment provisions in 42 CFR part 455, subpart B, to include therein regulatory provisions akin to those we proposed in part 424, subpart P.

In § 455.101, we proposed to add the same definitions of "additional disclosable party" and "organizational structure" that we proposed in § 424.502, excluding the reference to skilled nursing facility, a Medicare-only term; we would instead reference

nursing facilities as defined in section 1919(a) of the Act.

We also proposed to revise § 455.101's definition of "managing employee" in two ways. First, we would clarify in the definition's opening sentence that an individual can qualify as a managing employee: (1) even if he or she is acting under contract or through some other arrangement; and (2) whether or not the individual is a W-2 employee of the institution, organization, or agency. Second, and similar to our proposed revision to the definition of "managing employee" in § 424.502, we proposed to add to the end of the definition of this term in § 455.101 a separate definition of "managing employee" that mirrors section 1124(c)(5)(C) of the Act and applies only to nursing facilities. It would mean an individual (including a general manager, business manager, administrator, director, or consultant) who directly or indirectly manages, advises, or supervises any element of the practices, finances, or operations of the facility.

Current § 455.104 identifies certain ownership and control information that Medicaid providers must disclose to enroll or remain enrolled in Medicaid. This information includes some of that referenced in section 1124(c) of the Act, but § 455.104 does not currently incorporate all of the section 1124(c) of the Act data elements. To address this, we proposed several changes to § 455.104.

First, existing § 455.104(e) states that federal financial participation is not available in payments made to a disclosing entity that fails to report required ownership or control information. We proposed to redesignate this paragraph as § 455.104(f) for organizational purposes and to establish a new § 455.104(e) that would address our proposed additional disclosure provisions.

Second, and for nursing facilities as defined in section 1919(a) of the Act, new § 455.104(e)(1)(i) through (iv) would include the same data elements described in proposed § 424.516(g)(1) through (iv). Paragraph (e)(1) would also specify that this information must be furnished (a) upon initial enrollment and revalidation and (b) in addition to (and not in lieu of) all other required data disclosures in part 455, subpart B.

Third, we proposed in § 455.104(e)(2) that the state need not require the provider to report the data described in paragraph (e)(1) more than once on the same enrollment application submission. This provision is similar to that in proposed § 424.516(g)(2) for Medicare but with an important difference, in that § 455.104(e)(2) would

be optional for states. That is, the state could, but would not be required to, mandate the reporting of the § 455.104(e)(1) data more than once on the same application submission. Consistent with the general deference we have long afforded states regarding the operation of their Medicaid provider enrollment programs, we did not seek to overly restrict the logistical means by which states collect the information in question.

In a similar vein regarding state deference, we did not propose that states require nursing homes to report changes to their existing section 1124(c) information within certain timeframes. However, we did encourage states to establish such reporting requirements, including when the provider changes its ownership. Likewise, we suggested (but did not propose to require) that states collect data signifying whether a particular organization reported under section 1124(c) of the Act is a PEC or REIT.

c. Additional Related Proposed Provisions

(1) Public Posting of Data

Section 6101(b) of the Affordable Care Act states that no later than 1 year after final regulations promulgated under section 1124(c)(3)(A) of the Act are published in the **Federal Register**, the Secretary shall make the information reported per such regulations available to the public. Consistent with section 6101(b) of the Affordable Care Act, we outlined in the proposed rule our intention to make data reported per section 1124(c) of the Act publicly available within 1 year after the final rule is published in the **Federal Register**.

(2) Section 1124(c)(3)(A) of the Act

Section 1124(c)(3)(A) of the Act states, in part, that regulations implementing the reporting requirements of section 1124(c) of the Act must also require that the facility certifies (as a condition of participation and payment under Medicare and Medicaid) that the information the facility reports "is, to the best of the facility's knowledge, accurate and current." Under our current Medicare regulations at § 424.510(d)(3), an authorized official or delegated official (as those terms are defined in § 424.502) must sign the Form CMS-855A on behalf of the provider. In signing the application, the official attests to the following: "By my signature, I certify that the information contained herein is true, correct, and complete, and I authorize the Medicare fee-for-service contractor to verify this

information. If I become aware that any information in this application is not true, correct, or complete, I agree to notify the Medicare fee-for-service contractor of this fact in accordance with the timeframes established in 42 CFR 424.516(e).” This “true, correct, and complete” standard has been part of Medicare provider enrollment applications for many years, and we believe its lack of associated qualifying language (such as “to the best of my knowledge”) is beneficial for ensuring that the provider and its signatory fully understand the need to submit accurate data.

We expressed concern in the proposed rule that implementation of section 1124(c)(3)(A) of the Act would result in two knowledge standards for the Form CMS–855A. Specifically, the required nursing facility information would have a “to the best of my knowledge” standard, whereas all other data on the application (for instance, practice locations, final adverse actions) would have an unqualified “true, correct, and complete” standard. This could cause confusion within the nursing facility community. More importantly, though, it might convey the impression that the provider need not be as careful and thorough about confirming the correctness of the nursing facility data in comparison to the rest of the application’s information. This is because the nursing facility data would appear to invoke a lesser knowledge standard. We noted that these same issues could arise with Medicaid enrollment, since some state Medicaid provider enrollment applications may have knowledge standards different from that identified in section 1124(c)(3)(A) of the Act. Due to the need to further review the potential operational implications of section 1124(c)(3)(A) of the Act, we did not propose to implement this provision but stated that we may pursue implementation via future rulemaking. Regardless, providers should submit accurate information, and we may take enforcement action if the information furnished is inaccurate.

(3) Section 1124(c)(2)(B) of the Act

Section 1124(c)(2)(B) of the Act states that if a facility reports the data described in section 1124(c)(2)(A) to another Federal agency, the facility may provide the form on which the data was submitted (or other such information submitted) to meet the disclosure requirements of section 1124(c)(1) of the Act. Given the potential operational complexities of incorporating the provisions of section 1124(c)(2)(B) of the Act into § 424.516(g) or 42 CFR part 455

when we already have a vehicle (the Form CMS–855A) for collecting the data referenced in section 1124(c) of the Act, we stated in the proposed rule that we needed additional time to examine this matter but would consider addressing section 1124(c)(2)(B) of the Act in future rulemaking.

B. FY 2024 IPPS/LTCH PPS Proposed Rule

In addition, in the FY IPPS/LTCH PPS proposed rule (88 FR 27190), we proposed to apply the aforementioned PEC and REIT definitions to all providers and suppliers that complete the Form CMS–855A, not merely SNFs.¹⁴ We explained therein that the reason for this proposal was to help us better understand the scope of PEC and REIT involvement in the health care field as a whole. In our view, limiting the collection of PEC and REIT data to SNFs would give us an incomplete picture of PEC and REIT impact on patient care.

We explained in the FY 2024 IPPS/LTCH PPS final rule (88 FR 59309) that we would address the comments we received on our proposal in the present final rule.

III. Analysis of and Responses to Public Comments and Final Provisions

As noted in section I.D. of this final rule, we received approximately 75 timely pieces of correspondence in response to the February 15, 2023 proposed rule. We received approximately 10 timely pieces of correspondence in response to our PEC and REIT proposals in the aforementioned FY 2024 IPPS/LTCH PPS proposed rule. This section summarizes and responds to all the public comments and addresses our finalized provisions stemming from the February 15, 2023 proposed rule and our PEC and REIT proposals from the FY 2024 IPPS/LTCH PPS proposed rule.

Although the comments and responses regarding the February 15, 2023 proposed rule are categorized by specific subject matter, we note that there is topical overlap between some of them; for instance, certain comments can fall within multiple subcategories. Readers are therefore encouraged to review all of the comments and responses following to ensure that their specific areas of interest are addressed.

A. Comments and Responses—February 15, 2023 Proposed Rule

1. General Comments

Comment: Numerous commenters supported our proposal to implement section 1124(c) of the Act and the

reporting requirements therein. They noted that nursing facilities are often owned by large corporations or investment funds with complex ownership structures that can be difficult to understand. Transparency in ownership, they stated, is necessary to: (1) provide accountability and oversight of these facilities; (2) identify potential risks and weaknesses in the facility’s operations, such as financial instability or inadequate staffing; and (3) help ensure that nursing facilities are operated with their patients’ best interests in mind.

Response: We appreciate the commenters’ support.

Comment: Several commenters believed the proposed rule lacked evidence of a direct connection between disclosure of the proposed information and nursing home quality of care. A commenter stated that some states already have similar disclosure requirements, but this data has neither predicted nor prevented instances of poor quality, which, the commenter stated, are infrequent. Another commenter questioned whether the significant effort they believed nursing homes will have to make to comply with the rule’s requirements will achieve CMS’ goal of providing the public with an understanding of nursing homes’ organizational relationships.

Response: We respectfully disagree with the commenters on several grounds.

First, section 1124(a)(1) of the Act required us to undertake this rulemaking consistent with section 6101 of the Affordable Care Act. We proposed the February 15, 2023 proposed rule in part to help satisfy this requirement.

Second, part of the challenge CMS faces in ensuring quality care at nursing homes is our lack of sufficient knowledge of all the parties associated with the nursing home’s ownership, operations, and management. Without a complete understanding of the full scope of the facility’s operations and its relationship with other persons and entities, it can be challenging to pinpoint the origin within the organization’s overall structure of any quality-of-care problems, as well as whether taxpayer funding is being appropriately spent on care. This, in turn, can hinder CMS’ ability to take remedial action as warranted and applicable. While we currently collect some ownership and management data per section 1124(a) of the Act, this data has proven insufficient to furnish the complete picture we need to detect nursing home care problems from an organizational standpoint.

Third, we agree that CMS in the proposed rule does not cite evidence beyond all possible doubt of a correlation between the section 1124(c) data and improved care. This is because we have not collected some of this data before. A principal motivation for this proposal is to accumulate more information to better understand the relationship between nursing facility ownership and management structures and quality of care.

Fourth, while the commenter contends that some states already collect similar data but that there is no proof it has positively impacted patient care, CMS will be obtaining and publishing this information on a national scale and not on a statewide basis. This will better enable CMS and stakeholders to view ownership trends, especially involving nationwide chains and organizations, to a truly robust degree and to gauge the impact on patient care. In other words, we believe a nationwide and uniform data collection could go further towards favorably affecting nursing home services than the more limited, piecemeal data submission that currently exists.

Fifth, we recognize that nursing facilities may incur some burden in accumulating and submitting the section 1124(c) data (see section IV. of this final rule for more information). As we have indicated, though, the importance of quality care and the potential saving of lives justifies additional burden on the part of the nursing facilities. It is imperative that beneficiaries and their families are aware of the persons and entities that own and operate nursing facilities so they can make the best decisions regarding care.

Comment: Commenters expressed concern about the increase in administrative burden and the allocation of resources that nursing facilities will need to fulfill these reporting requirements, particularly for multi-facility and multi-state organizations. A commenter cited, as an example, the requirement to report changes within 30 or 90 days, which the commenter stated could be frequently necessary and will require constant monitoring by dedicated staff. This commenter, as well as others, stated that assigning staff to address the proposed reporting requirements could: (1) inhibit the facility's ability to hire staff in other positions; and (2) negatively impact patients by taking personnel away from the provision of care. Another commenter contended that the proposed disclosure requirements far exceed what most other Medicare and Medicaid

enrolled healthcare organizations are currently required to report to CMS. Other commenters generally stated that some data (for instance, regarding additional disclosable parties (ADPs)) could be difficult to secure, in some cases due to confidentiality agreements.

Response: We again acknowledge the burden that nursing facilities may incur in complying with our proposal's requirements. Yet we also reiterate that, per section 1124(a) of the Act, nursing homes already furnish to CMS some of the information referenced in section 1124(c) of the Act via initial enrollments, revalidations, changes of ownership, and other changes to this information within 30 or 90 days (as applicable). This final rule would thus not increase the burden associated with disclosing such information. As for data elements not currently collected, and as a prior commenter noted, some states may presently require the disclosure of some of this information, meaning that: (1) the affected nursing homes may currently maintain this data for Medicaid reporting purposes; and (2) these facilities would not incur additional reporting burden under this final rule. In fact, some facilities not in these states may nonetheless have this information on hand as part of their normal business operations. We accordingly believe—and based partly on our longstanding experience in requiring section 1124(a) data submission—that the reporting burden on nursing homes may be less than the commenters surmise. We note further that while some section 1124(a) information, per provider feedback over the years, can be challenging to secure, providers have generally been able to obtain and report it. We are similarly confident that SNFs will be able to obtain section 1124(c) data that is not currently required to be disclosed.

Comment: A commenter stated that our provisions will lead to the submission of vague and inaccurate data from various categories of investors. This will undermine CMS' goal of collecting clear and useful information regarding parties that exercise operational, financial, or managerial control (OFMC) over nursing facilities.

Response: We respectfully disagree. We believe the data reporting standards in the rule are clear as articulated. However, to avoid provider uncertainty and to facilitate the clarity of the furnished data, we will: (1) ensure that the data elements to be reported are specifically identified and labeled on the Form CMS-855A; and (2) issue sub-regulatory guidance and perform outreach to the nursing home community regarding our data

submission expectations. Moreover, we will verify this data as fully as possible for correctness.

2. Revalidation

Comment: A commenter requested that CMS give nursing facilities at least 90 days' advance notice if CMS intends to perform an off-cycle revalidation of their enrollment.

Response: We typically do not furnish advance notice of our intent to perform an off-cycle revalidation beyond the standard notification letter sent to the provider requesting its submission of a revalidation application within 60 days of the date of the letter. We believe 60 days is sufficient time for a provider to submit the required revalidation information.

Comment: Several commenters stated that CMS should require Medicare and Medicaid nursing facilities to report the section 1124(c) data on an annual basis, rather than upon revalidation every 5 years. A commenter stated, as an example, that a PEC that controls a nursing home might make substantial changes to the facility's staffing, patient care, and asset/debt ratio during its period of control that could harm patients; requiring annual disclosures of PEC data would allow CMS to have up-to-date information on such owners.

Response: Though we appreciate this suggestion, we are concerned about the burden on nursing homes of what would amount to annual revalidations of the section 1124(c) data as opposed to a 5-year schedule. No other data on the Form CMS-855 is subject to annual revalidations, and we do not believe we should establish an exception for certain types of information on the application. However, and as already mentioned, we reserve the right and plan to commence off-cycle revalidations of SNFs to secure the section 1124(c) data once the Form CMS 855A application is revised to collect it. Additionally, we will continue to enforce our longstanding policy, codified in 42 CFR 424.516, that requires providers to report any changes to their enrollment data (including, with this rule, the section 1124(c) information) within the timeframes specified therein.

Comment: Several commenters were concerned that currently enrolled nursing homes might not need to furnish the section 1124(c) data for several years after the Form CMS-855A is revised. This is because the rule only requires full disclosure upon initial enrollment, a 42 CFR 489.18 change of ownership, or revalidation, none of which might apply to the facility for some time following the form's revision.

Response: We appreciate the commenters' concerns but emphasize again that CMS can perform off-cycle revalidations. Accordingly, once the Form CMS-855A application is revised to collect the section 1124(c) data, we plan to commence off-cycle revalidations of SNFs to obtain it.

3. Medicaid

Comment: A commenter recommended that the final rule outline specific requirements for state Medicaid programs to use in operationalizing the Medicaid disclosure provisions. The commenter believed this would: (1) minimize inconsistencies among states, particularly with respect to multi-state providers; and (2) enable CMS to monitor states' implementation of this rule.

Response: We previously noted that states have considerable flexibility when administering their Medicaid programs within a broad federal framework, and programs vary by state. While all states must comply with federal Medicaid and CHIP provider enrollment requirements, states have substantial discretion to establish: (1) additional provider enrollment requirements; and (2) their own operational procedures in implementing provider enrollment requirements. Consistent with this, we believe each state should have the ability (and is in the best position) to determine the most appropriate logistical means of implementing this final rule's provisions.

Comment: A commenter stated that to ensure standardized data reporting, CMS should: (1) require Medicaid nursing facilities to report the section 1124(c) data via the Provider Enrollment, Chain, and Ownership System (PECOS); (2) have states work with CMS to develop a common dataset that would enable analyses of all Medicare and Medicaid nursing facility ownership; and (3) build on existing processes to reduce reporting burden and make the data more useable.

Response: We appreciate this comment. We intend to work with the states regarding the coordination and publication of the submitted data. This includes ensuring that consistent, organized, and thorough information regarding Medicare and Medicaid nursing homes is published. However, we believe each state should, consistent with states' existing discretion regarding their enrollment processes, be able to determine their own means of collecting the section 1124(c) data. We do not believe the Medicare and Medicaid enrollment processes must be combined for purposes of section 1124(c) data

when they have remained largely separate for all other enrollment information; this includes not having Medicaid nursing homes report their section 1124(c) data via PECOS, to which Medicaid providers do not currently have access or utilize for Medicaid enrollment.

Comment: Noting the proposed rule stated that (per redesignated 42 CFR 455.104(f)) federal financial participation would be unavailable in payments for nursing facilities that do not report required ownership or control data, a commenter requested that CMS explain how this oversight will occur, including any enforcement authorities given to the Medicaid program.

Response: We routinely conduct oversight of Medicaid provider enrollment requirements, such as through various audits, reviews, and technical assistance efforts. In addition, states will continue to have responsibility for establishing their own oversight and enforcement mechanisms regarding the reporting of section 1124(c) data. If a state's non-compliance is identified, we would follow our normal processes related to the recovery of FFP associated with any identified overpayments.

Comment: Commenters stated that CMS should share section 1124(c) data gathered during Medicare enrollment with Medicaid agencies or otherwise align the disclosure processes.

Response: As noted previously, we plan to work with the states regarding the coordination and publication of the submitted data. States will also be required to submit to CMS the section 1124(c) data they receive. With respect to the collection of this information, though, states will utilize their own means for this purpose. Indeed, the Medicare and Medicaid programs and enrollment processes are separate and often collect different types and quantities of data.

Comment: A commenter suggested that CMS consider expanding Medicaid agencies' authority to require reporting on ownership structures to include other types of long-term services and entities, such as assisted-living facilities, adult day health programs, and senior living communities.

Response: States currently have the authority to collect ownership and control enrollment data above and beyond the minimum ownership and control information outlined in 42 CFR part 455. This includes, but is not limited to, obtaining section 1124(c)-type information from enrollment-eligible provider types other than nursing facilities (to the extent a state's

particular laws and regulations require or permit such collection).

Comment: A commenter stated that there are significant differences between the proposed Medicare and Medicaid definitions. The commenter, as well as others, stated that CMS should ensure in the final rule that: (1) the definitions are the same; and (2) the proposed PEC and REIT definitions are applied to Medicaid. Additional commenters also recommended that CMS require (and not merely encourage) states to collect PEC and REIT data from Medicaid nursing homes, with a commenter stating that the final rule should: (1) outline a timeframe within which states must begin collecting this data; and (2) describe how states should consider this information in assessing the provider's enrollment application. Other commenters stated that the proposed Medicaid disclosure regulations should mirror the proposed Medicare disclosure provisions in all aspects.

Response: We respectfully disagree that the Medicare and Medicaid definitions are materially different. The definitions of, for instance, organizational structure and ADP are similar and reflect the language of section 1124(c) of the Act. In fact, the preponderance of Medicare and Medicaid provisions we proposed are virtually identical. Any variations in definition language or data collection policies are largely attributable to differences in each program's unique terminology, the structure of their respective regulatory sections, and basic differences in program requirements. As we explained in the proposed rule, we wish to maintain the deference generally afforded to states in the operation of their Medicaid programs, including with respect to provider enrollment; this includes the timeframes by which they must implement section 1124(c) of the Act and how they assess this information in their enrollment determinations. It is for this reason that we did not propose to require states to, for example, collect PEC and REIT data, though we encouraged them in the proposed rule to do so and we reiterate this recommendation here. We also strongly encourage states to use the same definitions for PEC and REIT as finalized in this rule for the sake of consistent data collection.

Comment: Commenters stated that CMS should use the same reporting timeframes for Medicaid nursing homes that it proposed in the 2011 proposed rule. Specifically, they contended that Medicaid nursing facilities should furnish all the required disclosures upon enrollment, on an annual basis to be determined by the state, and within

30 days after any change to any of the previous disclosures.

Response: Consistent with our proposed provisions, Medicaid nursing homes will have to report the section 1124(c) data upon initial enrollment and revalidation. In terms of the latter, the revalidation periods are left to the states' discretion so long as revalidation is performed at least as frequently as prescribed in 42 CFR part 455. Hence, we are not requiring states to conduct annual revalidation of the section 1124(c) information. Likewise, the establishment of timeframes for reporting changes in Medicaid enrollment information (which would include the section 1124(c) data) is a matter within the states' purview.

4. Public Availability of Data

Comment: Many commenters urged CMS to furnish more specificity (preferably in the final rule) concerning: (1) when, where, how, and via which vehicle the section 1124(c) data will be publicly released; and (2) the exact data that will be included. They added that it was important that the information be published in full as soon as possible but no later than the 1-year deadline referenced in section 6101(b) of the Affordable Care Act.

Response: As we indicated in the proposed rule, we will issue sub-regulatory guidance regarding the publication of the section 1124(c) data. This guidance will outline the timing, content, and means of the data publication, as well as other related information. We agree with the commenters regarding the importance of publishing the section 1124(c) data as soon as possible, and we intend to do so within the aforementioned 1-year timeframe.

Comment: Many commenters recommended that CMS publish the section 1124(c) data: (1) on the Care Compare website, *cms.data.gov*, and/or other easily accessible and searchable/sortable website; (2) using plain language; and (3) to allow consumers to identify and examine quality ratings for multiple nursing facilities that may be owned or controlled by the same PEC. Several commenters more specifically urged CMS to make parent company and related party data for each nursing home available on its Care Compare website, including information indicating whether a facility is part of a chain. They added that the data must be organized to enable stakeholders to detect patterns in quality, ownership, management, etc.

Response: We appreciate these suggestions and will consider them as we develop our sub-regulatory guidance

and prepare to publish the section 1124(c) data. We concur with the commenters concerning the need to disseminate the section 1124(c) information in an easy-to-read-manner: (1) via an accessible, navigable, and searchable website that users can understand; and (2) in a manner that enables users to search for trends, relationships, and connections in nursing homes' ownership structures.

Comment: A commenter stated that CMS should make the section 1124(c) data publicly available using common identifiers (for example, CMS Certification Number (CCNs)) that are linked to existing CMS data, such as nursing facility quality measures, staffing rates, survey deficiencies, and nursing facility resident demographics.

Response: We appreciate these recommendations and agree that identifiers such as CCNs could help users locate nursing homes and their section 1124(c) information. Future sub-regulatory guidance will address whether (and, if applicable, the extent to which) the section 1124(c) data will link to other CMS information like nursing home quality measures or to cost reports.

Comment: Several commenters recommended that CMS post section 1124(c) information on the Care Compare website in lieu of publishing it only on *cms.data.gov*. A commenter stated that many nursing home residents and their families are unfamiliar with the *cms.data.gov* website and that said website can be challenging to use.

Response: We appreciate and will consider these comments as we prepare our sub-regulatory guidance and determine the best vehicle by which to publish the section 1124(c) data.

Comment: A commenter stated that CMS should make available for public review data regarding the facility's ownership, budgets, expenditures, and payments. The location of this data, the commenter added, should be furnished to residents and other interested parties, and the information should be provided on facility websites, Care Compare, and in admissions and marketing materials.

Response: Certain ownership data reported per section 1124(a), such as the names of SNF owners and their percentages of ownership, is already public via Care Compare. Additional ownership information under section 1124(c) of the Act will, as previously noted, be published publicly. Regarding budgets, expenditures, and payments, however, this information has never been collected as part of the enrollment process, we did not propose to do so in the proposed rule, and section 1124(c)

of the Act does not require its acquisition.

Comment: A commenter stated that Care Compare: (1) should include information from the data file on nursing home ownership posted to *data.cms.gov* in September 2022 and not simply a link thereto; and (2) must be made easily searchable by chain, common ownership and operators, and across multiple states given the significant number of for-profit nursing homes operated and/or owned by multi-state or national chains or private equity firms.

Response: We thank the commenter for their suggestions and will consider them as we prepare our sub-regulatory guidance and determine the best vehicle by which to publish the section 1124(c) information. We further appreciate the request that this information be provided on Care Compare and will consider publishing the section 1124(c) data via that vehicle. We will also ensure that the ownership data already in Care Compare is included in the section 1124(c) data release if we determine the best vehicle for the latter is something other than Care Compare.

Comment: Several commenters stated that the section 1124(c) data posting should include documentation verifying the accuracy of the facility's information submission.

Response: We will, as needed, request supporting documentation to validate the disclosed data. However, verification documentation that is submitted as part of the current enrollment process is generally not made public, and we do not intend to do so with the section 1124(c) data.

Comment: A commenter stated that CMS should incorporate into the final rule the current requirements on the Form CMS-855A that: (1) the provider submit an organizational diagram identifying all entities identified in Section 5 of the Form CMS-855A and their relationship with the provider and each other; and (2) nursing homes submit a chart identifying the organizational structures of all its owners. Additional commenters recommended that CMS publish all organizational diagrams submitted by providers.

Response: The requirement to submit these diagrams is consistent with our authority under 42 CFR 424.510(d)(2)(ii) to collect documentation that helps verify details regarding the provider's ownership (for example, whether a particular owner is direct or indirect). This is akin to other existing Form CMS-855A documentation submission requirements per § 424.510(d)(2)(ii), such as sales agreements, adverse legal

action documentation, and documentation verifying non-profit status, none of which are explicitly identified in 42 CFR part 424, subpart P. Since these and other documents are requested under our authority in § 424.510(d)(2)(ii), we deem it unnecessary to articulate all of them in regulation.

Concerning the publication of organizational diagrams, we previously noted that we presently publish certain ownership data submitted by providers on the enrollment application, some of which mirrors the information that providers furnish on the organizational charts. We will release, in a yet-to-be-determined manner and form, those portions of the SNF organizational charts containing data that must be published under section 1124(c).

Comment: A commenter stated that CMS should make available a public database that identifies and tracks entities that have common ownership of nursing homes or exercise managing control over them.

Response: We appreciate and will consider this comment as we prepare our sub-regulatory guidance and determine the best vehicle by which to publish the section 1124(c) information.

Comment: A commenter opposed our intention to publicly post section 1124(c) data because it would involve releasing the names of the nursing facility's employees. The commenter believed this could discourage persons from seeking employment with nursing facilities, hence harming the nursing facility industry.

Response: While we recognize the commenter's concern, we emphasize that section 6101(b) of the Affordable Care Act requires the public disclosure of the section 1124(c) data. We further note that not every employee of a nursing facility will have to be reported on the Form CMS-855A and, consequently, be included in the public data posting. Only those parties that must be disclosed under section 1124(c) of the Act will be part of said posting.

5. Timeframes for Reporting Changes of Information

Comment: Several commenters supported our proposal to require changes to the section 1124(c) data to be reported within, as applicable, 30 days or 90 days of the change.

Response: We appreciate the commenters' support.

Comment: A commenter recommended that CMS increase the reporting timeframe for changes in ADPs from within 90 days of the change to 120 days.

Response: We first reiterate that the timeframe for any such change in an ADP depends, as we proposed and consistent with existing § 424.516(e)(1) and (2), on whether it involves a change in ownership or control. If it does, the reporting period is within 30 days of the change; if it does not, the period is 90 days. Regardless, we do not believe the 90-day timeframe should be increased to 120 days. It is important that CMS receive updated enrollment data as soon as possible, and we consider 90 days to be an adequate amount of time for SNFs to report non-ownership/control changes to us. CMS will identify in future sub-regulatory guidance those changes in section 1124(c) data that qualify as ownership/control changes and those that do not.

Comment: Several commenters suggested timeframes for reporting changes in section 1124(c) data that are stricter than what we proposed. These included requiring: (1) any change in direct or indirect ownership of a parent company, parent organization, or ADP to be disclosed at least 30 days before the change takes effect; (2) all other changes to data concerning the parties referenced in (1) to be reported within 30 days of the change; and (3) any change in nursing home ownership or management to be reported at least 90 or 120 days prior to the change.

Response: We do not currently require changes in provider enrollment data to be reported before their occurrence because providers and suppliers often do not and cannot know when a change will happen. To illustrate, the voluntary or involuntary departure of a managing employee can be sudden, making prior notice thereof to CMS impossible. We thus believe that applying to section 1124(c) data our proposed timeframes of 30/90 days post-change is appropriate. As for the suggestion in (2) earlier, some of these changes could qualify as a change in ownership/control (for example, a change in managing employees) and thus have to be disclosed within 30 days consistent with the commenters' recommendation.

6. Certification and Accuracy of Data, Including Penalties for Non-Compliance

Comment: Several commenters supported our proposal that SNFs certify on the Form CMS-855A that the section 1124(c) data is "true, correct, and complete" without a "to the best of my knowledge" qualifier while we continue to review the potential operational implications of section 1124(c)(3)(A) of the Act.

Response: We appreciate the commenters' support.

Comment: Several commenters stated that the SNF's parent company's or sole owner's chief executive officer (CEO) (and not simply any representative of the nursing facility) should be required to certify (under penalty of perjury) the accuracy of all section 1124(c) disclosures. If the CEO is unavailable, a designee of the CEO who has full knowledge of the SNF's ownership should certify the information's accuracy.

Response: We have specific and strict regulatory requirements regarding who can sign the Form CMS-855A on behalf of a provider. To illustrate, an initial Form CMS-855A application must be signed by an authorized official. Existing § 424.502 defines an authorized official as an appointed official to whom the organization has granted the legal authority to enroll it in Medicare, to make changes or updates to the organization's Medicare status, and to commit the organization to fully abide by Medicare's statutes, regulations, and program instructions. Examples of such high-ranking persons, as outlined in the § 424.502 definition, include a chief executive officer, chief financial officer, general partner, chairman of the board, or direct owner. Therefore, it is not as though any person, regardless of status, can serve as a provider's authorized official. Only those that meet the aforementioned definition may do so. This requirement helps ensure the correctness and thoroughness of the furnished data without a need to require the commenter's recommended signatories to sign the Form CMS-855A.

Comment: Several commenters suggested that, along with denial or revocation/termination of Medicare/Medicaid enrollment, CMS should consider imposing the following penalties should the nursing home fail to completely, truthfully, and accurately report the required section 1124(c) data: (1) withholding of payments; (2) assessment of a \$10,000 civil money penalty; (3) fines; and (4) immediate suspension, in whole or in part, of payments to providers that submit materially false information. Repeated failures should warrant increased sanctions. They and other commenters stated that any penalty must be significant enough to ensure compliance with the reporting requirements, though some commenters added that the sanction should be commensurate with the reporting failure in question (for example, material failures warrant more significant penalties) and/or proportional to the parent company's revenue. Additional commenters suggested criminal penalties for owners

and operators who knowingly submit false information.

Response: As the commenters noted, CMS has the authority to deny or revoke enrollment under §§ 424.530(a)(4) and 424.535(a)(4), respectively, if the provider certified as “true” misleading or false information on the enrollment application to enroll or maintain enrollment in Medicare. A provider that is denied enrollment on this basis is subject to a reapplication bar of up to 3 years per § 424.530(f),¹⁵ and a provider revoked under § 424.535(a)(4) is subject to (with certain exceptions) a maximum 10-year reenrollment bar under per § 424.535(c). We further state in §§ 424.530(a)(4) and 424.535(a)(4) that offenders may be subject to either fines or imprisonment, or both, in accordance with current law and regulations. Moreover, we can, as applicable, deny, revoke, or deactivate enrollment (or reject an enrollment application) in certain instances where the provider does not submit complete information to us. We take very seriously the provider’s obligation to furnish full and accurate data, will do so with respect to the section 1124(c) information, and will stand ready to take the applicable administrative measures we have just outlined, including, as needed, referrals to law enforcement. We are confident that the mechanisms we presently possess to enforce compliance will help ensure the submission of correct and thorough data.

Comment: Several commenters suggested that CMS establish a “reward system” for finding and reporting errors in a facility’s disclosure of the section 1124(c) data. To illustrate, if an individual notifies CMS that a facility furnished inaccurate information and CMS confirms that the facility indeed did, the individual could be paid a modest fee (though without supplanting existing whistleblower laws).

Response: We appreciate this suggestion, though we believe there is no statutory authority for such a system as it relates to section 1124(c) information.

Comment: A number of commenters stated that CMS and the states should:

(1) perform auditing to verify the accuracy of reported section 1124(c) data; (2) analyze this data alongside cost reports, staffing information, survey inspection results, and other relevant information; (3) use the section 1124(c) data in determining who can participate in Medicare and/or Medicaid and ensuring that high quality care is provided; and (4) explain in the final rule how the auditing process will work. They added that merely relying on the provider’s attestation (for example, the authorized official’s signature on the Form CMS–855A) that the submitted data are correct is insufficient to guarantee its accuracy and that actual verification is required.

Response: We validate submitted enrollment information notwithstanding the signing official’s attestation that it is accurate and complete, and we intend to take steps to verify the submitted section 1124(c) data, too. The specific means of validation will be clarified during the implementation process.

Comment: Commenters urged CMS to outline a definite timeframe for completing its revisions to the Form CMS–855A to capture the section 1124(c) data. They stressed the importance of collecting this data as soon as possible.

Response: Although we will furnish more information about the timing of our planned Form CMS–855A revisions after the final rule is published, we agree with the commenters regarding the importance of revising the application and collecting the section 1124(c) information as soon as feasible. This is indeed our aim.

8. Definitions/Terminology in Section 1124(c) of the Act

a. General Comment

Comment: Numerous commenters requested that CMS in the final rule: (1) add definitions of certain terms used in section 1124(c) of the Act, such as “financial control;” (2) include more specificity in some of the proposed definitions; and (3) expand the scope of several proposed definitions to include additional parties. Regarding the first two requests, commenters stated that nursing facilities need more clarification (via additional or revised definitions) to understand what data must be disclosed; without this clarification, CMS might receive superfluous and unnecessary information. Concerning the third request, commenters expressed concern that some of the proposed definitions (such as organizational structure) are too narrow and would not capture enough data to clarify a nursing

facility’s ownership, managerial, and operational structure.

Response: We appreciate these comments and note two things.

First, some of the more specific comments that follow identify various terms that commenters wish to see defined in the final rule. We believe the ordinary meanings of these terms are clear and that formal definitions are unnecessary. However, we will provide clear examples of their meaning, as well as factual situations that could fall within the scope of a particular term, via sub-regulatory guidance to ensure that all interested parties understand the new disclosure requirements. There are, of course, parties that would clearly fall within some of these definitions, such as a: (1) management company that runs the day-to-day operations of the SNF (managing control); and (2) an organization the SNF hires to manage all of its financial matters (financial control). Yet we believe that sub-regulatory guidance allows CMS to modify our planned sub-regulatory examples to provide greater specificity in response to stakeholder questions and feedback and to address the variety of factual scenarios that may arise. We stress further that the two examples cited previously should not be construed as establishing a minimum reporting threshold of control and influence; the first example, for instance, is not meant to imply that any entity with less managing control over the SNF need not be disclosed under section 1124(c) or (a) of the Act.

Second, and regarding revisions of (and expansions to) some of our proposed definitions, we are generally satisfied with these definitions’ scope and clarity. Although we are finalizing two modifications to these definitions, most of the commenters’ recommended revisions involve changes that would collect data well beyond the scope of what we proposed. Nonetheless, we will keep these comments in mind and, if we determine in the future that collecting some of this additional data is appropriate, we will take appropriate steps.

b. Additional Disclosable Party

Comment: A commenter recommended that CMS amend its proposed definition of ADP to clarify that a party can have OFMC of a nursing facility regardless of whether it has an ownership interest.

Response: We agree that a party can have OFMC without having an ownership interest. Indeed, this has long been our position with respect to our section 1124(a) reporting requirements. While we believe this

¹⁵ CMS recently finalized an expansion of the maximum reapplication bar to 10 years in a final rule placed on display at the **Federal Register** on November 1, 2023, titled Medicare Program; Calendar Year (CY) 2024 Home Health (HH) Prospective Payment System Rate Update; HH Quality Reporting Program Requirements; HH Value-Based Purchasing Expanded Model Requirements; Home Intravenous Immune Globulin Items and Services; Hospice Informal Dispute Resolution and Special Focus Program Requirements; Certain Requirements for Durable Medical Equipment Prosthetics and Orthotics Supplies; and Provider and Supplier Enrollment Requirements.”

interpretation is clear based on the statutory language and thus the ADP definition need not be revised, we will restate this point in our forthcoming sub-regulatory guidance.

Comment: Commenters suggested additions to the ADP definition to ensure that CMS has a full understanding of the nursing facility's ownership and managerial structure. The first addition would include any party with an ownership or control interest (as that term is defined in 42 CFR 420.201) in the nursing facility. The second would include any party that directly or indirectly owns or controls an equity interest in the nursing facility, its business, its parent company or chain, or any other subsidiaries (including properties) that equals or exceeds 5 percent of the total outstanding equity interest of all equity owners in the nursing facility, its business, its parent company or chain, or other subsidiaries. This could include an individual or organization that receives or is entitled to receive (directly or indirectly) 5 percent or more of the profits or revenues of the nursing home, parent company, etc. The third would include any person or entity who: (1) exercises any level of OFMC over the facility or a part thereof; (2) provides any level of financial or cash management services to the facility; or (3) provides any level of management or administrative services, management or clinical consulting services, or accounting or financial services to the facility. The fourth would include all: (1) the nursing facility's parent organizations and related parties (as the term "related" is defined in 42 CFR 413.17(b)(1)), for purposes of cost reporting; and (2) the owners and related entities of the parties described in (1).

Response: We do not believe section 1124(c) of the Act gives the Secretary the authority to add persons and entities to the ADP definition in section 1124(c)(5)(A) of the Act. As previously noted, there is no provision in section 1124(c)(5)(A) of the Act akin to section 1124(c)(5)(D)(vii) of the Act regarding the organizational structure definition. Nonetheless, we believe much of the data the commenters reference will still be captured under our proposal and, in some cases, is collected today. For example, regarding the commenters' first recommended addition, CMS currently collects information on all parties with a 5 percent or greater direct or indirect ownership interest in a nursing facility. (Section 1124(a) of the Act has no minimum percentage threshold for reporting partnership interests.) In many instances, this

involves the disclosure of multiple layers of the facility's ownership. (As a further illustration, suppose the nursing facility is 100 percent owned by Entity W, which is 75 percent owned by Entity X, which is 90 percent owned by Entity Y, and which is 90 percent owned by Entity Z. Since all these owners—representing four layers of ownership—hold a 5 percent or greater direct or indirect ownership interest in the nursing home, they must be reported.) Concerning the third recommendation, these parties already fall within the proposed ADP definition and may include parent companies and other owners (for instance, the owning parent exercises managerial control over the facility).

As for the fourth suggestion, parties that are "related" to the nursing facility must be disclosed to the extent required under section 1124(a) or 1124(c) of the Act, though the organizational charts referenced on the Form CMS-855A application will also capture data regarding related entities.

Comment: A commenter expressed concern that it could prove difficult for nursing facilities to obtain and furnish data on ADPs and the relationships between them. The commenter stated that the facility may not know or be able to ascertain the organizational structures of all ADPs (for example, consulting or professional services firms) and related parties. The commenter requested that CMS: (1) outline the efforts that facilities must make to secure ADP data; (2) explain how the facility would demonstrate such efforts; and (3) state that facilities will not be held accountable for failing to disclose data it could not reasonably be expected to secure.

Response: We previously acknowledged that securing data regarding owning or managing organizations can prove challenging. Yet we have found with respect to section 1124(a) data that nursing facilities have typically been able to obtain it and to also furnish the required organizational charts. We believe this will also be true with section 1124(c) data, such as ADP information. Given the importance of the section 1124(c) data, we do not believe any exemptions to its reporting, such as the commenter suggests, should be granted. The information must be disclosed without exception, and this will be demonstrated via the submission of full, complete, and accurate data. Our position is that if a nursing facility wishes to receive Medicare or Medicaid payment, it must comply with all requirements for doing so, one of which is the disclosure of the information in question.

Comment: Regarding the disclosure of parties that furnish the services outlined in the ADP definition (for example, consulting, financial), a commenter questioned whether this would include, for instance: (1) all corporate office staff who support individual facilities within a multi-site organization; (2) an external nurse consultant who offers brief assistance with preparing a plan of correction following an annual nursing home survey but otherwise does not provide services to the facility; (3) all staff who work in the billing department; (4) a nursing staff member who supervises one unit within the facility (since the ADP definition references "part(s)" of a facility); (5) unaffiliated, independent auditors; and (6) an independent, unaffiliated organization that provides template policies and procedures. The commenter believed that disclosing this sixth party would seem unnecessary, since nursing home leadership must separately tailor, adopt, and implement those policies.

Response: We believe the ADP definition is clear on its face. However, CMS' forthcoming sub-regulatory guidance will include examples (some of which may mirror those the commenter presents) to help nursing facilities understand which ADP data must be reported.

Comment: Several commenters requested greater specificity as to the exact types of services that fall within the categories of management or administrative services, management or clinical consulting services, or accounting or financial services to the facility under section 1124(c)(5)(A)(iii) of the Act.

Response: Again, we believe the ordinary meanings of the terms used in the ADP definition, including those in section 1124(c)(5)(A)(iii) of the Act (for example, financial services), are clear. Our sub-regulatory guidance will nevertheless furnish examples of the types of services that can fall within these categories.

Comment: A commenter stated that management entities under the ADP definition should include any organization that is paid for furnishing management services (or is paid management fees) regardless of that organization's level of involvement in the facility's day-to-day operations.

Response: We concur with the commenter's statement. We note that the references to management in sections 1124(c)(5)(A)(i) and (iii) of the Act contain no minimum threshold regarding the level of management services or day-to-day involvement a party must furnish to qualify as an ADP.

Comment: A commenter stated that CMS should, for each ADP, require a detailed statement of the functions the ADP performs as part of any contract or other arrangement with the nursing facility; this could include, for example, identifying the specific type of administrative services performed, such as payroll, accounting services, or insurance billing.

Response: We appreciate this recommendation. We agree that the facility must identify the types of services, control, etc., the ADP provides to or has over the nursing facility so that CMS can evaluate compliance with the statutory and regulatory requirements. This will also enable CMS to better understand the ADP's precise relationship to the nursing home. We will keep this comment in mind when considering revisions to the Form CMS-855A.

Comment: A commenter recommended that nursing homes submit an explanation of how each ADP is related to it (for example, shared ownership, familial relationship, officer/director). This explanation, the commenter added, should list all persons who are employed or paid a salary by each ADP. It should also identify whether any entity involved in leasing, subleasing, or owning the property (including any direct or indirect property owners) is a REIT or affiliated with a REIT; this should include the REIT's identity and a description of the arrangement/agreement between the nursing facility and its REIT landlord.

Response: For reasons similar to those in our previous response, we concur that each ADP should identify on the Form CMS-855A its relationship with the facility, which could include lease and sub-lease arrangements. Yet we do not believe a list of all the ADP's employees and paid personnel is warranted for several reasons. First, section 1124(c) does not contemplate the collection of all such persons. Second, some ADPs may have thousands of employees. Reporting all of them could pose an undue burden on the nursing facility, particularly since some persons might, for instance, have no involvement with the ADP's contractual relationship with the facility. Insofar as the commenter's recommendations regarding REITs, and for each entity disclosed under section 1124(a) or (c) of the Act, the nursing facility will have to identify whether that organization is a REIT. Furthermore, and as already noted, Medicare nursing facilities are currently required per the Form CMS-855A to furnish: (1) a diagram identifying the

organizational structures of all its owners, which can include REITs; and (2) an organizational chart identifying all entities listed in Section 5 of the Form CMS-855A (including REITs) and their relationships with the provider and with each other. We believe our current and proposed disclosure requirements will encompass much of the data the commenter suggested that we collect.

Comment: A commenter urged CMS to clarify the proposed ADP definition. Without this elucidation, the commenter believed that facilities will interpret the definition too broadly, resulting in the disclosure of persons (for example, consultants that do not own, control or manage the facility's operations) who need not have been reported.

Response: We reiterate our view that the ADP definition is clear. Yet we will ensure our forthcoming sub-regulatory guidance furnishes examples regarding the ADP definition to help nursing homes understand the scope of the reporting requirements.

Comment: A commenter recommended that PECs and REITs be included as ADPs.

Response: Although, as stated, we do not believe section 1124(c) of the Act permits us to add parties to the ADP definition, we believe that some PECs and REITs will fall within one of the ADP categories in section 1124(c) of the Act regardless. A REIT might qualify as an ADP by, for example, exercising financial control over the nursing facility, leasing or subleasing real property thereto, or owning at least 5 percent of said real property. PECs, meanwhile, could meet the ADP definition by having operational, managerial, or financial control over the nursing home. Even if the PEC or REIT does not qualify as an ADP, it would have to be identified as a PEC or REIT per our Form CMS-855A revisions if the organization must otherwise be reported under section 1124(a) or (c) of the Act. Consequently, considerable information about owning, managing, and leasing PECs and REITs will be reported irrespective of whether these entities are explicitly referenced in the ADP definition.

c. Managing Employee

Comment: Several commenters recommended that CMS specifically include medical directors within the definition of managing employee. A commenter further suggested that the definition include persons, such as consultants, who influence the finances and operations of a facility but may not be permanent staff; the commenter

believed this would recognize the involvement of private-equity-backed management services companies in health care.

Response: In the Calendar Year 2024 Home Health Prospective Payment System final rule, which was published in the **Federal Register** on November 13, 2023 (88 FR 77676), we revised our current managing employee definition in § 424.502 to explicitly include SNF and hospice medical directors and administrators.¹⁶ Specifically, we added the following language to the end of the current managing employee definition: For purposes of this definition, this includes, but is not limited to, a hospice or skilled nursing facility administrator and a hospice or skilled nursing facility medical director. We believe this change will make clear that SNF medical directors are managing employees, a stance we have held for many years.

We note that our February 15, 2023, proposed change to this definition did not include the previously noted language. With the finalization of the managing employee definitions in both the November 1, 2023, final rule and the present nursing home disclosure final rule, paragraph (1) of the managing employee definition will incorporate the definition we finalized in the November 1, 2023, final rule. Paragraph (2) will include the second paragraph of the definition we are finalizing in this final rule.

Concerning the remaining comment, it is unnecessary for someone to be an employee or permanent staff member to qualify as a managing employee. This is consistent with our existing managing employee definition in § 424.502, which states that a person can be a managing employee "whether or not the individual is a W-2 employee of the provider or supplier."

Comment: A commenter stated that the facility's medical director should not be identified as management when the nursing home data is published.

Response: We respectfully disagree. As already mentioned, we have long taken the stance that SNF medical directors qualify as managing employees. Each medical director will hence be designated as such when we publish the section 1124(c) data.

¹⁶ Medicare Program; Calendar Year (CY) 2024 Home Health (HH) Prospective Payment System Rate Update; HH Quality Reporting Program Requirements; HH Value-Based Purchasing Expanded Model Requirements; Home Intravenous Immune Globulin Items and Services; Hospice Informal Dispute Resolution and Special Focus Program Requirements, Certain Requirements for Durable Medical Equipment Prosthetics and Orthotics Supplies; and Provider and Supplier Enrollment Requirements.

d. Operational, Financial, or Managerial Control (OFMC)

Comment: A commenter recommended that CMS in the final rule discuss and clearly define (with accompanying examples) a party that exercises OFMC over the facility or a part thereof.

Response: We did not propose to define “operational, financial, or managerial control” because we believe the ordinary meanings of these terms are clear. Nevertheless, we plan to outline examples of possible OFMC in our sub-regulatory guidance and will, as needed, consider proposing an OFMC definition in future rulemaking.

Comment: A commenter stated that the definition of “managerial control” should include any entity that: (1) receives and approves facility budgets; or (2) approves or has the right to approve any nursing home operational expenditure. Several other commenters suggested defining managerial control as having the power (directly or indirectly) to influence or direct the day-to-day operation of an institution, organization, or agency, either under contract or through some other arrangement. This would include any party that is a related organization under § 413.17.

Response: We believe the meaning of “managerial control” is plain. As already noted, however, we intend to provide examples in sub-regulatory guidance to help ensure that nursing homes understand these reporting requirements.

Comment: A commenter suggested that CMS define “control” as the ability to direct the operation or management of the nursing facility, including through intermediary or subsidiary entities. Another commenter recommended defining “control” as direct or indirect exercise of substantial control. Substantial control, according to the commenter, would involve: (1) board representation; (2) ownership or control of a majority of the voting power or voting rights of the reporting company; (3) rights associated with any financing arrangement or interest in a company; (4) control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company; (5) arrangements or financial or business relationships (whether formal or informal) with other individuals or entities acting as nominees; or (6) any other contract, arrangement, understanding, or relationship. Another commenter suggested defining control consistent with the same definition of the term in § 413.17. It could include, the commenter stated, language from the

Medicare Provider Reimbursement Manual stating that the § 413.17 definition includes “any kind of control, whether or not it is legally enforceable and however it is exercisable or exercised; it is the reality of the control which is decisive, not its form or the mode of its exercise.” An additional commenter stated that CMS should explicitly state that control includes chain or parent company activity.

Response: We appreciate these suggestions but believe the meaning of “control” is clear.

Comment: Several commenters sought clarification of the meaning of “or a part thereof” (cited in section 1124(c)(5)(A)(i) of the Act) in the context of OFMC over the facility.

Response: We believe the meaning of “or a part thereof” is clear. Nonetheless, we will provide examples of the term “part” in our sub-regulatory guidance to assist nursing homes in reporting the section 1124(c) data.

Comment: Several commenters recommended that CMS define “operational control” (with minor variations among the commenters’ suggested definitions) as an individual or entity that has the power (directly or indirectly) to: (1) to influence or direct the actions or policies of any part of either the nursing facility or any ADP; or (2) choose, appoint, or terminate: (i) any member of the board of directors or management committee; (ii) any manager or managing member; (iii) any member of senior management of the nursing facility or its business, including its chain or parent company; or (iv) any other person or entity that participates in the operational or financial oversight of the facility or its business. Another commenter stated that operational control should include parties that guide the overall operation of the nursing home, including setting policies and budgets.

Response: Our sub-regulatory guidance will include examples of potential operational control, though we believe the term’s meaning is plain. Yet we note that section 1124(c)(5)(A)(i) of the Act only references OFMC over the facility itself or a part thereof. It does not include OFMC over the facility’s parent or another ADP. Hence, our sub-regulatory examples will address OFMC over the facility rather than over other organizations.

Comment: Additional commenters recommended that CMS define “financial control” as a party that directly or indirectly: (1) has the power to influence, direct, or manage the finances of the facility or an ADP; (2) receives or is entitled to receive 5 percent or more of any of the profits or

revenues of the facility, its business, or its properties during any time period; or (3) owns or controls an equity interest in the facility, its business, or its properties that is equal to or exceeds 5 percent of the total outstanding equity interest of all equity owners in the facility, its business, or its properties. Another commenter stated that the financial control concept should take into account complex ownership structures.

Response: We believe the phrase “financial control” is plain on its face, though our sub-regulatory guidance will furnish examples so that nursing homes understand the reporting requirements.

e. Ownership Interests

Comment: Several commenters expressed concern about limiting the ownership interest for financial control to 5 percent, with a commenter stating that the 5 percent threshold inaccurately reflects the complex ways that certain owners (including PECs) operate and hide connections to other entities and individuals. Commenters suggested that: (1) 5 percent ownership be an aggregate across all nursing homes in which a party holds an interest (and not simply a 5 percent interest in a single facility); or (2) change the 5 percent standard to any ownership interest regardless of the percentage involved. A commenter stated that the first suggestion regarding aggregation would prevent individuals from avoiding disclosure by holding several investments in nursing homes slightly below the percentage threshold. Another commenter stated that CMS should at least acknowledge that ownership interests can be shielded from disclosure by having the interest be, for example, 4.9 percent.

Response: Section 1124(a) of the Act requires disclosure of the provider’s 5 percent or greater direct or indirect owners (excluding partnerships, which have no minimum threshold). Too, sections 1124(c)(5)(A)(ii) and (c)(5)(D)(i) of the Act, which discuss ADPs, explicitly reference a 5 percent standard. Although, under sections 1124(c)(5)(D)(ii) and (iii) of the Act, general partnership and limited liability company ownership interests have no minimum percentage for disclosure, limited partnerships have a 10 percent threshold. There are, accordingly, clear parameters in section 1124 of the Act regarding the reporting of certain types of ownership interests. While we recognize the commenters’ concerns about potential circumvention of the aforementioned 5-percent limit, we do not believe we have the statutory authority to: (1) collect ownership interests below the current specified

thresholds; and (2) interpret the 5 percent threshold as meaning ownership interests across multiple providers that together total 5 percent. To illustrate the latter situation in the context of section 1124(a) of the Act, suppose Entity W has a 2 percent ownership interest in Provider X, 2 percent in Provider Y, and 2 percent in Provider Z. (None of the entities are partnerships.) The 5 percent standard applies to an ownership interest in a single provider, not a combined 5 percent across several providers. In our example, therefore, since Entity W does not own at least 5 percent of X, Y, or Z, Entity W need not be reported as an owner on X's, Y's, or Z's enrollment application.

Comment: A commenter stated that CMS should adopt a broad definition of "ownership interest" so that facilities cannot use shell companies, affiliates, and financial instruments to evade reporting requirements.

Response: As explained previously, many of the entities the commenter references must already be reported per section 1124(a) of the Act; this includes indirect owners of at least 5 percent of the provider, such as holding companies. We also noted the organizational charts that must be furnished which identify, for instance, some of the provider's affiliates and the relationships between them.

Comment: A commenter recommended that CMS define "ownership interest" such that it includes, for instance, equity, stock, preorganization certificates, voting trust certificates, certificates of deposit for an equity security, interest in a joint venture, any capital or profit interest in an entity, or any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.

Response: Section 420.201 currently defines an "ownership interest" as "possession of equity in the capital, the stock, or the profits of the disclosing entity." (The term "disclosing entity" includes providers and suppliers per § 420.201.) We believe this definition broadly captures many of the matters the commenter cites.

Comment: Several commenters recommended that CMS insert "direct or indirect" before the word "ownership" in paragraph (1) (which addresses corporations) of the proposed ownership structure definition in §§ 424.502 and 455.101. Other commenters stated that this paragraph (1) should also clarify that a corporation can be owned by another corporation.

Response: While we did not include "direct or indirect" in paragraph (1), our

longstanding definition of owner in § 424.502 references direct and indirect owners. This is consistent with section 1124(a)'s requirement that all 5 percent or greater direct or indirect owners be disclosed. We interpret the "ownership" reference in paragraph (1) in the same manner and do not believe the regulatory text needs to be updated in the final rule to reflect this. Concerning corporate ownership, we often see providers and suppliers that are corporations under the ownership of other corporations.

Comment: A commenter recommended that CMS limit the meaning of "ownership interest" to those parties that can remove or replace a general partner or managing member without cause. The commenter believed this modification would better reflect an owner's actual level of influence and be consistent with the definition of "voting security" in 15 U.S.C. 80a-2(a)(42).

Response: We believe the commenter is referencing ownership in the context of disclosure thereof (for instance, under section 1124(a) or (c) of the Act) rather than the "ownership interest" definition in § 420.201. To this extent, we respectfully disagree with the commenter. There is no reporting exception in section 1124(a) or (c) of the Act for owners that otherwise meet the requirements for disclosure but do not have the type of authority or influence the commenter cites. Indeed, if we were to limit ownership disclosures only to those parties with such influence, many indirect owners, including holding companies, might not be reported. This would be contrary to both the statute and our need to have as full a picture as possible of a provider's or supplier's ownership structure.

Comment: A commenter stated that CMS should not require nursing facilities to disclose indirect owners because such parties generally lack the ability to control and operate a nursing facility.

Response: We respectfully disagree. Again, section 1124(a) of the Act is clear that persons and entities with at least a 5 percent direct or indirect ownership in the nursing facility must be disclosed. Capturing indirect ownership data also helps CMS understand the scope of the provider's organizational framework.

f. Organizational Structure

Comment: Several commenters recommended that the term "trust" in the organizational structure definition: (1) require identification of the trustees and beneficiaries of the trust; and (2) specifically reference REITs.

Response: Section 1124(c)(5)(D)(v) of the Act includes the trust's trustees within the definition of organizational structure. However, beneficiaries are not included. Although section 1124(c)(5)(D)(vii) of the Act permits the Secretary to include within the organizational structure definition any other person or entity as deemed appropriate, the addition of trust beneficiaries would require rulemaking. We may consider the commenters' suggestions regarding the term "trust" (including that pertaining to REITs) for future rulemaking.

Comment: A commenter stated that our proposed definition of organizational structure (which mirrors that in section 1124(c)(5)(D) of the Act) is overbroad and should be restricted to ease the burden on disclosing facilities. In this vein, the commenter stated that a minimum 25 percent ownership threshold for reporting should apply to interests in limited partnerships and limited liability companies. The commenter contended that this modification, besides reducing burden, would clarify that certain owners do not have managerial or decision-making authority over the business.

Response: We respectfully disagree with the commenter on several grounds. First, section 1124(c) of the Act clearly outlines the interests and parties that fall within the definition of organizational structure. While, as mentioned, the Secretary has the authority under section 1124(c)(5)(vii) of the Act to add persons and entities to the scope of this definition, there is no authority in section 1124(c) of the Act to restrict the definition, such as by applying a higher threshold percentage (for example, 25 percent) for reporting ownership interests. Second, and as already noted, it is critical that CMS obtain as much background as possible about the nursing facility's ownership structure, even if certain owners may not exercise day-to-day control over the provider. Only in this manner can we truly ascertain the scope of parties that own and operate the nursing facility.

Comment: Several commenters stated that the organizational structure definition should include the following phrase from section 1124(c)(5)(D)(vii) of the Act: "any other person or entity, such information as the Secretary determines appropriate." The commenters believed this would give CMS the authority to require additional parties and interests to be disclosed.

Response: The quoted language in section 1124(c)(5)(D)(vii) of the Act, as already mentioned, gives the Secretary the authority to include additional parties and interests within the

organizational structure definition. We do not need to include this language within our proposed organizational structure definition to retain such authority. However, any addition of parties and interests to this definition would require future rulemaking.

Comment: Several commenters suggested that the proposed organizational structure definition in § 424.502 include the following categories, which would be codified respectively as paragraphs (7), (8), and (9) within the definition: (i) a financial investment entity (including a private equity investment company) and any partner, limited partner, or investor that has a 5 percent or greater ownership or equity interest in the entity; (ii) if an ADP does not meet any of the definitions contained in paragraphs (1) through (7), the name and contact information of the person or entity and any other information the Secretary determines appropriate; or (iii) if an entity listed in sections (1) through (8) is not the parent organization, the corresponding organizational structure for all direct or indirect owners of that entity back to the parent organization of the initial disclosing entity.

Response: We appreciate these suggestions and may consider them for future rulemaking.

Comment: A commenter recommended that the organizational structure definition include investment firms (such as private equity firms or funds) and any partner or limited partner with an ownership interest in the firm or fund that exceeds 5 percent.

Response: We appreciate this suggestion and may consider it for future rulemaking. We note that with our previously referenced revision to the Form CMS-855A, the provider or supplier (including nursing homes) will have to disclose whether an entity reported in Section 5 (or its successor or supplementary section) of the application is a PEC or REIT. With this, some of the entities to which the commenter refers will ultimately be disclosed irrespective of whether we pursue the rulemaking the commenter recommends.

Comment: A commenter stated that CMS should strike the proposed language “with respect to a skilled nursing facility defined at section 1819(a) of the Act” from proposed § 424.516(g)(1). The commenter contended that this language: (1) is not in the original statute; and (2) appears to apply the organizational structure definition only to nursing facilities and not to all ADPs, which would defeat section 1124(c)’s purpose.

Response: We respectfully disagree. The language the commenter cites is referenced in section 1124(c)(5)(B) of the Act, which defines a facility as a skilled nursing facility “as defined in section 1819(a)” or a nursing facility “as defined in section 1919(a).” To clarify which types of facilities are the subject of our provisions—specifically, SNFs and nursing facilities—we believe that referencing the applicable statutory provisions is necessary. In other words, the language in the opening of our proposed organizational structure definition that reads “Organizational structure means, with respect to a skilled nursing facility defined at section 1819(a)” simply confirms that the definition applies to SNFs as opposed to, for example, a hospital or home health agency. Moreover, the reference to section 1819(a) of the Act does not restrict the proposed reporting requirements in any way. The organizational structure of each ADP will still have to be reported per § 424.516(g)(1)(iv).

Comment: A commenter suggested including non-profit entities within the organizational structure definition.

Response: The business types described in this definition include all for-profit and non-profit entities. Section 1124(c)(5)(D) of the Act makes no distinction between the two and contains no exemption for non-profit entities. We have long interpreted section 1124(a) of the Act in a similar manner when requiring the disclosures mentioned therein. We hence do not believe a specific addition of non-profit entities to the organizational structure definition is needed because, in our view, said definition already includes such organizations.

g. Additional Suggested Definitions and Disclosures (Excluding PECs and REITs)

Comment: Several commenters recommended that CMS require the nursing facility to report its status as a “chain provider” in any nursing home chain. For this purpose, some commenters suggested utilizing the definition of “chain provider” in § 421.404(a). Others recommended defining “chain” consistent with this term’s definition in the Medicare Provider Reimbursement Manual; specifically, as a group of two or more health care facilities or at least one health care facility and any other business or entity owned, leased, or, through any other device, controlled by one organization. These latter commenters added that chain organizations: (1) should include, but not be limited to, chains operated by proprietary, religious, charitable, or

governmental organizations; and (2) may include business organizations engaged in activities not directly related to health care. Additional commenters recommended that if the nursing facility is part of a chain, CMS should require the disclosure of the names and identifying information of: (1) all facilities within that chain; and (2) the parent organization. Too, commenters stated that the facility should include a detailed explanation of its relationship to the chain (wholly owned, managed, etc.) and to the other facilities in the chain. They further added that this explanation should address how the ownership is structured between the facility and the chain level, whether the provider is under contract to pay the chain (chain home office) any fees, revenues or profits, and what type of support (financial or otherwise) the chain provides the facility. The commenters believed that requiring all of this chain-related data would give CMS a clearer understanding of nursing home chain structures in a manner that existing Section 7 of the Form CMS-855A does not.

Response: Like all certified providers, a nursing home currently must disclose in Section 7 of the Form CMS-855A if they are part of a chain. If it is, it must disclose: (1) identifying information about the chain home office; (2) the chain home office administrator; (3) the chain home office’s business structure (for example, corporation, non-profit religious organization, government-owned); and (4) the chain home office’s affiliation to the nursing facility (for instance, owned, managed). Section 7 also specifically references the chain provider regulations in § 421.404. The aforementioned required organizational charts also help CMS ascertain the ownership structure between the provider and the chain. In sum, much of the chain data the commenters cite is already reported via the Form CMS-855A. To the extent information on nursing home chain data is collected under this rule and falls within the scope of data referenced in section 1124(c), it will be made publicly available.

CMS does not presently collect data in Section 7 regarding whether the provider is contractually obligated to pay the chain home office any fees, revenues, or profits, or what kind of financial or other support the chain provides the facility. We appreciate the commenters’ recommendation that we do so, however, and may consider them as future enhancements to the Form CMS-855A to the extent necessary.

Insofar as having individual facilities report reporting identifying data on all

other providers in the chain, this is not currently required. We are not seeking at this time to establish such a requirement, for some chains may have many entities. Asking each facility to report all of them could pose an excessive burden on each provider and lead to the submission of duplicative information. We note, though, that CMS assigns each chain a unique identifier known as a “chain home office number.” When each certified provider in the chain enrolls, it must report the chain data in Section 7, including the chain home office number. This allows PECOS to identify all enrolled providers within the chain. Consequently, although each provider is not required to disclose all providers in its chain, much of this data is already furnished to CMS via the individual enrollments of the providers in the chain.

Comment: Several commenters suggested that CMS define “parent corporation or parent organization.” The term should mean, the commenters stated, the legal entity that owns a controlling interest in a nursing facility. The definition should further clarify that: (1) the parent organization is the “ultimate” parent, or the top entity in a hierarchy (which may include other parent organizations) of subsidiary organizations that is not itself a subsidiary of any corporation; and (2) a legal entity may be its own parent organization if it is not a subsidiary of any other organization. Another commenter stated that “parent organization” and/or “parent company” should be defined as an organization in control of another organization either directly or indirectly through one or more intermediaries.

Response: While we appreciate this comment, neither section 1124(a) or 1124(c) of the Act nor our proposed rule contains the term “parent.” Therefore, we believe this comment is outside the scope of this rule. However, we do use this term sporadically in our sub-regulatory provider enrollment manual instructions in CMS Publication (Pub.) 100–08, Medicare Program Integrity Manual, Chapter 15. Should we deem it necessary, we will consider clarifying this term in our manual instructions.

Comment: Several commenters suggested that proposed § 424.516(g) require a description (and accompanying diagram) of each ADP’s relationship with the nursing facility, with other ADPs, and all parties identified in section 1124(a) of the Act. Another commenter stated that the diagram should include all persons or entities that are intermediaries between the facility and the parent company.

Response: The diagrams we currently require, which will capture additional nursing home data per section 1124(c) of the Act, already secure or will secure much of the data the commenters reference. We may combine the currently required nursing home charts with the ADP organizational data description requirement referenced in § 424.516(g)(1)(iv) such that only one chart encompassing all this information will be required.

Comment: Several commenters stated that CMS should require the nursing facility to disclose organizations in which it has an ownership or managerial interest.

Response: Neither section 1124(a) nor 1124(c) of the Act require a nursing home to disclose entities in which it has an ownership or managerial interest. However, some of this data may be reported via the organizational charts or through more indirect means. To illustrate the latter, suppose Provider X owns 50 percent of Provider Y. Provider Z owns the other 50 percent of Provider Y as well as 75 percent of Provider X. All three providers are enrolling in Medicare. Here—

- Z would not have to report on its Form CMS–855A that it owns X and Y. Yet CMS would still receive this data when X and Y report that they are owned by Z.

- Neither X nor Y would need to disclose that their owner, Z, also owns another Medicare provider. Again, however, X and Y will report that they are owned by Provider Z.

With this data, PECOS can ascertain the providers that Z owns and how X and Y are related through this common ownership (for example, what percentage of X and Y that Z owns). In sum, even though certain information the commenters identify is not directly reported on a particular facility’s application, the facility’s relationships with other providers can be ascertained in PECOS due to the submission of applications by these other providers. We therefore believe that much of the data the commenters are requesting be submitted is already being furnished. To the extent it is not, we believe that the requirement to furnish data (including organizational structures) on ADPs will help close some gaps in nursing home information. CMS will make information collected on facility relationships per section 1124(c) accessible to the public in a clear manner.

Comment: A commenter stated that the description of relationships between ADPs and facilities: (1) must include information that clearly outlines the ownership structure of each disclosed

entity, the exchange of any goods or services between each entity and the facility, the flow of payments between each entity and the facility, and any and all related party relationships; and (2) should be provided via a graphical diagram that allows stakeholders to easily understand each ADP’s organizational structure and the various relationships among the disclosed parties and the facility (including the parent/subsidiary hierarchy of all direct and indirect owners, any related party relationships, and any private equity involvement). The commenter added that the facility should regularly update these diagrams and post them on a public website. Another commenter stated that for disclosed related organizations, the facility should also have to report (1) total payments to the related organization; and (2) costs incurred by the related organization to provide services to the nursing facility. An additional commenter stated that CMS should require nursing facilities to disclose their debt in comparison to the total market value of their property and assets.

Response: We agree that: (1) the ownership structure of each disclosed entity must be clearly outlined; (2) this data would be ideally via a comprehensive and understandable diagram; and (3) the data must be updated within the applicable timeframes specified in § 424.516. However, we do not believe that data regarding debt, the exchange of goods/services, payment flow, and payments to or costs incurred by related organizations must be reported as part of the section 1124(c) of the Act disclosure process. We do not believe sections 1124(a) and (c) of the Act authorize the collection of this information, we did not propose to require its reporting, and we are concerned in any event about the burden this data submission could pose on the nursing homes.

Comment: Several commenters recommended that CMS require the disclosure of individuals and entities with 5 percent or greater ownership in the parent company.

Response: As noted, section 1124(a) of the Act requires the reporting of the provider’s direct or indirect owners as opposed to 5 percent owners of the nursing facility’s parent company. Thus, we do not believe section 1124(a) of the Act (or, for that matter, section 1124(c) of the Act) permits us to collect all of a parent company’s owners regardless of whether they have a 5 percent or greater indirect ownership interest in the facility. However, depending on the number of ownership layers and

indirect owners the facility has, there are situations where the parent company's owners are indeed reported because they meet the aforementioned 5 percent indirect ownership threshold.

Comment: Several commenters recommended that CMS require the submission of an organizational diagram: (1) identifying all the companies the nursing facility's parent organization controls; and (2) that explains how these entities are related to each other.

Response: Neither section 1124(a) nor 1124(c) of the Act explicitly requires the disclosure of all entities the provider's parent company controls, owns, manages, or is related to. Nonetheless, and as already explained, some of this data is already captured via the Form CMS-855A data and the organizational charts. (For example, if the provider lists all its 5 percent direct and indirect owners up to the parent company on the Form CMS-855A, the intermediate organizations between the parent and the provider—and in which the parent has an ownership interest—will be reflected.)

Comment: Many commenters stated that facilities should include supporting documentation with their disclosures to verify said data, such as documents that confirm financial or managing control. To this end, several commenters requested that CMS require the facility to submit: (1) copies of articles of incorporation and bylaws; (2) management, property, loan, mortgage, organizational, employment, and other types of agreements, contracts, etc.; and (3) copies of documents that clarify the relationship between the facility and any disclosed person or entity. The commenters believed such documents will help CMS confirm the submitted data's accuracy.

Response: We intend to validate section 1124(c) data to the fullest extent feasible. As already mentioned, CMS under 42 CFR 424.510(d)(2)(ii) is authorized to require the submission of documentation that helps confirm details regarding the provider's ownership. Our sub-regulatory guidance will identify the types of supporting documents that nursing homes may be required to submit, some of which may fall within the categories the commenters suggested.

Comment: Several commenters stated that CMS should require the nursing facility to disclose details of any lease agreement it has with its lessor/landlord. This should include: (1) how many and which other nursing homes are included under the lease; and (2) other lease terms that may have

substantial financial implications for the nursing facility.

Response: We appreciate this suggestion. To the extent necessary to validate data the facility has submitted (for example, ADP lessor information under section 1124(c)(5)(A)(ii) of the Act), we may consider requiring a copy of the lease agreement.

9. PECs and REITs

Comment: Many commenters supported: (1) the disclosure of PEC and REIT data on the Form CMS-855A application; and (2) the inclusion of publicly traded firms within the PEC definition.

Response: We appreciate the commenters' support.

Comment: Several commenters opposed the collection of PEC and REIT data. A commenter stated that, according to some reports, there are no statistically significant differences between PEC-owned nursing facilities and non-PEC-owned nursing facilities in the areas of: (1) staffing levels; (2) COVID-19 cases or deaths; or (3) deaths from any cause.

Response: We respectfully disagree with these commenters. We noted in the proposed rule and this final rule that we have seen reports that raise concerns about the quality of care in PEC-owned and REIT-owned nursing homes. One such report, issued by the National Bureau of Economic Research, estimated that PEC ownership "increases the short-term mortality of Medicare patients by 10%."¹⁷ We believe these and other studies, combined with our obligation to protect Medicare beneficiaries, justify our efforts to gather PEC and REIT data so that we can examine the extent to which these entities' ownership of facilities impacts patient care.

Comment: A commenter stated that the PEC definition should include any PEC with any ownership interest in a nursing facility no matter how the PEC has titled itself.

Response: We concur with this commenter. It is important that any such entity—irrespective of whether it owns a majority or minority interest in the nursing home—be disclosed if the applicable ownership reporting thresholds (for example, 5 percent) are met so that CMS and stakeholders can understand the full scope of the nursing home's ownership structure. We also do not believe the question of whether an organization qualifies as a PEC for

disclosure purposes should be determined by its title; the test, rather, is whether the entity meets the PEC definition.

Comment: A commenter stated that CMS should not create its own PEC definition (which the commenter believed was inaccurate and too broad) but should instead use the existing definition of "private equity fund" utilized by other regulatory agencies, including the Securities and Exchange Commission (SEC).

Response: We respectfully disagree. In establishing our PEC definition, we considered several regulatory and non-regulatory descriptions of such companies. The definition was intended to be sufficiently expansive so as to collect a wide volume of these entities. In our view, only by promulgating a broad definition, rather than a restrictive one, can we capture the universe of organizations needed to help us assess the extent of private equity involvement among nursing homes.

Comment: Commenters contended that our PEC definition improperly includes entities that are not private companies. A commenter did not believe that information about public entities aligns with CMS' intent and that CMS' main interest was in private organizations. The commenter recommended that the PEC definition be revised to read, "for purposes of this subpart only, a publicly-traded or non-publicly-traded company that collects capital investments from individuals or entities and purchased [a majority ownership share of]/[a controlling interest in] a provider."

Response: While we appreciate this comment, we do not believe our proposed PEC definition can be interpreted to include governmental entities (which we believe the commenter was referencing when discussing "public entities"). In our view, the definition clearly only includes private entities, whether publicly traded or not. We also respectfully do not favor limiting PEC disclosure to those PECs with majority ownership of the nursing facility. We cannot obtain a full understanding of the prevalence of PECs in the nursing home sector without collecting data on all PECs that meet our definition thereof, regardless of whether the ownership interest is majority or minority.

Comment: A commenter stated that the proposed PEC definition: (1) does not fully capture private equity involvement in facilities and their chain organizations and parent companies; and (2) applies only to owners or managers of the facility, which is not

¹⁷ Atul Gupta, Sabrina T. Howell, Constantine Yannelis, and Abhinav Gupta, Does Private Equity Investment in Healthcare Benefit Patients? Evidence from Nursing Homes, 2021, p. i.

necessarily how private equity structures its involvement in facilities. To secure more thorough PEC data, the commenter (as well as others) stated that CMS should expand the ADP definition to include private equity ownership and control of nursing homes.

Response: We note several things. First, and as previously explained, data regarding a nursing home's chain home office and parent companies, will, with isolated exceptions, be reported to CMS. (Exceptions could include parent companies with less than 5 percent indirect ownership of the provider.) For each of these reported entities, the facility will have to disclose whether that organization is a PEC. To illustrate, assume 6 nursing homes are in a chain. All are enrolling in Medicare and must disclose whether a reported entity is a PEC. PECOS will be able to identify these 6 as part of a chain and, equally important, indicate whether a PEC owns these facilities. Therefore, we believe this will alleviate concerns that PEC involvement in a chain (and the degree of said involvement) will not be revealed. Second, the PEC disclosure requirement is not limited to owning and managing entities of the provider. It includes all entities reported per section 1124(a) and (c) of the Act, some of which may be, for example, lessors of real property per section 1124(c)(5)(A)(ii) of the Act. Third, and as mentioned, section 1124(c) of the Act contains no provision authorizing the Secretary to include additional parties within the ADP definition. Nevertheless, nursing facilities will still have to submit the organizational charts currently required per the Form CMS-855A, which will help identify the ownership relationships of entities that are PECs.

Comment: Commenters suggested that CMS revise its proposed PEC definition. A PEC, according to the commenters, should be defined as a publicly-traded or non-publicly traded company that collects capital investments from individuals or entities and purchases an ownership share of: (1) a provider; (2) the real estate or buildings on or in which a provider operates; (3) a company with an ownership or control interest in a provider; or (4) an ADP. They further stated that CMS' proposed definition has two drawbacks. One is that it lacks adequate specificity to capture actual private equity investment, partly because there is no legal term for private equity. The second is that it is too narrow and focuses only on the provider rather than taking into account complex ownership structures.

Response: We believe our definition is clear enough to alert nursing homes of the types of entities that must be disclosed as PECs. We disagree that the definition is too narrow. As previously explained, we consider it to be reasonably broad in terms of the companies that fall within its purview.

On the other hand, we recognize the commenters' concerns that the proposed definition could be read to only apply to PEC interests in the provider rather than, for instance, PEC interests in one of the provider's indirect owners. As an illustration, assume Nursing Home W is 75 percent owned by Entity X, which is 75 percent owned by Entity Y. Entity Z, a PEC, owns 90 percent of Entity Y. Although Entity Z would have to be disclosed as a 5 percent or greater indirect owner of the nursing facility, it would not qualify as a PEC for Form CMS-855A reporting purposes because its capital investment is in Entity Y instead of the provider/nursing home. This could inhibit our ability to assess the amount of PEC involvement among a provider's indirect owners. We emphasize that we proposed our PEC definition with the intention of collecting both direct and indirect PEC ownership interests in the provider. We never meant to exclude indirect interests. To clarify this for the public, we will insert "direct or interest" before "ownership share" in our final PEC definition. We do not view this as an expansion of the data we proposed because we had always intended to require PEC data from indirect owners. We appreciate the commenters' other suggested revisions, and we will consider them for future rulemaking.

Comment: Commenters recommended changing our proposed REIT definition to that of an entity that meets the definition of REIT in 26 U.S.C. 856 or that claims REIT status when filing taxes with the Internal Revenue Service (IRS). The commenters stated that: (1) REIT is a legal term recognized by the IRS; and (2) CMS' proposed definition does not reference this legal definition but instead captures many companies that own the real estate or building in or on which a provider operates (or owns or operates the provider itself) but are not REITs. With so all-encompassing a definition, CMS will be unable to identify actual REITs. Commenters also recommended establishing definitions that differentiate between publicly offered and non-publicly offered REITs.

Response: The commenters' recommendation to adopt an alternative REIT definition of REIT differs from the earlier recommendation to adopt a different PEC definition in two ways. First, some of the suggested PEC

definition revisions could entail a significant increase in the number of entities that would qualify as PECs and, in turn, would have to be reported as such. The section 856 definition, on the other hand, would be narrower than the REIT definition we proposed, as the commenters indicated when noting that the proposed definition would capture numerous entities that are not REITs. This means that fewer organizations would be reported as REITs, hence potentially reducing the burden on nursing homes, although this definition will still capture entities that should appropriately be reported as REITs. Second, there is no uniform, standard, widely accepted definition of "private equity company" in our federal regulations. Such is not so with the section 856 REIT definition, which is broadly acknowledged throughout the public and private sectors and, accordingly, could help facilitate the reporting of consistent REIT data. For these two reasons (as well as for the reasons the commenters outlined), we concur with the recommendation that the section 856 definition should be utilized instead of the proposed REIT definition. We will update this final rule to include the former.

As for the recommendation to establish definitions to distinguish between publicly-offered and non-publicly offered REITs, we are not at this time focused on such differences for Medicare provider enrollment purposes.

Comment: A commenter offered several recommendations regarding our REIT proposal. First, the commenter stated that CMS should adopt the definition of "publicly offered REIT" in 26 U.S.C. 562 and require said entity to designate whether it is a publicly offered REIT. Second, the commenter suggested that our proposed REIT definition be revised to mean an entity that: (1) reported itself as a REIT for its last tax return and continues to qualify as such under section 856; or (2) has not filed its first tax return but has stated its intention to identify itself as a REIT on its tax return to its owners and effectuates it stated intention. Third, the commenter urged CMS to clarify that an entity that has elected to be taxed as a REIT should continue to be categorized as such for "organizational structure" purposes.

Response: As stated, we are including within this final rule the REIT definition used in section 856, which we believe addresses the commenter's second suggestion. We also previously noted section 562's definition of publicly offered REIT, which is referenced in 26 U.S.C. 856(c)(5)(L)(i). If the commenter is suggesting that we include

checkboxes on the Form CMS–855A to distinguish between publicly offered REITs and non-publicly offered REITs, we may consider this as a future enhancement to the application. Regarding the commenter's third recommendation, we interpret this as a request to add REITs to our organizational structure definition. We appreciate this suggestion and may contemplate it for future rulemaking.

Comment: While recommending adoption of the section 856 REIT definition, a commenter stated that REIT disclosure should only be required if the REIT: (1) leases or subleases real property to the provider in the ordinary course of its business; and (2) has the power to exert OFMC over the provider or a part thereof. Another commenter agreed that the second criterion regarding OFMC should be a prerequisite for REIT disclosure.

Response: While we concur that the REIT definition should mirror that in section 856, we respectfully disagree that disclosure should be restricted to REITs that meet the two recommended criteria. The central issue is not whether a particular transaction was done in the ordinary business course or the degree of the REIT's control over the provider. The main issue is whether it meets the section 856 definition. Indeed, REITs often merely own or lease the land on which the provider is located and do not own or operate the facility.

Comment: A commenter stated that, in addition to REIT data, CMS should collect information on non-profit or public entities that purchase nursing facility real estate but may not qualify as REITs. The commenter stated that these entities, like for-profit organizations, engage in such practices.

Response: We appreciate this suggestion and may consider it for future policy development.

Comment: A commenter stated that CMS should exempt non-profit, hospital-based providers (NPHBPs) that operate nursing facilities from the PEC disclosure requirements (or, at a minimum, add a checkbox to the Form CMS–855A to capture NPHBP ownership to distinguish NPHBPs from PECs). The commenter stated that NPHBPs (being hospital-based) are subject to stricter oversight and regulations than private equity firms. Excluding NPHBPs as described would reduce the reporting burden on these entities.

Response: We respectfully disagree. Exempting certain types of nursing facilities from PEC disclosure could leave CMS, stakeholders, and beneficiaries with an incomplete understanding of the scope of PEC

prevalence in the nursing home sector. Concerning the suggested checkbox, an enrolling nursing home must already disclose any non-profit status in Section 2 of the Form CMS–855A; furthermore, any association with a hospital (such as ownership or management) is reported in Section 5 of the Form CMS–855A. We thus do not believe the recommended checkbox is necessary.

Comment: Several commenters recommended that CMS continue investigating private equity's involvement in health care facilities.

Response: We agree with this commenter and intend to continue our efforts to examine the role and scope of PEC involvement in the health care sector.

10. Miscellaneous Comments

Comment: A commenter stated that CMS should: (1) require nursing homes to place signs at their entrances stating their ownership type and for-profit/non-profit status; and (2) create a registry outlining each nursing home's status concerning national nurse and doctor staffing standards.

Response: Although we respectfully believe these comments are outside the scope of this rule, we appreciate all suggestions from stakeholders regarding means of (1) facilitating transparency concerning nursing home ownership and operations and (2) improving the quality of nursing home care.

Comment: A commenter encouraged CMS to consult with industry experts regarding the proposed rule. These parties should include: (1) unions representing nursing home employees; (2) academics who research nursing homes; and (3) organizations that advocate for the elderly. Other commenters stated that CMS should seek input from stakeholders when developing plans for publishing the section 1124(c) data and when crafting the sub-regulatory guidance related to this rule.

Response: We received feedback from some of the parties the commenter references during the 60-day notice-and-comment period and, as with all the comments we received, both appreciated and considered them. After the final rule is issued, CMS will remain open to feedback from stakeholders regarding section 1124(c)'s implementation, the publication of the section 1124(c) data, and our sub-regulatory guidance.

Comment: A commenter urged CMS to expand the section 1124(c) reporting requirements to include additional provider/supplier types, such as physician practices, hospitals, and dialysis facilities.

Response: While we appreciate this comment, section 1124(c) of the Act is limited to nursing homes. Therefore, we believe we lack the statutory authority to include other provider/supplier types within section 1124(c)'s purview.

Comment: Several commenters expressed concern that CMS and certain states allow nursing home ownership changes a— with Medicare changes of ownership under § 489.— transfer of a provider agreement with little scrutiny of the new owner. They recommended that CMS: (1) establish or strengthen requirements for changes of ownership or management of nursing homes; and (2) identify owners with a potential for (or actual history of) furnishing poor care or participating in fraud and disqualify them from Medicare or Medicaid participation. They added that these requirements should extend to current owners and managers of nursing homes (not simply new ones) and that these parties should be removed or suspended from Medicare if they engage in such conduct.

Response: We appreciate these comments but believe they are outside the scope of this rule.

Comment: A commenter recommended that a centralized Medicaid provider enrollment application system be created to better coordinate information across states and reduce duplication.

Response: We appreciate this recommendation but believe it is outside the scope of this rule.

Comment: Several commenters requested clarification as to how the section 1124(c) data collection will help improve the quality of nursing home care.

Response: We believe the section 1124(c) information will help enhance nursing home quality by enabling CMS, states, and stakeholders to examine the entire scope of the facility's organizational, operational, and managerial structure, including its relationships with other entities (for instance, consulting firms). With this more complete picture—and in conjunction with quality-of-care data such as survey results—CMS, states, and stakeholders will be better positioned to ascertain areas of the facility's operations that could be sources of sub-standard quality and, to the extent applicable, undertake remedial measures or otherwise hold the facilities accountable. Furthermore, public disclosure of the section 1124(c) data will allow beneficiaries, their families, and other parties to identify which nursing homes may be best suited to provide quality care. This, in turn, could spur nursing homes to improve

the quality of their services so as to become a more desirable choice for beneficiaries.

Comment: Several commenters stated that CMS should assign a personal identification number to an individual with an ownership or management interest in a nursing home.

Response: We appreciate this suggestion, but we do not believe the personal identification numbers the commenters cite are necessary. Providers must currently report identifying data about their owners and managers, such as their legal business name, doing business name, address, etc. This allows us to track such parties in PECOS, including their ownership or management of other enrolled providers and suppliers. (We will also require identifying information regarding the parties reported per section 1124(c) of the Act.) We believe this identifying data largely serve the same purpose as a personal identification number.

Comment: Several commenters requested that CMS explain how it will use section 1124(c) data disclosures in: (1) its Medicare enrollment decisions; and (2) determining whether a potential owner requires further investigation.

Response: Nursing homes will have to submit full and accurate section 1124(c) data. If the facility does not, its enrollment may, as applicable, be denied, revoked, or deactivated, or its application rejected. Reported parties will be reviewed against the OIG exclusion list, too. Newly reported SNF owners will be scrutinized (and, as applicable, subject to further review) consistent with our current procedures, such as requiring the submission of fingerprints.

Comment: Several commenters stated that CMS should implement in the final rule section 1124(c)(2)(B) of the Act, which permits non-profit nursing homes to submit the IRS Form 990 to the extent that the information thereon meets the section 1124(c) disclosure requirements. A commenter explained that the Form 990 discloses governance and operational leadership, related parties and affiliates, level of control and ownership, key employees and independent contractors, and other detailed information. The commenter stated CMS should promptly establish procedures for submitting Form 990 data in lieu of its duplicate disclosure via the Form CMS-855A.

Response: As we noted in the proposed rule, CMS is exploring the operational complexities involved in implementing section 1124(c)(5) of the Act. We may address this matter in future rulemaking.

Comment: Several commenters recommended that CMS prohibit a party from: (1) acquiring 5 percent or more ownership of a nursing facility (or management company under contract therewith); or (2) becoming an officer, director, or general partner in a SNF or contracted management company without written CMS approval at least 90 days before the transaction.

Response: We appreciate this recommendation but believe it is outside the scope of this rule.

Comment: A commenter stated that CMS should: (1) collect data that assesses the labor-related impacts of consolidation in health care and how changes to the labor market affect patient care; and (2) release data to help stakeholders better understand how mergers and acquisitions can lead to anti-competitive and harmful practices (for example, reduced wages and/or non-cash benefits).

Response: We appreciate this comment but believe it is outside the scope of this final rule. However, with the additional information collected as part of this rule, we hope to better elucidate how consolidation and certain ownership structures may be affecting the health care labor market and quality of care.

Comment: A commenter stated that CMS should prohibit “squatting”, which the commenter described as when a party acquires, operates, establishes, manages, conducts, or maintains a nursing facility before CMS has approved its enrollment application. The commenter contended that should a party obtain such an interest in a nursing facility without first obtaining a state license, CMS should take immediate action, including a: (1) ban on new admissions; and (2) suspension of all Medicare and Medicaid payments to the facility.

Response: We appreciate this comment but believe it is outside the scope of this final rule.

Comment: Several commenters noted that section 1124(c)(1) of the Act requires the “identity of and information on” the parties disclosed under section 1124(c)(2)(A)(ii) of the Act. They stated that CMS should use this authority to collect data other than names, titles, and dates of service. A commenter explained that disclosure of a person’s name by itself may not adequately identify that individual.

Response: We recognize that requiring data beyond the party’s name and title (such as an address) may be necessary to confirm identification. Any such data elements will, if required, be added to the Form CMS-855A via the Paperwork

Reduction Act process and be subject to prior public notice-and-comment.

Comment: Several commenters recommended the creation of an interagency task force to identify trends in nursing home transparency and monitor nursing homes that require particular scrutiny. This group, the commenters stated, should include Justice Department and Labor Department staff to provide guidance on mechanisms for: (1) enforcing the final rule’s provisions; and (2) improving patient care.

Response: We appreciate this suggestion and note that we communicate with other government agencies regarding nursing home program integrity, quality, and transparency issues. We will continue to do so during and after section 1124(c)’s implementation.

Comment: Several commenters urged CMS to implement the GAO’s recommendations in its January 2023 report titled, “CMS Should Make Ownership Information More Transparent for Consumers.”¹⁸ In that report, the GAO found that ownership information on Care Compare was insufficiently transparent for consumers.¹⁹ Its recommendations included but were not limited to: (1) using plain language to define key terms in Care Compare’s ownership section; and (2) organizing ownership information by providing consumers easy access to a list of all facilities under common ownership.²⁰

Response: We believe these comments are outside the scope of this final rule because our proposals were unrelated to the format of the current Care Compare website. However, as announced on June 28, 2023, ownership and operatorship affiliation information is now available on the Nursing Home Care Compare website in a clear, accessible, and easily readable format for consumers (<https://www.cms.gov/files/document/qso-23-18-nh.pdf>).

B. Public Comments Received on the FY 2024 IPPS/LTCH PPS Proposed Rule

Comment: Several commenters supported our proposed PEC and REIT definitions, the collection of PEC and REIT data, and the application of these definitions to all providers and suppliers that complete the Form CMS-855A.

Response: We appreciate the commenters’ support.

Comment: Several commenters recommended that CMS furnish

¹⁸ GAO-23-104813.

¹⁹ Ibid., p. 18.

²⁰ Ibid., p. 25.

scenarios regarding when and how PEC and REIT ownership and relationships would be reported. They cited an example of a provider with a long-term building lease with a county to operate a hospital and questioned whether this would qualify as a REIT relationship.

Response: CMS in its sub-regulatory guidance will provide guidance on the requirements for reporting PEC and REIT data, including situations similar to the commenter's example.

Comment: Several commenters opposed the collection of PEC data from providers and suppliers other than SNFs. A commenter stated that PEC ownership does not inherently indicate lesser levels of care than other types of ownership, while another commenter stated that the proposed rule cited no evidence that PEC-owned hospitals needed closer monitoring. At a minimum, a commenter recommended that CMS explain how: (1) it will determine if a connection exists between quality and ownership type for non-SNF providers and suppliers; and (2) quality is impacted if the requested data show that such a connection exists. Another commenter stated that the request for PEC data impugns private equity owners.

Response: We cited in the aforementioned February 15, 2023 proposed rule several studies that expressed concern regarding the quality of care furnished at PEC-owned SNFs. Although those studies were restricted to SNFs, we explained in the FY 2024 IPPS/LTCH PPS proposed rule that the studies raised legitimate concerns that similar problems might exist with PEC ownership of other provider and supplier types, hence the need to collect PEC data on the latter across the healthcare industry. Concerning the commenter's recommendation, and as previously explained, the furnishing of PEC data will help CMS determine: (1) the prevalence of PEC involvement within the Medicare provider or supplier universe; and (2) the extent to which (and in what aspects) patient care is deleteriously impacted. That is, our objective is not to disparage PECs but to ascertain the degree and impact of PEC ownership of providers and suppliers.

Regarding our proposed PEC definition, we previously noted that we considered several other regulatory and non-regulatory descriptions of PECs with the goal of establishing a definition that could capture a wide volume of such organizations; this will help us ascertain the degree of PEC involvement among Medicare providers and suppliers. We believe our proposed definition (aside from the aforementioned minor clarification

thereto that we are finalizing) fulfills this objective.

Comment: Several commenters opposed the collection of REIT data. They stated that: (1) CMS furnished no proof that REIT ownership leads to substandard care; and (2) REITs have only limited involvement in the health care arena.

Response: We noted in the February 15, 2023 proposed rule that REIT ownership of nursing homes has generated concerns akin to those involving PEC-owned nursing facilities. We acknowledge that these concerns pertained to REIT-owned nursing homes as opposed to, for example, hospices that are owned by REITs. Yet it is precisely for this reason that we need to know the prevalence of REIT involvement with other Medicare provider and supplier types. Indeed, any quality-of-care issues regarding REIT-owned nursing homes might also exist with respect to non-SNF providers. Given our obligation to protect Medicare beneficiaries, it is imperative to collect information that can assist us in stemming any problems associated with certain types of ownership, no matter the amount of involvement a particular ownership type may have in the health care field.

Comment: Several commenters recommended that CMS not finalize its proposed definition of REIT and instead adopt the REIT definition in 26 U.S.C. 856.

Response: As stated in our response to a similar comment on the February 15, 2023 proposed rule, we agree with this suggestion and will finalize the section 856 definition.

C. Final Provisions

We are finalizing all of our provisions from both the February 15, 2023 and FY 2024 IPPS/LTCH PPS final rules as proposed except as follows:

- We are inserting "direct or indirect" before the term "ownership share" in our PEC definition in 42 CFR 424.502.
- We are redefining REIT in 42 CFR 424.502 as a real estate investment trust as that term is described in 26 U.S.C. 856.

IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section

3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We sought public comment on each of these issues for the following sections of this document that contain information collection requirements (ICRs):

A. Background

As explained in section II. of this final rule, we proposed to implement most of section 1124(c) of the Act. Section 1124(c) of the Act requires Medicare and Medicaid nursing facilities to report certain information about their ownership and operators. This data include, but is not limited to: (1) members of the facility's governing body; (2) the facility's officers, directors, members, partners, trustees, and managing employees; (3) parties that exercise operational, financial, or managerial control over the facility or a part thereof; (4) parties who lease or sublease real property to the facility, or own a whole or part interest equal to or exceeding 5 percent of the total value of such real property; and (5) parties that furnish management or administrative services, management or clinical consulting services, or accounting or financial services to the facility.

B. Nursing Home Submission of Section 1124(c) Data

1. Medicare

We noted in section II. of this final rule that the Form CMS-855A (OMB Control No.: 0938-0685), which SNFs must complete to enroll in Medicare, already collects much of the aforementioned information. Examples of this data include the SNF's owners, managing employees, corporate officers, corporate directors, and other parties. As part of the enrollment process, the SNF is also currently required to submit the previously referenced organizational charts. However, certain data is not collected via the existing Form CMS-855A process, such as parties that perform administrative, financial, or clinical consulting services and do not qualify as another person or entity that is otherwise required to be reported on the application (for example, a managing employee or owner).

Disclosure of this heretofore non-mandatory information (hereafter referenced as “supplemental data”) will constitute additional ICR burden to the SNF community.

There will be three principal types of Form CMS–855A transactions via which SNFs will report supplemental data: (1) applications to initially enroll in Medicare (which, for purposes of the reporting requirements in proposed

§ 424.516(g), will include changes of ownership under 42 CFR 489.18); (2) applications to revalidate the SNF’s current enrollment information per § 424.515; and (3) reporting changes to any of the SNF’s previously disclosed supplemental data per proposed § 424.516(g).

Form CMS–855A applications are typically completed by the provider’s office staff. However, given the potential

complexity of the supplemental data to be reported, it is possible that the SNF’s legal counsel will be involved in reviewing this information. Accordingly, we will use the following categories and hourly wage rates from the U.S. Bureau of Labor Statistics’ (BLS) May 2022 National Occupational Employment and Wage Estimates for all salary estimates (https://www.bls.gov/oes/current/oes_nat.htm):

TABLE 1—NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES

Occupation title	Occupation code	Mean hourly wage (\$/hr)	Fringe benefits and overhead (\$/hr)	Adjusted hourly wage (\$/hr)
Office and Administrative Support Workers, All Other	43–9199	20.75	20.75	41.50
Lawyers	23–1011	78.74	78.74	157.48

Based on our internal data, and as stated in the proposed rule, we estimate that each year approximately: (1) 1,055 SNFs will submit an initial Form CMS–855A enrollment application (excluding Form CMS–855A change of ownership applications under § 489.18); (2) 1,672 will submit a Form CMS–855A revalidation application; (3) 951 will submit a Form CMS–855A change of ownership application; and (4) 4,500 will report new or changed supplemental data via a Form CMS–855A change of information application. Furthermore, we project that it will take the SNF an average of 2.25 hours to furnish the supplemental data for initial, revalidation, and change of ownership applications and 1 hour for changes of information. (We recognize that the actual time for a particular SNF may be more or less than these figures.) Of these hour estimates, we project that the burden will be split evenly between the SNF’s administrative staff and legal counsel (for example, 1.125 hours each for initial and revalidation applications). With this equal division, the per hour wage will be \$99.49 $((\$41.50 + \$157.48)/2)$. (The figure in the proposed rule was \$91.64 $((\$40.94 + \$142.34)/2)$, which was based on the

May 2021 BLS wage figures.) As outlined in more detail in Table 2, this results in a projected annual ICR burden of our Medicare SNF disclosure provisions of 12,776 hours at a cost of \$1,271,084. (Using the May 2021 BLS wage figures, our estimate in the proposed rule was \$1,170,793.)

2. Medicaid

We mentioned in section II. of this final rule that states have considerable discretion in the operational aspects of their Medicaid programs, including with respect to provider enrollment. Concerning our requirements regarding nursing home data, some states may already collect all of this information, the majority of it, or only a modest portion of it. This means that the number of projected initial and revalidation applications newly reporting this information, as well as the time it takes the facility to disclose the data, will likely vary from state to state. Furthermore, we do not have readily available information on the number of Medicaid nursing facility initial and revalidation applications that are submitted to each state each year. Notwithstanding these uncertainties, we

believe that reasonable estimates of the hour and cost burdens are possible.

The number of Medicaid-enrolled nursing facilities nationwide is comparable to that for Medicare-enrolled SNFs: roughly between 15,000 and 15,500. In light of this, we believe the Medicare application estimates we used in section III.B. of the final rule for initial and revalidation applications can also be used for our proposed Medicaid provisions. (We took a similar approach when establishing our Medicaid application projections in the proposed rule.) Consequently, and as indicated in Table 2, we estimate an annual ICR burden for these provisions of 6,136 hours and \$610,470. (Using the May 2021 BLS wage figures, our estimate in the proposed rule was \$562,303. We solicited public comments on the accuracy of this projection.)

3. Total

Given the foregoing, and as outlined in the following table, we project an annual total ICR burden associated with our SNF disclosure provisions of 18,912 hours and \$1,881,554. (Our estimate in the proposed rule was \$1,733,096, which, again, was due to our use therein of the May 2021 BLS wage figures.)

TABLE 2—HOUR AND BURDEN ESTIMATES FOR NURSING HOME DISCLOSURE PROVISIONS

	OMB control No.	Number of respondents	Number of responses	Burden per response (hours)	Total annual burden (hours)	Hourly labor cost of reporting (\$) (includes 100% fringe benefits)*	Total cost (\$)
Medicare							
Initial Form CMS–855A Applications	0938–0685	1,055	1,055	2.25	2,374	99.49	236,189

TABLE 2—HOUR AND BURDEN ESTIMATES FOR NURSING HOME DISCLOSURE PROVISIONS—Continued

	OMB control No.	Number of respondents	Number of responses	Burden per response (hours)	Total annual burden (hours)	Hourly labor cost of reporting (\$) (includes 100% fringe benefits)*	Total cost (\$)
Form CMS–855A Revalidation Applications	0938–0685	1,672	1,672	2.25	3,762	99.49	374,281
Form CMS–855A Change of Ownership Applications	0938–0685	951	951	2.25	2,140	99.49	212,909
Form CMS–855A Change of Information Applications	0938–0685	4,500	4,500	1	4,500	99.49	447,705
Medicare Totals	N/A	8,178	8,178	N/A	12,776	N/A	1,271,084
Medicaid							
Initial Application	N/A	1,055	1,055	2.25	2,374	99.49	236,189
Revalidation Application	N/A	1,672	1,672	2.25	3,762	99.49	374,281
Medicaid Totals	N/A	2,727	2,727	N/A	6,136	N/A	610,470
Totals	N/A	10,905	10,905	N/A	18,912	N/A	1,881,554

C. ICRs for Reporting of PEC and REIT Data

As previously explained in this final rule, we proposed in the FY 2024 IPPS/LTCH proposed rule that the PEC and REIT definitions we proposed in the February 15, 2023 proposed rule apply to all providers and suppliers completing the Form CMS–855A enrollment application (OMB Control No. 0938–0685), not merely SNFs. This was consistent with our proposal on

December 15, 2022 to revise the Form CMS–855A application in a Paperwork Reduction Act submission (87 FR 76626) to require all owning and managing entities listed on any provider's or supplier's Form CMS–855A submission to disclose whether they are a PEC or a REIT.²¹

There will be five types of Form CMS–855A transactions via which we believe providers and suppliers (including SNFs) would report PEC and

REIT data: (1) initial enrollment applications; (2) change of ownership applications; (3) revalidation applications; (4) reactivation applications; and (5) change of information applications. Form CMS–855A applications are typically completed by the provider's or supplier's office staff. Therefore, we will use the previously referenced BLS wage estimate for “Office and Administrative Support Workers, All Other.”

TABLE 3—NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES

Occupation title	Occupation code	Mean hourly wage (\$/hr)	Fringe benefits and overhead (\$/hr)	Adjusted hourly wage (\$/hr)
Office and Administrative Support Workers, All Other	43–9199	20.75	20.75	41.50

Based on our internal data, and as we did in the FY 2024 IPPS/LTCH PPS proposed rule, we estimate that the following number of Form CMS–855A applications will be submitted reporting PEC or REIT data: (1) 6,462 initial

applications; (2) 3,105 changes of ownership; (3) 3,133 revalidations; (4) 610 reactivations; and (5) 27,000 changes of information. Furthermore, we project that it would take an average of 12 minutes to furnish the PEC and

REIT data, though we recognize that this will vary by Form CMS–855A transaction type and the amount of the data the particular provider or supplier must disclose.

²¹ <https://www.cms.gov/regulations-and-guidance/legislation/paperworkreductionactof1995/prra-listing/cms-855a>.

TABLE 4—HOURLY AND BURDEN ESTIMATES FOR PEC AND REIT PROVISIONS

	OMB control No.	Number of respondents	Number of responses	Burden per response (hours)	Total annual burden (hours)	Hourly labor cost of reporting (\$) (includes 100% fringe benefits)*	Total cost (\$)
Initial Form CMS–855A Applications	0938–0685	6,462	6,462	0.2	1,292	41.50	53,618
Form CMS–855A Change of Ownership	0938–0685	3,105	3,105	0.2	621	41.50	25,772
Form CMS–855A Revalidation Applications	0938–0685	3,133	3,133	0.2	627	41.50	26,021
Form CMS–855A Reactivation Applications ..	0938–0685	610	610	0.2	122	41.50	5,063
Form CMS–855A Change of Information Applications	0938–0685	27,000	27,000	0.2	5,400	41.50	224,100
Totals	N/A	40,310	40,310	N/A	8,062	41.50	334,574

D. Totals

Given the foregoing, we estimate that the combined burden of our section 1124(c) of the Act and PEC/REIT disclosure requirements is 26,974 hours and \$2,216,128.

We received no comments on our proposed ICR estimates for either rule and are finalizing them as proposed with the exception of the increased costs (described in the succeeding paragraphs) associated with our use of the May 2022 BLS wage estimates.

V. Regulatory Impact Analysis

A. Statement of Need

This final rule is necessary so that CMS and states can obtain important data about the owners and operators of nursing facilities. This would better enable CMS and states to monitor the ownership and management of these providers; this is an especially critical consideration given documented quality issues and differences in outcomes in nursing facilities with certain types of owners, such as PECs. This rule is an important component of the Biden-Harris Administration's initiative to improve nursing home safety, quality, and accountability.²²

B. Overall Impact of Provisions of This Final Rule

1. Background

We have examined the impacts of this final rule, as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving

Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995, Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (commonly known as the Congressional Review Act) (5 U.S.C. 804(2)). This section of this final rule contains the impact and other economic analyses for our proposed provisions.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review), defines a “significant regulatory action” as an action that is likely to result in a rule: (1) having an annual effect on the economy of \$200 million or more in any 1 year (adjusted every 3 years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product), or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities; (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary

impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in Executive Order 12866, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

A regulatory impact analysis (RIA) must be prepared for rules with significant regulatory action/s and/or with significant effects as per section 3(f)(1) of \$200 million or more in any 1 year. Based on our estimates, OIRA has determined this rulemaking is not significant per section 3(f)(1) of Executive Order 12866 and does not meet the definition in 5 U.S.C. 804(2) (Congressional Review Act). Accordingly, we have prepared a Regulatory Impact Analysis that to the best of our ability presents the costs and benefits of the rulemaking.

C. Detailed Economic Analysis

1. Benefits

As discussed in section II. of this final rule, we believe the data furnished in accordance with this rule will help CMS more closely monitor the ownership and management of nursing facilities. This, in conjunction with the Biden-Harris Administration's other initiatives, could help improve beneficiary care, although these potential benefits cannot be monetarily quantified.

2. Costs

The costs associated with the requirements of this final rule involves nursing facilities' submission of the required information and the regulatory review costs. We projected in section IV.

²² <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-protecting-seniors-and-people-with-disabilities-by-improving-safety-and-quality-of-care-in-the-nations-nursing-homes/>.

of this final rule that the annual burden on nursing facilities of furnishing this data would be 26,974 hours and \$2,216,128. Meanwhile, the total cost of reviewing this final rule is \$4,160,189.

If regulations impose administrative costs on private entities, such as the time needed to read and interpret this final rule, we should estimate the cost associated with regulatory review. Due to the uncertainty involved with accurately quantifying the number of entities that will be directly impacted and will review this final rule, we will assume that roughly half the number of SNFs (or 7,770 out of the aforementioned universe of 15,500) will review this rule. We acknowledge that this assumption may understate or overstate the costs of reviewing this rule.

For purposes of our estimate, we assume that the SNF's legal counsel and the medical and health service manager will read the rule. Using the BLS May 2022 mean wage information for medical and health service managers

(Code 11–9111) we estimate that the cost of reviewing this final rule is \$123.06 per hour, including overhead and fringe benefits (<https://www.bls.gov/oes/current/oes119111.htm>). The mean hourly wage for the SNF's lawyer (Code 23–1011) is \$157.48. Assuming an average reading speed of 250 words per minute, we estimate that it will take approximately 114 minutes (1.91 hours) for the staff to review all of this final rule, which contains a total of approximately 28,600 words. For each SNF that reviews the final rule, the estimated cost is $(1.91 \times \$123.06) + (1.91 \times \$157.48)$ or \$545.42. Therefore, we estimate that the total cost of reviewing this final rule is \$4,160,189 ($\$535.42 \times 7,770$ SNFs).

3. Savings or Transfers

We do not anticipate any direct savings or transfers from our provisions. This is principally because the provisions merely involve the submission of data for CMS or state review.

D. Alternatives Considered

The principal alternative we considered and adopted was our proposal that a SNF would not have to report the data referenced in proposed § 424.516(g) twice on the same Form CMS–855A submission: once per section 1124(a) of the Act and again per section 1124(c) of the Act. This was intended to alleviate the burden on the SNF community, though we cannot quantify any resultant savings in monetary terms. We did not consider other alternatives because of the statute's clear mandate concerning the specific data to be reported.

E. Accounting Statement and Table

As required by OMB Circular A–4 (available at https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf), we have prepared an accounting statement in Table 5 showing the classification of the impact associated with the provisions of this final rule.

TABLE 5—ACCOUNTING STATEMENT: ESTIMATED ANNUAL BURDEN OF NURSING FACILITY DISCLOSURE FINAL RULE

Category	Primary estimate	Year dollar	Period covered
Annualized Monetized ICR Burden	\$2.22	2022	2022–2032

We did not receive comments on our regulatory impact analysis and are finalizing the estimates described therein with the exception of the increased costs (described in the succeeding paragraphs) associated with our use of the May 2022 BLS wage estimates.

F. Regulatory Flexibility Act (RFA) Analysis

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, we estimate that SNFs are small entities as that term is used in the RFA (including small businesses, nonprofit organizations, and small governmental jurisdictions). The great majority of hospitals and most other health care providers and suppliers (including nursing facilities) are small entities, either by being nonprofit organizations or by meeting the Small Business Administration (SBA) definition of a small business having revenues of less than \$14 million to \$30 million in any 1 year (for details, see the SBA's website at <https://www.sba.gov/document/support-table-size-standards> for the

62311 SNFs series). For purposes of the RFA, most SNFs are considered small businesses according to the SBA's size standards with total revenues of \$30 million or less in any 1 year.

Individuals and states are not included in the definition of a small entity. As its measure of significant economic impact on a substantial number of small entities, HHS uses a change in revenue of more than 3 to 5 percent. Given the: (1) fairly small number of providers that would be affected by this rule when compared with the over 2 million Medicare providers and suppliers; and (2) projected costs we previously outlined, we do not believe this threshold would be reached by the requirements of this final rule. Therefore, the Secretary has certified that this final rule will not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital

as a hospital that is located outside of a metropolitan statistical area and has 100 or fewer beds. As this final rule will only affect nursing facilities, it will not have a significant impact on the operations of a substantial number of small rural hospitals.

G. Unfunded Mandates Reform Act Analysis

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2023, that threshold level is currently approximately \$177 million. Given the aforementioned estimated costs, this final rule does not mandate any requirements for State, local, or tribal governments, or for the private sector.

H. Federalism Analysis

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct costs on State and local governments, preempts State law, or otherwise has federalism implications. We have

examined our final provisions in accordance with Executive Order 13132 and have determined that they will not have a substantial direct effect on State, local or tribal governments, preempt State law, or otherwise have a federalism implication.

Chiquita Brooks-LaSure, Administrator of the Centers for Medicare & Medicaid Services, approved this document on November 8, 2023.

List of Subjects

42 CFR Part 424

Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 455

Grant programs—health, Health facilities, Medicaid, Program integrity.

For the reasons stated in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as follows:

PART 424—CONDITIONS FOR MEDICARE PAYMENT

- 1. The authority for part 424 continues to read as follows:

Authority: 42 U.S.C. 1302 and 1395hh.

Subpart P—Requirements for Establishing and Maintaining Medicare Billing Privileges

- 2. Section 424.502 is amended by—
 ■ a. Adding the definition of “Additional disclosable party” in alphabetical order;
 ■ b. Revising the definition of “Managing employee”; and
 ■ c. Adding the definitions of “Organizational structure”, “Private equity company”, and “Real estate investment trust” in alphabetical order.

The additions and revision read as follows:

§ 424.502 Definitions.

* * * * *

Additional disclosable party means, with respect to a skilled nursing facility defined at section 1819(a) of the Act, any person or entity who does any of the following:

- (1)(i) Exercises operational, financial, or managerial control over the facility or a part thereof;
 (ii) Provides policies or procedures for any of the operations of the facility; or
 (iii) Provides financial or cash management services to the facility.

(2)(i) Leases or subleases real property to the facility; or

(ii) Owns a whole or part interest equal to or exceeding 5 percent of the total value of such real property.

(3) Provides—

- (i) Management or administrative services;
 (ii) Management or clinical consulting services; or
 (iii) Accounting or financial services to the facility.

* * * * *

Managing employee means—

(1) A general manager, business manager, administrator, director, or other individual that exercises operational or managerial control over, or who directly or indirectly conducts, the day-to-day operation of the provider or supplier, either under contract or through some other arrangement, whether or not the individual is a W-2 employee of the provider or supplier. For purposes of this definition, this includes, but is not limited to, a hospice or skilled nursing facility administrator and a hospice or skilled nursing facility medical director.

(2) With respect to the additional requirements at § 424.516(g) for a skilled nursing facility defined at section 1819(a) of the Act, an individual, including a general manager, business manager, administrator, director, or consultant, who directly or indirectly manages, advises, or supervises any element of the practices, finances, or operations of the facility.

* * * * *

Organizational structure means, with respect to a skilled nursing facility defined at section 1819(a) of the Act, in the case of any of the following:

(1) *A corporation.* The officers, directors, and shareholders of the corporation who have an ownership interest in the corporation which is equal to or exceeds 5 percent.

(2) *A limited liability company.* The members and managers of the limited liability company including, as applicable, what percentage each member and manager has of the ownership interest in the limited liability company.

(3) *A general partnership.* The partners of the general partnership.

(4) *A limited partnership.* The general partners and any limited partners of the limited partnership who have an ownership interest in the limited partnership which is equal to or exceeds 10 percent.

(5) *A trust.* The trustees of the trust.

(6) *An individual.* Contact information for the individual.

* * * * *

Private equity company means, for purposes of this subpart only, a publicly traded or non-publicly traded company that collects capital investments from individuals or entities and purchases a

direct or indirect ownership share of a provider.

Real estate investment trust means, for purposes of this subpart only, a real estate investment trust as defined in 26 U.S.C. 856.

* * * * *

- 3. Section 424.516 is amended by adding paragraph (g) to read as follows:

§ 424.516 Additional provider and supplier requirements for enrolling and maintaining active enrollment status in the Medicare program.

* * * * *

(g) *Skilled nursing facilities.* (1) In addition to all other applicable reporting requirements in this subpart, a skilled nursing facility (as defined in section 1819(a) of the Act) must disclose upon initial enrollment (which, for purposes of this paragraph (g), also includes a change of ownership under 42 CFR 489.18) and revalidation the following information:

(i) Each member of the governing body of the facility, including the name, title, and period of service for each such member.

(ii) Each person or entity who is an officer, director, member, partner, trustee, or managing employee (as defined in § 424.502) of the facility, including the name, title, and period of service of each such person or entity.

(iii) Each person or entity who is an additional disclosable party of the facility (as defined in § 424.502).

(iv) The organizational structure (as defined in § 424.502) of each additional disclosable party of the facility and a description of the relationship of each such additional disclosable party to the facility and to one another.

(2) The skilled nursing facility need not disclose the same information described in paragraph (g)(1) of this section more than once on the same enrollment application submission.

(3) The skilled nursing facility must report any change to any of the information described in paragraph (g)(1) of this section consistent with the applicable timeframes in paragraph (e) of this section.

PART 455—PROGRAM INTEGRITY: MEDICAID

- 4. The authority citation for part 455 continues to read as follows:

Authority: 42 U.S.C. 1302.

- 5. Section 455.101 is amended by:

■ a. Adding the definition of “Additional disclosable party” in alphabetical order;

■ b. Revising the definition of “Managing employee”; and

■ c. Adding the definition of “Organizational structure” in alphabetical order.

The additions and revision read as follows:

§ 455.101 Definitions.

Additional disclosable party means, with respect to a nursing facility defined in section 1919(a) of the Act, any person or entity who—

(1) Exercises operational, financial, or managerial control over the facility or a part thereof, or provides policies or procedures for any of the operations of the facility, or provides financial or cash management services to the facility;

(2) Leases or subleases real property to the facility, or owns a whole or part interest equal to or exceeding 5 percent of the total value of such real property; or

(3) Provides management or administrative services, management or clinical consulting services, or accounting or financial services to the facility.

* * * * *

Managing employee means—

(1) A general manager, business manager, administrator, director, or other individual who exercises operational or managerial control over, or who directly or indirectly conducts, the day-to-day operation of an institution, organization, or agency, either under contract or through some other arrangement, whether or not the individual is a W–2 employee of the institution, organization, or agency; or

(2) With respect to the additional requirements at § 455.104(e) for a nursing facility defined in section 1919(a) of the Act, an individual, including a general manager, business manager, administrator, director, or consultant, who directly or indirectly manages, advises, or supervises any element of the practices, finances, or operations of the facility.

Organizational structure means, with respect to a nursing facility defined in section 1919(a) of the Act, in the case of any of the following:

(1) *A corporation.* The officers, directors, and shareholders of the corporation who have an ownership interest in the corporation which is equal to or exceeds 5 percent.

(2) *A limited liability company.* The members and managers of the limited liability company including, as applicable, what percentage each member and manager has of the ownership interest in the limited liability company.

(3) *A general partnership.* The partners of the general partnership.

(4) *A limited partnership.* The general partners and any limited partners of the limited partnership who have an ownership interest in the limited partnership which is equal to or exceeds 10 percent.

(5) *A trust.* The trustees of the trust.

(6) *An individual.* Contact information for the individual.

* * * * *

■ 6. Section 455.104 is amended by redesignating paragraph (e) as paragraph (f) and adding a new paragraph (e) to read as follows:

§ 455.104 Disclosure by Medicaid providers and fiscal agents: Information on ownership and control.

* * * * *

(e) *Nursing facilities.* (1) In addition to all other applicable reporting requirements in this subpart, a nursing facility (as defined in section 1919(a) of the Act) must disclose upon initial enrollment and revalidation the following information:

(i) Each member of the governing body of the facility, including the name, title, and period of service for each such member.

(ii) Each person or entity who is an officer, director, member, partner, trustee, or managing employee (as defined in § 455.101) of the facility, including the name, title, and period of service of each such person or entity.

(iii) Each person or entity who is an additional disclosable party of the facility (as defined in § 455.101).

(iv) The organizational structure (as defined in § 455.101) of each additional disclosable party of the facility and a description of the relationship of each such additional disclosable party to the facility and to one another.

(2) The State need not require the facility to disclose the same information described in this paragraph (e) more than once on the same enrollment application submission.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2023–25408 Filed 11–15–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Chapter III

[Docket No. FMCSA–2023–0174]

RIN 2126–AC60

General Technical, Organizational, Conforming, and Correcting Amendments to the Federal Motor Carrier Safety Regulations

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: FMCSA amends its regulations by making technical corrections throughout the Federal Motor Carrier Safety Regulations (FMCSRs). The Agency makes minor changes to correct inadvertent errors and omissions, remove or update obsolete references, and improve the clarity and consistency of certain regulatory provisions. The Agency also makes a change to its rules of organization, procedures, and practice.

DATES: This final rule is effective November 17, 2023, except for amendatory instruction 88, which is effective January 16, 2024.

FOR FURTHER INFORMATION CONTACT: Mr. Nicholas Warren, Regulatory Development Division, Office of Policy, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590–0001; (202) 366–6124; nicholas.warren@dot.gov.

SUPPLEMENTARY INFORMATION:

I. Legal Basis for the Rulemaking

Congress delegated certain powers to regulate interstate commerce to DOT in numerous pieces of legislation, most notably in section 6 of the Department of Transportation Act (DOT Act) (Pub. L. 89–670, 80 Stat. 931, 937, Oct. 15, 1966). Section 6 of the DOT Act transferred to DOT the authority of the former Interstate Commerce Commission (ICC) to regulate the qualifications and maximum hours of service of employees, the safety of operations, and the equipment, of motor carriers in interstate commerce (80 Stat. 939). This authority, first granted to the ICC in the Motor Carrier Act of 1935 (Pub. L. 74–255, 49 Stat. 543, Aug. 9, 1935), now appears in 49 U.S.C. chapter 315. The regulations issued under this authority, as well as subsequently enacted laws, became known as the FMCSRs, codified at 49 Code of Federal Regulations (CFR) parts 350 through 399. The administrative powers to

enforce chapter 315 (codified in 49 U.S.C. chapter 5) were also transferred from the ICC to DOT in 1966, assigned first to the Federal Highway Administration (FHWA), and then to FMCSA. The FMCSA Administrator, whose powers and duties are set forth in 49 U.S.C. 113, has been delegated authority by the Secretary of Transportation (the Secretary) under 49 CFR 1.81 to prescribe regulations and to exercise authority over and with respect to any personnel within the organization, and under 49 CFR 1.87 to carry out the motor carrier functions vested in the Secretary.

Between 1984 and 1999, enforcement of the FMCSRs, the Hazardous Materials Regulations, and the Commercial Regulations was added to FHWA's authority. The statutes granting these authorities include the Motor Carrier Safety Act of 1984 (Pub. L. 98–554, Title II, 98 Stat. 2832, Oct. 30, 1984), codified at 49 U.S.C. chapter 311, subchapter III; the Commercial Motor Vehicle Safety Act of 1986 (Pub. L. 99–570, Title XII, 100 Stat. 3207–170, Oct. 27, 1986), codified at 49 U.S.C. chapter 313; the Hazardous Materials Transportation Uniform Safety Act of 1990, as amended (Pub. L. 101–615, 104 Stat. 3244, Nov. 16, 1990), codified at 49 U.S.C. chapter 51; the Omnibus Transportation Employee Testing Act of 1991 (Pub. L. 102–143, Title V, 105 Stat. 917, 952, Oct. 28, 1991), codified at 49 U.S.C. 31306; the ICC Termination Act of 1995 (Pub. L. 104–88, 109 Stat. 803, Dec. 29, 1995), codified at 49 U.S.C. chapters 131–149; and the Transportation Equity Act for the 21st Century (Pub. L. 105–178, 112 Stat. 107, June 9, 1998).

The Motor Carrier Safety Improvement Act of 1999 (Pub. L. 106–159, 113 Stat. 1748, Dec. 9, 1999) established FMCSA as a new operating administration within DOT, effective January 1, 2000. Accordingly, since that time the motor carrier safety, and certain commercial, responsibilities previously assigned to both the ICC and FHWA have been the jurisdiction of FMCSA. These responsibilities also include regulations relating to section 18 of the Noise Control Act of 1972, codified at 42 U.S.C. 4917, which were originally assigned to the Secretary of Transportation (Pub. L. 92–574, 86 Stat. 1249, Oct. 27, 1972) and delegated to FHWA (39 FR 7791, Feb. 28, 1974), and are now the jurisdiction of FMCSA, as codified at 49 U.S.C. 113(f)(1).¹

Congress subsequently expanded, modified, and amended FMCSA's authority in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Pub. L. 107–56, 115 Stat. 272, Oct. 26, 2001); the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Pub. L. 109–59, 119 Stat. 1144, Aug. 10, 2005); the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat. 1572, June 6, 2008); the Moving Ahead for Progress in the 21st Century Act (MAP–21) (Pub. L. 112–141, 126 Stat. 405, July 6, 2012); Fixing America's Surface Transportation Act (Pub. L. 114–94, 129 Stat. 1312, Dec. 4, 2015); and the Infrastructure Investment and Jobs Act (Pub. L. 117–58, 135 Stat. 429, Nov. 15, 2021).

The specific regulations amended by this rule are based on the statutes detailed above. Generally, the legal authority for each of those provisions was explained when the requirement was originally adopted and is noted at the beginning of each part in 49 CFR.

The Administrative Procedure Act (APA) specifically provides exceptions to its notice and comment rulemaking procedures when an agency finds there is good cause to dispense with them, and incorporates the finding, and a brief statement of reasons therefore, in the rules issued (5 U.S.C. 553(b)(B)). Good cause exists when an agency determines that notice and public comment procedures are impractical, unnecessary, or contrary to the public interest. The amendments made in this final rule primarily correct inadvertent errors and omissions, remove or update obsolete references, and make minor language changes to improve clarity and consistency. The technical amendments do not impose any new material requirements or increase compliance obligations. For these reasons, FMCSA finds good cause that notice and public comment on this final rule are unnecessary.

In addition to amendments that fall within the APA good cause exception, this rule also contains amendments that fall within the APA exception for rules of agency organization, procedure, or practice. The Agency amends part 386, titled “Rules of Practice for FMCSA Proceedings,” so that administrative proceedings under that part are brought before the appointed or duly authorized Agency Decisionmaker rather than the Assistant Administrator. These amendments fall within the exception to the APA's notice and comment rulemaking procedures for “rules of agency organization, procedure, or

practice,” (5 U.S.C. 553(b)(A)), and are therefore excepted from the notice and public comment requirements. Further, the APA does not apply to matters “relating to agency management or personnel” (5 U.S.C. 553(a)(2)); therefore, the notice and comment rulemaking procedures do not apply to the Agency Decisionmaker amendments in part 386.

The APA also allows agencies to make rules effective immediately with good cause (5 U.S.C. 553(d)(3)), instead of requiring publication 30 days prior to the effective date. For the reasons already stated, FMCSA finds there is good cause for this rule to be effective immediately, except as noted in amendatory instruction 84 concerning the revised Medical Examination Report Form, MCSA–5875, in § 391.43(f) and Medical Examiner's Certificate, Form MCSA–5876, in § 391.43(h).

II. Severability

The purpose of this rule is to make technical amendments throughout FMCSA's regulations. These amendments include minor changes to correct inadvertent errors and omissions, remove or update obsolete references, and improve the clarity and consistency of certain regulatory provisions. These technical amendments, which apply to many different parts of FMCSA's regulations, are collected into this single rule for rulemaking efficiency. This rule is bound together by the common character of the changes as technical amendments, rather than a common subject matter. As a result, FMCSA finds that the provisions in this final rule can operate independently and are therefore severable. In the event a court were to invalidate one or more of this rulemaking's unique provisions, the remaining provisions should stand.

III. Section-by-Section Analysis

This section-by-section analysis first describes changes to the regulatory text that affect multiple parts within the FMCSRs, and then the remaining changes to the regulatory text in numerical order.

A. Amendments Affecting Multiple Parts Within Chapter III, Subchapter B

The following amendments affect chapter III, subchapter B, as a whole, or multiple parts within the subchapter.

Redesignation of Appendix B to Subchapter B of Chapter III and Deletion of Reserved Appendices

FMCSA makes several amendments to the appendices of chapter III, subchapter B, to complete a

¹ Responsibility for the regulations related to section 18 of the Noise Control Act was given to FMCSA by Congress in section 101 of the Motor Carrier Safety Improvement Act (Pub. L. 106–159, 113 Stat. 1748, 1750, Dec. 9, 1999).

reorganization of that subchapter. The object of the reorganization is to move each appendix at the end of subchapter B to the specific part to which the appendix most directly pertains, for the purpose of making the appendices more helpful and accessible to the reader. All but one of the appendices have already been moved via redesignation, though appendices A and C through E remain reserved at the end of the subchapter to maintain the appendix ordering.² The last non-reserved appendix, appendix B, is now moved and the reserved appendices are deleted.

Subchapter B formerly had an appendix A entitled “Interpretations.” This appendix contained a collection of interpretations of the FMCSRs. FMCSA’s predecessor agency, FHWA, deemed this appendix obsolete, and removed and reserved it (59 FR 60319, 60322, Nov. 23, 1994). With the relocation of appendix B, appendix A no longer needs to be reserved to maintain the appendix ordering, and so FMCSA deletes reserved appendix A to subchapter B.

FMCSA redesignates appendix B to subchapter B, entitled “Special Agents,” as appendix B to part 390. This appendix describes the authority of persons appointed as special agents of FMCSA, and the obligations of motor carriers and other regulated entities to comply with examination and inspection by special agents. Of the parts within the FMCSRs, this appendix most directly pertains to part 390, “Federal Motor Carrier Safety Regulations; General,” therefore FMCSA redesignates the appendix as appendix B to that part. Note that the appendix is cross-referenced in several sections of the FMCSRs, and conforming amendments are made to update these cross-references, as described later in the section-by-section analysis.

Subchapter B formerly had an appendix C entitled “Written Examination for Drivers.” This appendix related to a written examination covering the FMCSRs, then required by part 391. FHWA determined this requirement was unnecessary and removed and reserved the appendix (59 FR 60319, 60320, Nov. 23, 1994). FMCSA now deletes the reserved appendix.

Subchapter B formerly had an appendix D entitled “Table of Disqualifying Drugs and Other Substances, Schedule I,” and an appendix E entitled “Tables of Disqualifying Drugs and Other Substances, Schedules II Through V.” Earlier versions of the FMCSRs cross-referenced these tables in regulations related to controlled substances use and testing. When the controlled substances use and testing regulations were updated, these cross-references to appendices were replaced with cross-references to drug schedules located elsewhere in the CFR (see, e.g., 62 CFR 37150, 37151, July 11, 1997 (amendment to the definition of *controlled substance* in § 383.5)). The change in cross-references made appendices D and E unnecessary, and FHWA removed and reserved them (62 CFR 37150, 37153, July 11, 1997). FMCSA now deletes these reserved appendices.

Replacement of the Term “Web Site”

FMCSA amends the FMCSRs throughout to change the terms “Web site” and “web site” to “website.” This change adds consistency throughout the FMCSRs by adopting the updated form of the term, which is already used in several regulations (see, e.g., 49 CFR 375.213(a)(1)). FMCSA also changes the term “http” to “https” to ensure the website addresses in the CFR are accurate. This amendment affects §§ 365.105, 365.106T, 365.503, 368.3, 368.3–1T, 368.3T, 369.1, 371.107, 371.111, 371.117, 375.103, 375.213, 385.305, 385.305T, 385.603T, 389.5, 390.19, 390.19T, 390.200T, 390.201, 391.43, 395.22, and appendix A to subpart B of part 395.

Addition of a Hyphen to the Adjective “Third-Party”

FMCSA amends the FMCSRs by adding a hyphen to the term “third party” where it is used as an adjective. In these instances, hyphen usage is recommended by the U.S. Government Publishing Office Style Manual. This amendment increases clarity by updating the term to use the correct grammar to avoid confusion. This amendment does not affect instances where “third party” is used as a noun (see, e.g., 49 CFR 350.207(b)). This amendment affects §§ 382.107, 382.401, 382.403, 382.409, 382.711, 383.5, 383.75, 384.228, 384.229, and 390.15.

B. Part 325—Compliance With Interstate Motor Carrier Noise Emission Standards

Section 325.13 Inspection and Examination of Motor Vehicles

FMCSA replaces “appendix B to subchapter B” with “appendix B to part 390” in paragraph (a). This change reflects the redesignation of appendix B to subchapter B of chapter III—Special Agents, as discussed above in section III.A. The redesignation appends the Special Agents material to part 390, the part to which it most directly pertains.

C. Part 375—Transportation of Household Goods in Interstate Commerce; Consumer Protection Regulations

Section 375.103 What are the definitions of terms used in this part?

FMCSA replaces “§ 1312.3(a)” with “§ 1310.3(a)” in the definition of *tariff* to correct a cross-reference. The definition currently references 49 CFR 1312.3(a) when referring to Surface Transportation Board tariff requirements. However, the Surface Transportation Board tariff requirements for shipments of household goods referenced in the definition of *tariff* are found at 49 CFR 1310.3(a). Accordingly, FMCSA is updating the cross-reference to reflect the correct section of the regulations.

Section 375.403 How must I provide a binding estimate?

FMCSA amends § 375.403(a)(6)(ii) to clarify the requirements for binding estimates provided by household goods motor carriers. Section 375.403(a) describes the requirements for a binding estimate, and § 375.403(a)(6) relates to situations where a shipper of household goods tenders additional household goods or requires additional services not identified in the binding estimate. This section was amended last year to incorporate recommendations from the Household Goods Consumer Protection Working Group (the Working Group) (87 FR 24431, Apr. 26, 2022). Prior to this amendment, § 375.403(a)(6)(ii) referred to a revised binding estimate that accurately listed, in detail, additional household goods or services. As amended, § 375.403(a)(6)(ii) refers to a new, rather than a revised, binding estimate and does not expressly refer to a list of additional goods or services.

FMCSA’s purpose in amending this section was merely to change the requirement from a revised binding estimate to a new binding estimate (87

² In 2021, FMCSA redesignated subchapter B, appendix F (entitled “Commercial Zones”), as appendix A to part 372 (86 FR 57060, 57066, Oct. 14, 2021). In the same rule FMCSA redesignated subchapter B, appendix G (entitled “Minimum Periodic Inspection Standards”), as appendix A to part 396 (86 FR 57060, 57066, Oct. 14, 2021). Both of these appendices were removed and were not reserved.

FR 24431, 24435, Apr. 26, 2022).³ The Working Group had found that, in some cases, revised estimates obscured whether the shipper and mover had agreed to the items to be moved, services to be provided, and price to be paid. The lack of clear terms made it difficult for investigators to address shipper complaints, and the Working Group recommended requiring a new estimate, rather than a revised estimate, to close this loophole.

In making the change from “revised binding estimate” to “new binding estimate” in 2022, however, there was no intent to remove the requirement that the estimate contain an accurate and detailed list of the household goods or services to which the estimate applied, and no such change was discussed in the rulemaking. Rather, FMCSA intended that the new estimate would justify the increased costs for additional goods and services by clearly describing all goods and services included in the shipment, as is required for original estimates in § 375.403(a)(5), including any additional goods tendered or services requested. It has come to FMCSA’s attention that deleting this language may have inadvertently caused confusion about what a new binding estimate must contain. The Agency is therefore amending § 375.403(a)(6)(ii) to restore the language indicating that a list of additional household goods and services is required when a new estimate is prepared.

FMCSA also replaces “§ 375.401(a)” with “§ 375.401(b)(1)” in paragraph (b) to correct a cross reference. The requirements for a binding estimate referenced in paragraph (b) are in § 375.401(b)(1), whereas § 375.401(a) discusses physical surveys and does not mention binding estimates. Accordingly, FMCSA is updating the cross-reference to reflect the correct section of the regulations.

Section 375.405 How must I provide a non-binding estimate?

FMCSA amends § 375.405(b)(7)(ii) to make a clarification similar to the above amendment in § 375.403(a)(6)(ii). Section 375.405(b) describes the

requirements for a non-binding estimate, and § 375.403(b)(7) relates to situations where a shipper of household goods tenders additional household goods or requires additional services not identified in the non-binding estimate, similar to the situation described in § 375.403(a)(6) but in the case of a non-binding estimate instead of a binding estimate. FMCSA amended § 375.405(b)(7)(ii) last year to require a new non-binding estimate, rather than a revised non-binding estimate (87 FR 24431, 24435, Apr. 26, 2022). As with the 2022 amendment to § 375.403(a)(6)(ii), FMCSA’s amendment to streamline the regulatory language inadvertently caused confusion for movers when preparing new estimates. FMCSA now amends § 375.405(b)(7)(ii) to restore the original language, clarifying that the non-binding estimate must provide a detailed and accurate list of the additional household goods or services to which the estimate applies.

Section 375.505 Must I write up a bill of lading?

FMCSA amends § 375.505 by replacing the term “order for service” with the term “bill of lading” in paragraph (b)(4). This revision is consistent with the changes made in the 2022 final rule incorporating recommendations from the Working Group (87 FR 24431, Apr. 26, 2022). As noted in the preamble of that rule, in agreement with Recommendation 9 of the Working Group, FMCSA removed the requirements in part 375 for an order for service as duplicative and updated the requirements for a bill of lading to also include information that was previously contained in an order for service (87 FR 2441). While all references to an order for service in part 375 should have been replaced with references to a bill of lading, the final rule inadvertently left the original language in place in § 375.505(b)(4). FMCSA updates the reference to reflect that the bill of lading has replaced the order for service, consistent with the prior revisions.

D. Part 378—Procedures Governing the Processing, Investigation, and Disposition of Overcharge, Duplicate Payment, or Overcollection Claims

Section 378.2 Definitions

FMCSA revises the definition of *overcollection* in § 378.2(d) so that the Surface Transportation Board is no longer described as a component of DOT. The Surface Transportation Board Reauthorization Act made the Surface Transportation Board completely independent from DOT (Pub. L. 114–

110, 129 Stat. 2228, at 2228–29, Dec. 18, 2015). This amendment removes the characterization of the Surface Transportation Board as a DOT component to conform with the board’s current status as an independent agency.

E. Part 381—Waivers, Exemptions, and Pilot Programs

Section 381.225 Who should I contact if I have questions about the information I am required to submit to the FMCSA or about the status of my request for a waiver?

FMCSA replaces “Office of Bus and Truck Standards and Operations (MC–PS)” with “Office of Carrier, Driver & Vehicle Safety Standards (MC–PS)” to update the name of the office. The office name has changed to “Office of Carrier, Driver & Vehicle Safety Standards” since this section was last amended. FMCSA removes the word “the” preceding the term “FMCSA” in the section heading as an update to the language for consistency. FMCSA also removes the period after the term “SE” in the address provided in the section.

Section 381.315 What will the FMCSA do after the agency receives my application for an exemption?

FMCSA removes the word “the” where it precedes the term “FMCSA” in the section heading for consistency. FMCSA removes the word “to” preceding the word “either” in paragraph (b) and adds the word “to” before the word “deny” to correct a typographical error. In paragraph (d)(1), FMCSA replaces “the Department of Transportation, Docket Management Facility, 1200 New Jersey Ave. SE, Washington, DC 20590–0001” with “Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Washington, DC 20590–0001” to update the office name and location. In paragraph (d)(2), FMCSA replaces “the Department of Transportation, Docket Management Facility” with “Dockets Operations, U.S. Department of Transportation” to update the office name.

F. Part 382—Controlled Substances and Alcohol Use and Testing

Section 382.213 Controlled Substance Use

FMCSA revises § 382.213(b) to replace “pursuant to the instructions of a licensed medical practitioner” with “prescribed by a licensed medical practitioner.” This amendment conforms to FMCSA’s intent as described in its final rule “Harmonizing

³ This intention is further evidenced by the report on which the 2022 amendment was based, Recommendations to the U.S. Department of Transportation to Improve Household Goods Consumer Education, Simplify and Reduce Paperwork, and Condense FMCSA Publication ESA 03005 (Working Group Recommendations). The report is available online at <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/fastact/450791/fast-act-hhg-working-group-report-recommendations.pdf> (last accessed July 19, 2023). The report describes situations where rogue operators take advantage of revised estimates and recommends revising § 375.403(a)(6)(ii) to require a new estimate (see pp. 28–30).

Schedule I Drug Requirements,” published at 77 FR 4479 (Jan. 30, 2012). The Agency had proposed to amend § 382.213(b) by replacing “prescribed by” with “pursuant to the instructions of” a licensed medical practitioner but declined to adopt that change. When declining to adopt the language change in the final rule, FMCSA explained that the proposed change was inconsistent with language used elsewhere in the Agency’s regulations and would be confusing to public. The Agency further stated in the final rule that it was removing the language “pursuant to the instructions of” and replacing it with the original language in this section, “prescribed by” (77 FR 4481). However, that change was inadvertently omitted from the 2012 final rule regulatory text. This amendment conforms the language of § 382.213(b) with FMCSA’s expressed intent.

Section 382.213(c) currently states that employers who have actual knowledge of controlled substance use by drivers must not permit the driver to perform, or continue to perform, safety-sensitive functions. The term *controlled substances*, currently defined in § 382.107, refers to those substances tested for in accordance with 49 CFR 40.82. FMCSA amends § 382.213(c) by adding “as defined in § 382.107” after “controlled substances” and by adding “except when the use is prescribed by a *licensed medical practitioner*, as defined in § 382.107, who is familiar with the driver’s medical history and has advised the driver that the substance will not adversely affect the driver’s ability to safely operate a commercial motor vehicle.” The Agency makes this change to conform § 382.213(c) with the language of § 382.213(b), as revised.

Section 382.217 Employer Responsibilities

Section 382.217 states that no employer may allow, require, permit, or authorize a driver to operate a commercial motor vehicle (CMV) during any period in which an employer determines that a driver is not in compliance with the return-to-duty requirements in 49 CFR part 40, subpart O, after the occurrence of prohibited drug or alcohol use, as specified in paragraphs (a) through (d) or has actual knowledge that a driver has used alcohol while performing safety sensitive functions, used alcohol within 4 hours of performing safety-sensitive functions, or used a controlled substance, as set forth in paragraphs (e)(1) through (3). The term *controlled substance*, currently defined in § 382.107, refers to those substances

tested for in accordance with 49 CFR 40.82.

FMCSA amends paragraph (e)(3) by adding after “controlled substance” the phrase “except when the use is prescribed by a licensed medical practitioner who is familiar with the driver’s medical history and has advised the driver that the substance will not adversely affect the driver’s ability to safely operate a commercial motor vehicle.” Under current regulations, a driver who uses a *controlled substance*, as defined in § 382.107, pursuant to a valid prescription as described above, is not required to comply with return-to-duty requirements. The Agency makes this change to conform with existing practice in FMCSA’s controlled substance use and testing program and to conform paragraph (e)(3) with the language of § 382.213(c), as revised.

G. Part 383—Commercial Driver’s License Standards; Requirements and Penalties

Section 383.25 Commercial Learner’s Permit (CLP)

FMCSA amends § 383.25(a)(1) by adding the words “and is otherwise authorized to operate the CMV for that trip” following “necessary to operate the CMV” in the first sentence. Section 383.25 permits a CLP holder to operate a CMV on public roads for purposes of behind-the-wheel (BTW) training, as long as several minimum conditions are met. One of these conditions, set forth in § 383.25(a)(1), requires that the CLP holder be accompanied by the holder of a valid commercial driver’s license (CDL) who has the proper CDL group and endorsement(s) necessary to operate the CMV and is physically present in the front seat of the CMV next to the CLP holder, or in the case of a passenger vehicle, directly behind or in the first row behind the driver. The CDL holder must have the CLP holder under observation and direct supervision. The amendment clarifies that the CDL holder must also be legally authorized to operate the CMV for the trip. FMCSA makes this revision in response to a petition for rulemaking submitted in April 2023 by the Commercial Vehicle Safety Alliance asking the Agency to clarify this issue in the interest of promoting safety.

The requirement that the CLP holder be accompanied by the holder of a valid CDL who has the proper CDL group and endorsement(s) serves two purposes: (1) the CDL holder, having passed the CDL skills test(s), is knowledgeable in the operation of the CMV for BTW training purposes; and (2) the CDL holder is ready to assume control of the CMV in

the event the CLP holder is not capable of performing a BTW training maneuver, or becomes otherwise incapacitated. As discussed below, FMCSA is aware, however, that situations may occur when the person accompanying the CLP holder has a valid CDL but is nevertheless not legally authorized to operate the CMV due to other existing regulatory requirements.

For example, someone holding a valid CDL may be prohibited from operating a CMV due to a drug or alcohol use or testing violation, in accordance with § 382.501(a). The Agency notes that even after the CDL downgrade provision set forth in § 383.73(q) takes effect on November 18, 2024, thereby removing the CDL privilege from the holder’s license, the downgrade may not be recorded on the CDL holder’s CDLIS record for up to 60 days. Another example involves a CDL holder who is not qualified to operate a CMV because they do not comply with the physical qualification requirements in 49 CFR part 391, subpart E, as required by § 391.11(a). The holder’s CDL is subject to downgrade in accordance with § 383.73(o)(4), due to not having a current medical certificate or medical variance, but again, the downgrade may not be effective for 60 days. Another scenario would be when a CDL holder has self-certified as “excepted interstate commerce” and is thus exempt from medical requirements, but the CDL holder is accompanying the CLP holder in a non-excepted interstate movement. Under these circumstances, operating without a current medical certificate is prohibited. In each of these examples, the individual continues to hold a CDL that is facially valid while they are otherwise prohibited from operating the CMV due to existing regulatory requirements. FMCSA acknowledges that these examples are not intended to be exclusive and that there may be other instances where an individual holding a valid CDL is not authorized to operate the CMV under the FMCSRs.

Section 383.37 Employer Responsibilities

FMCSA replaces the words “he or she” with the words “the employer” in the introductory text of § 383.37 to clarify that the knowledge requirement referred to in the regulation applies to the employer. In paragraph (d), FMCSA replaces the words “he/she is driving” with “the driver is operating” to update the language.

H. Part 384—State Compliance With Commercial Driver's License Program

Section 384.208 Notification of Disqualification

Section 383.5 defines *commercial driver's license (CDL)* as a license issued to an individual by a State or other jurisdiction of domicile, in accordance with the standards contained in this part, which authorizes the individual to operate a class of a CMV. In accordance with § 383.23(b)(1), CDLs issued by Canadian Provinces and Territories in conformity with the Canadian National Safety Code and the *Licencias Federales de Conductor* issued by the United Mexican States are in accordance with the standards of 49 CFR part 383. In § 384.208(a), FMCSA adds the phrase “or other jurisdiction of domicile” after “by another State” and adds the words “or jurisdiction” after “notify the State.” The purpose of these amendments, which reflect current practice, is to conform to the current definition of *CDL* set forth in § 383.5 and to clarify that the commercial licensing entities in Canada and Mexico are included within the scope of this section.

Section 384.209 Notification of Traffic Violations

In paragraphs (a)(1) and (b)(1) of § 384.209, FMCSA adds the phrase “or other jurisdiction of domicile” after “another State” and adds the words “or jurisdiction” between “the licensing entity in the State” and “where the driver is licensed.” The purpose of these amendments, which reflect current practice, is to conform to the current definition of *CDL* set forth in § 383.5 and to clarify that the commercial licensing entities in Canada and Mexico are included within the scope of this section, similar to the amendments to § 384.208 above.

I. Part 386—Rules of Practice for FMCSA Proceedings

Agency Proceedings Before the Agency Decisionmaker

FMCSA amends part 386 by replacing “Assistant Administrator” with “Agency Decisionmaker” throughout the part, excluding §§ 386.1 and 386.2. FMCSA amends §§ 386.1 and 386.2 to make similar, section-specific replacements. These amendments specify that administrative proceedings under applicable provisions of the Federal Motor Carrier Safety Regulations (49 CFR parts 350 through 399), including the commercial regulations (49 CFR parts 360 through 379), and the Hazardous Materials Regulations (49 CFR parts 171 through

180) are not necessarily brought before the Assistant Administrator. The statute requiring FMCSA to have an Assistant Administrator, 49 U.S.C. 113(e), does not require that this person act as the Agency Decisionmaker. Replacing the current language is consistent with the Agency's ability to allow another properly appointed official to assume the duties of Agency Decisionmaker when the Assistant Administrator position is vacant or when the Agency determines that this function is better served by a different official. Consequently, this part will be updated to state that such proceedings are before the Agency Decisionmaker, rather than before the Assistant Administrator. FMCSA also amends part 386 to conform the capitalization of the term “Agency Decisionmaker” throughout the part.

Final Order

FMCSA amends part 386 to correct certain instances where the term “Final Agency Order” is used instead of the term “Final Order.” These terms, while similar, are distinguishable in that a Final Order may be reviewed by the Agency Decisionmaker, while a Final Agency Order is typically issued by the Agency Decisionmaker and constitutes FMCSA's final action in a proceeding. The amendment applies to sections where the regulations are intended to refer to an administratively reviewable Final Order rather than a Final Agency Order as defined in § 386.2. The affected sections are §§ 386.14, 386.16, 386.31, 386.36, 386.61, and 386.64. Taking § 386.14 as an example, the document currently described as a “Notice of Default and Final Agency Order” in § 386.14(c)(1) is appealable to the Agency Decisionmaker for review and is therefore not a Final Agency Order when initially issued, thus the terminology must be corrected to read, “Notice of Default and Final Order.” In addition to replacing the term “Final Agency Order” with “Final Order” where necessary to correct this oversight, the Agency also makes minor conforming amendments to §§ 386.14(c)(3) and 386.16(a)(5). The term “Final Agency Order” is retained in sections describing orders that are Final Agency Orders as defined in § 386.2 (see, e.g., § 386.18).

Section 386.1 Scope of the Rules in This Part

FMCSA amends § 386.1(a) and (b) to replace “Assistant Administrator” with “Agency Decisionmaker,” consistent with the replacement amendment applied throughout part 386, described above. The amendment to § 386.1

includes the removal of the description of the Assistant Administrator as FMCSA's Chief Safety Officer, appearing in § 386.1(a), because the section will no longer refer to the Assistant Administrator.

Section 386.2 Definitions

FMCSA amends the definition of “Agency Decisionmaker” in § 386.2. Currently, the Agency Decisionmaker is the Assistant Administrator or any person to whom this decisionmaking authority has been delegated. The amended definition will make clear that other Agency officials may serve as the Agency Decisionmaker, provided they are appointed by the President or otherwise duly authorized. As discussed above, the Assistant Administrator is not statutorily required to serve in this role and FMCSA has the discretion to delegate these functions to another authorized official.

FMCSA deletes the definition of “Assistant Administrator,” as this term will no longer be used interchangeably with the term “Agency Decisionmaker.”

FMCSA amends the definition of “Final Agency Order” to reflect that such orders are issued by the Agency Decisionmaker or another authorized official, in conformance with the amendments discussed above.

Section 386.3 Separation of Functions

FMCSA amends § 386.3 to conform the capitalization of the terms “Agency Decisionmaker” and “Agency Decisionmakers” with the capitalization used throughout the rest of part 386.

Section 386.12 Complaints

FMCSA amends § 386.12 by correcting the telephone number provided for information on filing a written complaint, in each place that the number appears. The telephone number included in this section was inaccurately published as beginning with “1-800,” but in fact begins with “1-888.” The remainder of the telephone number is unchanged.

J. Part 387—Minimum Levels of Financial Responsibility for Motor Carriers

Section 387.9 Financial Responsibility, Minimum Levels

FMCSA amends § 387.9 by adding the words “in bulk” to one of the commodities listed in table 1, to conform the description of that commodity to other commodity descriptions on the list. Section 387.9 specifies minimum levels of financial responsibility that motor carriers must maintain to comply with other sections within part 387 (see 49 CFR 387.7). The

level of financial responsibility required depends on the type of carriage and the commodity transported, as shown in table 1 of § 387.9. The second row of the table specifies a combination of carriage type and commodity subject to a \$5,000,000 level of financial responsibility.

FMCSA, and FHWA before it, have amended table 1 several times to clarify that the list generally refers to commodities carried in bulk (see 59 FR 63921, 63924 (Dec. 12, 1994), 73 FR 76496 (Dec. 16, 2008), and 86 FR 57060, 57064 (Oct. 14, 2021)). The table previously used various terms to describe the quantities of these commodities and stated that the \$5,000,000 level of financial responsibility applied to, among other commodities, in bulk Division 1.1, 1.2, 1.3 materials, Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A material. As part of a later amendment, this list of commodities was broken into multiple clauses and the word “or” omitted. The term “in bulk” was also inadvertently omitted from the new clause containing Division 2.3, Hazard Zone A materials. This commodity should be described as in bulk, the same as the preceding and succeeding items on this list. FMCSA corrects this oversight by prepending the words “in bulk” to Division 2.3, Hazard Zone A material.

K. Part 389—Rulemaking Procedures—Federal Motor Carrier Safety Regulations

Section 389.3 Definitions

FMCSA revises the definition of *act* in § 389.3 by adding “or commercial activity” to the end of the definition. This revision clarifies that the rulemaking procedures in part 389 apply to the issuance, amendment, and revocation of rules under FMCSA’s statutory authority for both motor carrier safety and commercial activities.⁴ The definition of *act* currently references statutes only covering motor carrier safety. FMCSA’s intent and practice, however, is and has been that part 389 applies to rulemaking procedures in all areas of FMCSA’s authority, including the Agency’s commercial authorities. The lack of reference to commercial authorities is an oversight in § 389.3 that has carried

over from predecessor agency regulations.

When responsibility for administering these commercial authorities was transferred from the ICC to FHWA,⁵ the definition of *act* should have been updated to include the new authorities under which FHWA was promulgating regulations. However, the new commercial authorities were not formally updated into the definition of *act*, although nothing in the regulatory history of this section suggests this omission was intended. When the FHWA regulations were transferred to FMCSA, it was an inadvertent oversight for the Agency to not update the definition to include the commercial statutes. In practice, the Agency has treated these regulatory actions the same. Thus, the Agency remedies this ongoing oversight by revising the definition of *act* to include a reference to FMCSA’s commercial statutory authorities to clarify that the provisions in part 389 apply to the issuance, amendment, and revocation of rules under both safety and commercial authorities.

Section 389.31 Petitions for Rulemaking

FMCSA amends § 389.31 by correcting a typographical error in the Agency’s website address. The published address, “www.FMCSA.gov,” is incorrect and FMCSA replaces it with the correct address, which is “www.FMCSA.dot.gov.”

L. Part 390—Federal Motor Carrier Safety Regulations; General

Sections 390.5 (Suspended) and 390.5T Definitions⁶

FMCSA revises the definition of *employer* in §§ 390.5 (suspended) and 390.5T by replacing the word “terms” with “term” to correct a typographical error. The word “term” is meant to refer to the term “employer” in the singular.

FMCSA revises the definition of *medical variance* in §§ 390.5 (suspended) and 390.5T by removing the words “or § 391.64 of this chapter” in paragraph (1) of the definition. Section 391.64 provided a basis for an

exemption from the Agency’s vision standard for certain drivers who participated in FMCSA’s Vision Waiver Study Program conducted in the 1990s. On January 21, 2022, FMCSA published a final rule adopting an alternative vision standard for individuals to be medically certified to operate CMVs in interstate commerce (87 FR 3390). The rule also eliminated physical qualification under § 391.64 as of March 22, 2023 (87 FR 7756, Feb. 10, 2022). Because this date has passed, FMCSA removes the obsolete reference to medical certification under § 391.64 from the definition. In addition, FMCSA adds the word “or” to the end of paragraph (1) of the definition to make the list grammatically correct and reflect that either of the documents listed is included in the definition, as indicated in the introductory paragraph of the term.

FMCSA revises the definition of *special agent* in §§ 390.5 (suspended) and 390.5T by replacing “appendix B to subchapter B—Special agents” and “appendix B to this subchapter—Special agents,” respectively, with “appendix B to this part.” This change reflects the redesignation of appendix B to subchapter B of chapter III discussed above in section III.A. The redesignation appends the Special Agents material to part 390, the part to which it most directly pertains.

Section 390.25 Extension of Relief From Regulations—Emergencies

FMCSA revises § 390.25 by replacing the words “he or she” with the word “it” in the last sentence of the section. This amendment also corrects an error from a previous technical amendment. In FMCSA’s technical amendments rule published October 14, 2021, the Agency replaced the term “the FMCSA Field Administrator” with the term “FMCSA,” and a corresponding edit should have been made to replace “he or she” with “it” in the same sentence (see 86 FR 57060, 57064–65, Oct. 14, 2021). This amendment corrects that oversight.

Section 390.27 Locations of Motor Carrier Safety Service Centers

FMCSA revises § 390.27 to change the address of the Southern Service Center from 1800 Century Boulevard, Suite 1700, Atlanta, Georgia 30345–3220, to 61 Forsyth Street SW, Suite 3M40, Atlanta, GA 30303. The Southern Service Center moved in May 2021, requiring this update to remove the obsolete address.

⁴ FMCSA’s commercial household goods regulations in part 375 cite part 389 when referring to procedures required to update regulatory requirements relating to appendix A of part 375 through notice and comment rulemaking (49 CFR 375.213(c)(1)).

⁵ See the Legal Basis section above for an overview of the relevant statutes that transferred authority for certain provisions from the ICC to FHWA, and subsequently to FMCSA.

⁶ On January 17, 2017, FMCSA suspended certain regulations relating to the electronic Unified Registration System and delayed their effective date indefinitely (82 FR 5292). The suspended regulations were replaced by temporary provisions that contain the requirements in place on January 13, 2017. Section 390.5 was one of the sections suspended and § 390.5T, which is currently in effect, was one of the replacement sections added (82 FR 5299).

M. Part 391—Qualifications of Drivers and Longer Combination Vehicle (LCV) Driver Instructors

Section 391.23 Investigation and Inquiries

FMCSA revises § 391.23 to clarify that the initial motor vehicle record (MVR) required by § 391.23(a) is to cover the prior 3 years. This revision addresses an inadvertent error in a previous rulemaking titled, “Medical Certification Requirements as Part of the CDL,” published at 73 FR 73095 (Dec. 1, 2008). FMCSA’s intention in that rulemaking was to revise paragraph (a)(1) to use the terms “State driver license agency” and “motor vehicle record” (73 FR 73113). Prior to the rule, paragraph (a)(1) read, “An inquiry into the driver’s driving record during the preceding 3 years to the appropriate agency of every State in which the driver held a motor vehicle operator’s license or permit during those 3 years; and.” The rule revised the paragraph to read “An inquiry to each State where the driver held or holds a motor vehicle operator’s license or permit during the preceding 3 years to obtain that driver’s motor vehicle record.” The rulemaking provided no mention of, nor rationale for, the removal of the language requiring the initial MVR to cover the prior 3 years.

FMCSA now fixes this unintentional deletion by adding “covering that driver’s prior 3-year driving history” to the end of paragraph (a)(1). The accidental removal of the language in the 2008 rule has not changed how the 3-year requirement has been applied since 2008, but FMCSA believes adding that language back to paragraph (a)(1) increases clarity for regulated entities.

Section 391.43 Medical Examination; Certificate of Physical Examination

FMCSA amends three paragraphs in § 391.43 to remove obsolete references to medical certification under § 391.64. As noted above, § 391.64 provided a basis for an exemption from the Agency’s vision standard for certain drivers who participated in FMCSA’s Vision Waiver Study Program conducted in the 1990s. On January 21, 2022, FMCSA published a final rule adopting an alternative vision standard for individuals to be medically certified to operate CMVs in interstate commerce (87 FR 3390). The rule also eliminated physical qualification under § 391.64 as of March 22, 2023 (87 FR 7756, Feb. 10, 2022).

FMCSA revises § 391.43 by removing and reserving paragraph (e). Paragraph (e) relates only to drivers medically certified under § 391.64.

In paragraph (f), FMCSA changes the Medical Examination Report Form, MCSA–5875, by removing the option for medical certification under § 391.64 in the “Medical Examiner Determination (Federal)” section. Use of the revised form will become effective 60 days after this rule is published to provide sufficient time for the public to make any necessary information technology changes.

In paragraph (h), FMCSA changes the Medical Examiner’s Certificate, Form MCSA–5876, by removing the option for medical certification under § 391.64 in the first section on the form. Use of the revised form will become effective 60 days after this rule is published to provide sufficient time for the public to make any necessary information technology changes.

Section 391.45 Persons Who Must Be Medically Examined and Certified

FMCSA revises § 391.45 by removing and reserving paragraph (d). Paragraph (d) relates only to drivers medically certified under § 391.64. As previously noted, § 391.64 provided a basis for an exemption from the Agency’s vision standard for certain drivers who participated in FMCSA’s Vision Waiver Study Program conducted in the 1990s. On January 21, 2022, FMCSA published a final rule adopting an alternative vision standard for individuals to be medically certified to operate CMVs in interstate commerce (87 FR 3390). The rule also eliminated physical qualification under § 391.64 as of March 22, 2023 (87 FR 7756, Feb. 10, 2022). Because this date has passed, FMCSA removes the obsolete reference to medical certification under § 391.64.

Section 391.47 Resolution of Conflicts of Medical Evaluation

FMCSA amends § 391.47 to reflect current Agency terminology and eligibility to conduct a driver physical qualification examination. Section 391.47 provides a process to resolve conflicting medical certification determinations between the medical examiner for the driver and the medical examiner for the motor carrier. When § 391.47 was adopted in 1970, the term “medical examiner” was used in § 391.47 to describe the individuals who conducted the physical qualification examination (35 FR 6458, Apr. 22, 1970). At that time, § 391.43(a) provided that only a physician, *i.e.*, a licensed doctor of medicine or osteopathy, was allowed to conduct such examinations. In 1977, § 391.47 was completely rewritten and an opinion by an impartial medical specialist in the field in which the medical conflict arose was

added to the process (42 FR 18076, Apr. 5, 1977). The term “physician” was used throughout the revised section to replace medical examiner and to include the impartial medical specialist. The intent was to ensure that the medical specialist was well qualified. The relevant provisions of § 391.47 have not been revised since 1977.

Over time, the categories of medical professionals eligible to conduct physical qualification examinations have expanded and the term used to describe them has changed. In 1992, a new definition of *health care professional* was added to § 390.5 (57 FR 33276, July 28, 1992). The term was defined as a person who is licensed, certified, and/or registered, in accordance with applicable State laws and regulations, to perform physical examinations. It included, but was not limited to, doctors of medicine, doctors of osteopathy, physician assistants, advanced practice nurses, and doctors of chiropractic. Section 391.43(a)(1) was amended to provide that the physical qualification examination must be performed by a licensed *health care professional* as defined in § 390.5.

In 1993, §§ 390.5 and 391.43 were amended with a technical amendment that changed the term “health care professional” wherever it appeared back to the previous usage of “medical examiner” without a change to the definition (58 FR 59194, Nov. 8, 1993). In 2012, the definition of *medical examiner* in § 390.5 was amended with respect to physical qualification examinations conducted on and after May 21, 2014, to mean an individual certified by FMCSA and listed on the National Registry of Certified Medical Examiners in accordance with 49 CFR part 390 (77 FR 24104, Apr. 20, 2012). New § 390.103(a)(1) provides the professional licensure requirements for medical examiner eligibility, which are essentially the same as those in the prior definition of *medical examiner*.

Section 391.47 was inadvertently overlooked when these changes occurred; therefore, FMCSA amends § 391.47 to conform to current Agency terminology and medical examiner eligibility. In paragraphs (b)(1) and (7), FMCSA changes “physicians” to “medical examiners and medical specialists.” In paragraph (b)(2), FMCSA changes “physician” to “medical examiner” each place that it appears.

In addition, FMCSA revises § 391.47 by removing the mail stop “MC–PS” in each place that it appears. This amendment corrects an inadvertent error from a previous technical amendment. In FMCSA’s technical amendments rule published October 14,

2021, the Agency simplified many sections across various parts of the CFR to remove or otherwise update references to specific titles or offices to provide greater flexibility in delegations (86 FR 57060). The Agency replaced references to the Office of Carrier, Driver and Vehicle Safety Standards and its Director with the term “FMCSA,” but failed to remove the corresponding mail stop (86 FR 57074). This amendment corrects that oversight in § 391.47(c), (d)(1) and (2), and (f) by removing the reference to “MC-PS.”

N. Part 395—Hours of Service of Drivers

Section 395.2 Definitions

FMCSA amends the definition of *utility service vehicle* provided in § 395.2 by adding broadband-internet and cellular telephone operations as examples of public utilities in paragraph (1) of the definition. The definition of *utility service vehicle* in § 395.2 is used in part 391 as part of the hours of service regulations. The definition provides a non-exhaustive list of public utilities in paragraph (1) as an illustration of which CMVs should be considered utility service vehicles. Broadband-internet and cellular telephone operations are public utilities, as evidenced by the Federal Communication Commission’s classification of these services as public utilities. Many CMVs are used to repair, maintain, and operate facilities necessary for the delivery of broadband-internet and cellular telephone operations. Given the prevalence of these operations and associated vehicles, FMCSA amends the list of public utilities in § 395.2 by adding broadband-internet and cellular telephone operations.

Section 395.13 Drivers Ordered Out of Service

FMCSA replaces “appendix B to this subchapter” with “appendix B to part 390” in paragraph (a). This change reflects the redesignation of appendix B to subchapter B of chapter III discussed above in section III.A. The redesignation appends the Special Agents material to part 390, the part to which it most directly pertains.

O. Part 396—Inspection, Repair, and Maintenance

Section 396.9 Inspection of Motor Vehicles and Intermodal Equipment in Operation

FMCSA replaces “appendix B to this subchapter” with “appendix B to part 390” in paragraph (a). This change reflects the redesignation of appendix B to subchapter B of chapter III discussed

above in section III.A. The redesignation appends the Special Agents material to part 390, the part to which it most directly pertains.

P. Part 398—Transportation of Migrant Workers

Section 398.8 Administration Inspection of Motor Vehicles in Operation

FMCSA replaces “Appendix B of chapter III of this title” with “appendix B to part 390” in paragraph (a). This paragraph references the Special Agents appendix, although it incorrectly describes the appendix as appended to chapter III rather than subchapter B. FMCSA amends this section to reflect the redesignation of appendix B to subchapter B of chapter III discussed above in section III.A. The redesignation appends the Special Agents material to part 390, the part to which it most directly pertains.

IV. Regulatory Analyses

A. Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), E.O. 14094 (Modernizing Regulatory Review), and DOT Regulatory Policies and Procedures

FMCSA has considered the impact of this final rule under E.O. 12866 (58 FR 51735, Oct. 4, 1993), Regulatory Planning and Review, E.O. 13563 (76 FR 3821, Jan. 21, 2011), Improving Regulation and Regulatory Review, and by E.O. 14094 (88 FR 21879, Apr. 11, 2023), Modernizing Regulatory Review. The Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) determined that this final rule is not a significant regulatory action under section 3(f) of E.O. 12866, as supplemented by E.O. 13563 and E.O. 14094, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. Accordingly, OMB has not reviewed it under that E.O. In addition, this rule is not significant within the meaning of DOT regulations (49 CFR 5.13(a)). The amendments made in this final rule primarily correct inadvertent errors and omissions, remove or update obsolete references, and make minor language changes to improve clarity and consistency. Some changes are statutorily mandated or relate to previous changes that were statutorily mandated. In accommodating those changes, the Agency is performing nondiscretionary, ministerial acts. Other changes merely align regulatory requirements with the underlying statutory authority. None of the changes

in this final rule impose new material requirements or increase compliance obligations; therefore, this final rule imposes no new costs and a full regulatory evaluation is unnecessary.

B. Congressional Review Act

This rule is not a *major rule* as defined under the Congressional Review Act (5 U.S.C. 801–808).⁷

C. Regulatory Flexibility Act (Small Entities)

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612), FMCSA is not required to complete a regulatory flexibility analysis because, as discussed earlier in the Legal Basis for the Rulemaking section, this action is not subject to notice and public comment under section 553(b) of the APA.

D. Assistance for Small Entities

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857, Mar. 29, 1996), FMCSA wants to assist small entities in understanding this final rule so they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the final rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance; please consult the person listed under the **FOR FURTHER INFORMATION CONTACT** section of this final rule.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business Administration’s Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency’s responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1–888–REG–FAIR (1–888–734–3247). DOT has a policy regarding the rights of small entities to regulatory enforcement

⁷ A *major rule* means any rule that the Office of Management and Budget finds has resulted in or is likely to result in (a) an annual effect on the economy of \$100 million or more; (b) a major increase in costs or prices for consumers, individual industries, geographic regions, Federal, State, or local government agencies; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets (5 U.S.C. 802(4)).

fairness and an explicit policy against retaliation for exercising these rights.

E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or Tribal government, in the aggregate, or by the private sector of \$192 million (which is the value equivalent of \$100 million in 1995, adjusted for inflation to 2022 levels) or more in any 1 year. This final rule will not result in such an expenditure.

F. Paperwork Reduction Act

This final rule contains no new information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

G. E.O. 13132 (Federalism)

A rule has implications for federalism under section 1(a) of E.O. 13132 if it has “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.” FMCSA has determined that this rule will not have substantial direct costs on or for States, nor will it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation. Therefore, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Impact Statement.

H. Privacy

Section 522 of title I of division H of the Consolidated Appropriations Act, 2005 (Pub. L. 108–447, 118 Stat. 2809, 3268, Dec. 8, 2004 (5 U.S.C. 552a note)), requires the Agency to conduct a privacy impact assessment of a regulation that will affect the privacy of individuals. Because this rule does not require the collection of personally identifiable information, the Agency is not required to conduct a privacy impact assessment.

The Privacy Act (5 U.S.C. 552a) applies only to Federal agencies and any non-Federal agency that receives records contained in a system of records from a Federal agency for use in a matching program.

The E-Government Act of 2002 (Pub. L. 107–347, sec. 208, 116 Stat. 2899, 2921, Dec. 17, 2002), requires Federal agencies to conduct a privacy impact assessment for new or substantially changed technology that collects,

maintains, or disseminates information in an identifiable form. No new or substantially changed technology will collect, maintain, or disseminate information as a result of this rule. Accordingly, FMCSA has not conducted a privacy impact assessment.

I. E.O. 13175 (Indian Tribal Governments)

This rule does not have Tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

J. National Environmental Policy Act of 1969

FMCSA analyzed this rule pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and determined this action is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1 (69 FR 9680 (Mar. 1, 2004)), Appendix 2, paragraph 6.b and c. These Categorical Exclusions address technical amendments and other minor amendments such as those found in this rulemaking, as well as regulations concerning internal agency functions, organization or personnel administration. Therefore, preparation of an environmental assessment or environmental impact statement is not necessary.

List of Subjects

49 CFR Part 325

Motor carriers, Noise control.

49 CFR Part 365

Administrative practice and procedure, Brokers, Buses, Freight forwarders, Maritime carriers, Mexico, Motor carriers, Moving of household goods.

49 CFR Part 368

Administrative practice and procedure, Mexico, Motor carriers.

49 CFR Part 369

Motor carriers, Reporting and recordkeeping requirements.

49 CFR Part 371

Brokers, Motor carriers, Reporting and recordkeeping requirements.

49 CFR Part 375

Advertising, Consumer protection, Freight, Highways and roads, Insurance, Motor carriers, Moving of household goods, Reporting and recordkeeping requirements.

49 CFR Part 378

Freight forwarders, Investigations, Motor carriers, Moving of household goods.

49 CFR Part 381

Motor carriers.

49 CFR Part 382

Administrative practice and procedure, Alcohol abuse, Drug abuse, Drug testing, Highway safety, Motor carriers, Penalties, Safety, Transportation.

49 CFR Part 383

Administrative practice and procedure, Alcohol abuse, Drug abuse, Drug testing, Highway safety, Motor carriers, Penalties, Safety, Transportation.

49 CFR Part 384

Administrative practice and procedure, Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

49 CFR Part 385

Administrative practice and procedure, Highway safety, Mexico, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

49 CFR Part 386

Administrative practice and procedure, Brokers, Freight forwarders, Hazardous materials transportation, Highway safety, Highways and roads, Motor carriers, Motor vehicle safety, Penalties.

49 CFR Part 387

Buses, Freight, Freight forwarders, Hazardous materials transportation, Highway safety, Insurance, Intergovernmental relations, Motor carriers, Motor vehicle safety, Moving of household goods, Penalties, Reporting and recordkeeping requirements, Surety bonds.

49 CFR Part 389

Administrative practice and procedure, Highway safety, Motor carriers, Motor vehicle safety.

49 CFR Part 390

Highway safety, Intermodal transportation, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

49 CFR Part 391

Alcohol abuse, Drug abuse, Drug testing, Highway safety, Motor carriers, Reporting and recordkeeping requirements, Safety, Transportation.

49 CFR Part 395

Highway safety, Motor carriers, Reporting and recordkeeping requirements.

49 CFR Part 396

Highway safety, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

49 CFR Part 398

Highway safety, Migrant labor, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

In consideration of the foregoing, FMCSA amends 49 CFR chapter III as set forth below:

PART 325—COMPLIANCE WITH INTERSTATE MOTOR CARRIER NOISE EMISSION STANDARDS

■ 1. The authority citation for part 325 continues to read as follows:

Authority: 42 U.S.C. 4917; 49 U.S.C. 301; and 49 CFR 1.87.

■ 2. Amend § 325.13 by, in paragraph (a):

- a. Adding a heading; and
- b. Removing the words “appendix B to subchapter B” and adding in their place “appendix B to part 390 of this chapter”.

§ 325.13 Inspection and examination of motor vehicles.

(a) *Authority.* * * *
* * * * *

Appendix A to Subchapter B of Chapter III [Removed]

■ 3. Under the authority of 44 U.S.C. 1505 and 1510, remove reserved appendix A to subchapter B of chapter III.

Appendix B to Subchapter B of Chapter III [Redesignated as Appendix B to Part 390]

■ 4. Under the authority of 49 U.S.C. 113, redesignate appendix B to subchapter B of chapter III as appendix B to part 390.

Appendices C Through E to Subchapter B of Chapter III [Removed]

■ 5. Under the authority of 44 U.S.C. 1505 and 1510, remove reserved appendices C through E to subchapter B of chapter III.

PART 365—RULES GOVERNING APPLICATIONS FOR OPERATING AUTHORITY

■ 6. The authority citation for part 365 continues to read as follows:

Authority: 5 U.S.C. 553 and 559; 49 U.S.C. 13101, 13301, 13901–13906, 13908, 14708, 31133, 31138, and 31144; 49 CFR 1.87.

§ 365.105 [Amended]

■ 7. Amend § 365.105 by:

- a. Lifting the suspension of the section;
- b. In paragraph (c), removing “Web site” and “http” and in their places adding “website” and “https”, respectively; and
- c. Suspending the section indefinitely.

§ 365.106T [Amended]

■ 8. Amend § 365.106T by, in paragraph (c), removing “Web site” and “http” and in their places adding “website” and “https”, respectively.

Subpart D [Suspension Lifted]

■ 9. Lift the suspension of subpart D, consisting of §§ 365.401 through 365.405.

§§ 365.401, 365.403, and 365.405 [Suspended]

■ 10. Suspend §§ 365.401, 365.403, and 365.405 indefinitely.

§ 365.503 [Amended]

■ 11. Amend § 365.503 by, in paragraph (d), removing “Web site” and “http” and in their places adding “website” and “https”, respectively.

PART 368—APPLICATION FOR A CERTIFICATE OF REGISTRATION TO OPERATE IN MUNICIPALITIES IN THE UNITED STATES ON THE UNITED STATES–MEXICO INTERNATIONAL BORDER OR WITHIN THE COMMERCIAL ZONES OF SUCH MUNICIPALITIES

■ 12. The authority citation for part 368 continues to read as follows:

Authority: 49 U.S.C. 13301, 13902, 13908; Pub. L. 106–159, 113 Stat. 1748; and 49 CFR 1.87.

§ 368.3 [Amended]

■ 13. Amend § 368.3 by:

- a. Lifting the suspension of the section;
- b. In paragraph (f), removing “Web site” and “http” and in their places adding “website” and “https”, respectively; and
- c. Suspending the section indefinitely.

§ 368.3–1T [Amended]

■ 14. Amend § 368.3–1T by, in paragraph (c), removing “Web site” and “http” and in their places adding “website” and “https”, respectively.

§ 368.3T [Amended]

■ 15. Amend § 368.3T by, in paragraph (f), removing “Web site” and “http” and in their places adding “website” and “https”, respectively.

PART 369—REPORTS OF MOTOR CARRIERS

■ 16. The authority citation for part 369 continues to read as follows:

Authority: 49 U.S.C. 14123; 49 CFR 1.87.

§ 369.1 [Amended]

■ 17. Amend § 369.1 by, in paragraph (b), removing “Web site” and “http” and in their places adding “website” and “https”, respectively.

PART 371—BROKERS OF PROPERTY

■ 18. The authority citation for part 371 continues to read as follows:

Authority: 49 U.S.C. 13301, 13501, and 14122; subtitle B, title IV of Pub. L. 109–59; and 49 CFR 1.87.

§ 371.107 [Amended]

■ 19. Amend § 371.107 by:

- a. Removing the words “Web site(s)” wherever they appear and in their place adding the word “website(s)”; and
- b. In paragraph (e), removing “of this part”.

§ 371.111 [Amended]

■ 20. Amend § 371.111 by, in paragraph (a)(1), removing the words “Web site” and in their place adding the word “website”.

§ 371.117 [Amended]

■ 21. Amend § 371.117 by, in paragraph (a), removing the words “Web site” and in their place adding the word “website”.

PART 375—TRANSPORTATION OF HOUSEHOLD GOODS IN INTERSTATE COMMERCE; CONSUMER PROTECTION REGULATIONS

■ 22. The authority citation for part 375 continues to read as follows:

Authority: 49 U.S.C. 13102, 13301, 13501, 13704, 13707, 13902, 14104, 14706, 14708; subtitle B, title IV of Pub. L. 109–59; and 49 CFR 1.87.

§ 375.103 [Amended]

■ 23. Amend § 375.103 by:

- a. In the definition of “Advertisement”, removing the words

“Web site” and in their place adding the word “website”; and

- b. In the definition of “Tariff”, removing “§ 1312.3(a)” and adding in its place “§ 1310.3(a)”.

§ 375.213 [Amended]

- 24. Amend § 375.213 by, in paragraph (d), removing the words “Web site” and in their place adding the word “website”.

- 25. Amend § 375.403 by revising paragraph (a)(6)(ii) and the first sentence of paragraph (b) to read as follows:

§ 375.403 How must I provide a binding estimate?

- (a) * * *
- (6) * * *

(ii) Prepare a new binding estimate prior to loading. The new estimate must accurately list, in detail, the additional household goods or services included in the shipment. The new estimate must be signed by the individual shipper. You should maintain a record of the date, time, and manner that the new estimate was prepared.

* * * * *

(b) In accordance with § 375.401(b)(1), you may impose a charge for providing a written binding estimate. * * *

* * * * *

- 26. Amend § 375.405 by revising paragraph (b)(7)(ii) to read as follows:

§ 375.405 How must I provide a non-binding estimate?

* * * * *

- (b) * * *
- (7) * * *

(ii) Prepare a new non-binding estimate which must be signed by the individual shipper. The new estimate must accurately list, in detail, the additional household goods or services included in the shipment. You should maintain a record of the date, time, and manner that the new estimate was prepared.

* * * * *

§ 375.505 [Amended]

- 27. Amend § 375.505 by, in paragraph (b)(4), removing the words “order for service” and in their place adding the words “bill of lading”.

PART 378—PROCEDURES GOVERNING THE PROCESSING, INVESTIGATION, AND DISPOSITION OF OVERCHARGE, DUPLICATE PAYMENT, OR OVERCOLLECTION CLAIMS

- 28. The authority citation for part 378 continues to read as follows:

Authority: 49 U.S.C. 13321, 14101, 14704 and 14705; and 49 CFR 1.87.

§ 378.2 [Amended]

- 29. Amend § 378.2 by, in paragraph (d), removing the words “United States Department of Transportation’s”.

PART 381—WAIVERS, EXEMPTIONS, AND PILOT PROGRAMS

- 30. The authority citation for part 381 continues to read as follows:

Authority: 49 U.S.C. 31136(e), 31315; and 49 CFR 1.87.

- 31. Revise § 381.225 to read as follows:

§ 381.225 Who should I contact if I have questions about the information I am required to submit to FMCSA or about the status of my request for a waiver?

You should contact the Federal Motor Carrier Safety Administration, Office of Carrier, Driver & Vehicle Safety (MC-PS), 1200 New Jersey Ave. SE, Washington, DC 20590-0001.

- 32. Amend § 381.315 by revising the section heading, paragraph (b), and the first sentences of paragraphs (d)(1) and (2) to read as follows:

§ 381.315 What will FMCSA do after the agency receives my application for an exemption?

* * * * *

(b) After a review of the comments received in response to the **Federal Register** notice described in paragraph (a) of this section, the Federal Motor Carrier Safety Administration will make a recommendation(s) to the Administrator either to grant or to deny the exemption. Notice of the Administrator’s decision will be published in the **Federal Register**.

* * * * *

(d) * * *

(1) Interested parties may view the information contained in the docket by visiting Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Washington, DC 20590-0001. * * *

(2) Internet users can access all information received by Dockets Operations, U.S. Department of Transportation by using the Federal Docket Management System using the uniform resources locator (URL): <https://www.regulations.gov>. * * *

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

- 33. The authority citation for part 382 continues to read as follows:

Authority: 49 U.S.C. 31133, 31136, 31301 *et seq.*, 31502; sec. 32934 of Pub. L. 112-141, 126 Stat. 405, 830; and 49 CFR 1.87.

- 34. Amend § 382.107 by removing the definition of “Consortium/Third party administrator” and adding in its place the definition of “Consortium/Third-party administrator” to read as follows:

§ 382.107 Definitions.

* * * * *

Consortium/Third-party administrator (C/TPA) means a service agent that provides or coordinates one or more drug and/or alcohol testing services to DOT-regulated employers. C/TPAs typically provide or coordinate the provision of a number of such services and perform administrative tasks concerning the operation of the employers’ drug and alcohol testing programs. This term includes, but is not limited to, groups of employers who join together to administer, as a single entity, the DOT drug and alcohol testing programs of its members (*e.g.*, having a combined random testing pool). C/TPAs are not “employers” for purposes of this part, except as provided in § 382.705(c).

* * * * *

§ 382.213 [Amended]

- 35. Amend § 382.213 by:

- a. In paragraph (b), removing the words “pursuant to the instructions of a licensed medical practitioner” and in their place adding the words “prescribed by a licensed medical practitioner”; and

- b. In paragraph (c):

- i. Adding the words “, as defined in § 382.107,” after the words “controlled substance”; and

- ii. Adding the words “, except when the use is prescribed by a *licensed medical practitioner*, as defined in § 382.107, who is familiar with the driver’s medical history and has advised the driver that the substance will not adversely affect the driver’s ability to safely operate a commercial motor vehicle” to the end of the paragraph.

§ 382.217 [Amended]

- 36. Amend § 382.217 by, in paragraph (e)(3), adding the words “, except when the use is prescribed by a licensed medical practitioner who is familiar with the driver’s medical history and has advised the driver that the substance will not adversely affect the driver’s ability to safely operate a commercial motor vehicle” after the words “controlled substance”.

§ 382.401 [Amended]

- 37. Amend § 382.401 by, in paragraph (c)(6)(i), removing the words “third

party” and in their place adding the word “third-party”.

§ 382.403 [Amended]

■ 38. Amend § 382.403 by, in paragraph (e), removing the words “Consortium/Third party administrator” and in their place adding the words “Consortium/Third-party administrator”.

§ 382.409 [Amended]

■ 39. Amend § 382.409 by:
 ■ a. Removing the words “consortium/third party administrator” in each place they appear and in their place adding the words “consortium/third-party administrator”; and
 ■ b. Removing the words “third party administrator” in each place they appear and in their place adding the words “third-party administrator”.

§ 382.711 [Amended]

■ 40. Amend § 382.711 by, in paragraph (d) introductory text, removing the words “consortium/third party administrator” and in their place adding the words “consortium/third-party administrator”.

PART 383—COMMERCIAL DRIVER'S LICENSE STANDARDS; REQUIREMENTS AND PENALTIES

■ 41. The authority citation for part 383 continues to read as follows:

Authority: 49 U.S.C. 521, 31136, 31301 *et seq.*, and 31502; secs. 214 and 215 of Pub. L. 106–159, 113 Stat. 1748, 1766, 1767; sec. 1012(b) of Pub. L. 107–56, 115 Stat. 272, 297, sec. 4140 of Pub. L. 109–59, 119 Stat. 1144, 1746; sec. 32934 of Pub. L. 112–141, 126 Stat. 405, 830; sec. 23019 of Pub. L. 117–58, 135 Stat. 429, 777; and 49 CFR 1.87.

§ 383.5 [Amended]

■ 42. Amend § 383.5 by removing the words “Third party” and “third party” in each place they appear and in their places adding the words “Third-party” and “third-party”, respectively.

§ 383.25 [Amended]

■ 43. Amend § 383.25 by, in paragraph (a)(1), adding the words “and is otherwise authorized to operate the CMV for that trip” after the words “necessary to operate the CMV”.

§ 383.37 [Amended]

■ 44. Amend § 383.37 by:
 ■ a. In the introductory text, removing the words “he or she” and in their place adding the words “the employer”; and
 ■ b. In paragraph (d), removing the words “he/she is driving” and in their place adding the words “the driver is operating”.
 ■ 45. Amend § 383.75 by revising the section heading and paragraphs (a)

introductory text, (a)(2) through (4), (a)(5) introductory text, (a)(5)(ii), (a)(6), (a)(8)(ii), (a)(8)(iii)(B), (a)(8)(iv) through (viii), (a)(8)(ix) introductory text, (a)(8)(ix)(A) through (C), (E), and (F), (b), and (c) to read as follows:

§ 383.75 Third-party testing.

(a) *Third-party tests.* A State may authorize a third-party tester to administer the skills tests as specified in subparts G and H of this part, if the following conditions are met:

* * * * *

(2) The State must conduct an on-site inspection of each third-party tester at least once every 2 years, with a focus on examiners with irregular results such as unusually high or low pass/fail rates;

(3) The State must issue the third-party tester a CDL skills testing certificate upon the execution of a third-party skills testing agreement;

(4) The State must issue each third-party CDL skills test examiner a skills testing certificate upon successful completion of a formal skills test examiner training course prescribed in § 384.228 of this chapter;

(5) The State must, at least once every 2 years, do one of the following for each third-party examiner:

* * * * *

(ii) Have State employees co-score along with the third-party examiner during CDL skills tests to compare pass/fail results; or

* * * * *

(6) The State must take prompt and appropriate remedial action against a third-party tester that fails to comply with State or Federal standards for the CDL testing program, or with any other terms of the third-party contract;

* * * * *

(8) * * *

(ii) Require that all third-party skills test examiners meet the qualification and training standards of § 384.228 of this chapter;

(iii) * * *

(B) Have State employees co-score along with the third-party examiner during CDL skills tests to compare pass/fail results; or

* * * * *

(iv) Reserve unto the State the right to take prompt and appropriate remedial action against a third-party tester that fails to comply with State or Federal standards for the CDL testing program, or with any other terms of the third-party contract;

(v) Require the third-party tester to initiate and maintain a bond in an amount determined by the State to be sufficient to pay for re-testing drivers in the event that the third party or one or

more of its examiners is involved in fraudulent activities related to conducting skills testing of applicants for a CDL. Exception: A third-party tester that is a government entity is not required to maintain a bond;

(vi) Require the third-party tester to use only CDL skills examiners who have successfully completed a formal CDL skills test examiner training course as prescribed by the State and have been certified by the State as a CDL skills examiner qualified to administer CDL skills tests;

(vii) Require the third-party tester to use designated road test routes that have been approved by the State;

(viii) Require the third-party tester to submit a schedule of CDL skills testing appointments to the State no later than two business days prior to each test; and

(ix) Require the third-party tester to maintain copies of the following records at its principal place of business:

(A) A copy of the State certificate authorizing the third-party tester to administer a CDL skills testing program for the classes and types of commercial motor vehicles listed;

(B) A copy of each third-party examiner's State certificate authorizing the third-party examiner to administer CDL skills tests for the classes and types of commercial motor vehicles listed;

(C) A copy of the current third-party agreement;

* * * * *

(E) A copy of the third-party tester's State-approved road test route(s); and

(F) A copy of each third-party examiner's training record.

(b) *Proof of testing by a third party.* The third-party tester must notify the State driver licensing agency through secure electronic means when a driver applicant passes skills tests administered by the third-party party tester.

(c) *Minimum number of tests conducted.* The State must revoke the skills testing certification of any examiner who does not conduct skills test examinations of at least 10 different applicants per calendar year. Exception: Examiners who do not meet the 10-test minimum must either take the refresher training specified in § 384.228 of this chapter or have a State examiner ride along to observe the third-party examiner successfully administer at least one skills test.

PART 384—STATE COMPLIANCE WITH COMMERCIAL DRIVER'S LICENSE PROGRAM

■ 46. The authority citation for part 384 continues to read as follows:

Authority: 49 U.S.C. 31136, 31301, *et seq.*, and 31502; secs. 103 and 215 of Pub. L. 106–159, 113 Stat. 1748, 1753, 1767; sec. 32934 of Pub. L. 112–141, 126 Stat. 405, 830; sec. 5524 of Pub. L. 114–94, 129 Stat. 1312, 1560; and 49 CFR 1.87.

■ 47. Amend § 384.208 by revising paragraph (a) to read as follows:

§ 384.208 Notification of disqualification.

(a) No later than 10 days after disqualifying a CLP or CDL holder licensed by another State or other jurisdiction of domicile, or disqualifying an out-of-State CLP or CDL holder's privilege to operate a commercial motor vehicle for at least 60 days, the State must notify the State or jurisdiction that issued the license of the disqualification via CDLIS.

* * * * *

■ 48. Amend § 384.209 by revising paragraphs (a)(1) and (b)(2) to read as follows:

§ 384.209 Notification of traffic violations.

(a) * * *

(1) Whenever a person who holds a CLP or CDL from another State or other jurisdiction of domicile is convicted of a violation of any State or local law relating to motor vehicle traffic control (other than parking, vehicle weight or vehicle defect violations), in any type of vehicle, the licensing entity of the State in which the conviction occurs must notify the licensing entity in the State or jurisdiction where the driver is licensed of this conviction within the time period established in paragraph (c) of this section.

* * * * *

(b) * * *

(1) Whenever a person who does not hold a CDL, but who is licensed to drive by another State or other jurisdiction of domicile, is convicted of a violation in a CMV of any State or local law relating to motor vehicle traffic control (other than a parking violation), the licensing entity of the State in which the conviction occurs must notify the licensing entity in the State or jurisdiction where the driver is licensed of this conviction within the time period established in paragraph (c) of this section.

* * * * *

§ 384.228 [Amended]

■ 49. Amend § 384.228 by removing the words “third party” in each place they appear and in their place adding the words “third-party”.

§ 384.229 [Amended]

■ 50. Amend § 384.229 by removing the words “third party” in each place they

appear and in their place adding the words “third-party”.

PART 385—SAFETY FITNESS PROCEDURES

■ 51. The authority citation for part 385 continues to read as follows:

Authority: 49 U.S.C. 113, 504, 521(b), 5105(d), 5109, 5113, 13901–13905, 13908, 31135, 31136, 31144, 31148, 31151, 31502; sec. 113(a), Pub. L. 103–311, 108 Stat. 1673, 1676; sec. 408, Pub. L. 104–88, 109 Stat. 803, 958; sec. 350, Pub. L. 107–87, 115 Stat. 833, 864; sec. 5205, Pub. L. 114–94, 129 Stat. 1312, 1537; and 49 CFR 1.87.

§ 385.305 [Amended]

■ 52. Amend § 385.305 by:

■ a. Lifting the suspension of the section;

■ b. In paragraph (a), removing “Web site” and “http” and in their places adding “website” and “https”, respectively; and

■ c. Suspending the section indefinitely.

§ 385.305T [Amended]

■ 53. Amend § 385.305T by, in paragraph (a), removing the words “Web site” and in their place adding the word “website”.

§ 385.603T [Amended]

■ 54. Amend § 385.603T by, in paragraph (d), removing “Web site” and “http” and in their places adding “website” and “https”, respectively.

PART 386—RULES OF PRACTICE FOR FMCSA PROCEEDINGS

■ 55. The authority citation for part 386 continues to read as follows:

Authority: 28 U.S.C. 2461 note; 49 U.S.C. 113, 1301 note, 31306a; 49 U.S.C. chapters 5, 51, 131–141, 145–149, 311, 313, and 315; and 49 CFR 1.81, 1.87.

■ 56. Amend part 386 by:

■ a. In each section of the part, except §§ 386.1 and 386.2, removing the text “Assistant Administrator” wherever it appears and adding in its place the text “Agency Decisionmaker”;

■ b. In each section of the part, removing the text “Agency decisionmaker” wherever it appears and adding in its place the text “Agency Decisionmaker”;

■ c. In each section of the part, removing the text “agency decisionmaker” wherever it appears and adding in its place the text “Agency Decisionmaker”.

§ 386.1 [Amended]

■ 57. Amend § 386.1 by removing the words “Assistant Administrator, who also acts as the Chief Safety Officer of

the Federal Motor Carrier Safety Administration,” and adding in their place the words “Agency Decisionmaker”.

■ 58. Amend § 386.2 by:

■ a. Revising the definition of “Agency Decisionmaker”;

■ b. Removing the definition of “Assistant Administrator”; and

■ c. In the definition of “Final Agency Order”, removing “appropriate Field Administrator (for default judgments under § 386.14) or the Assistant Administrator,”, “386.22”, and “386.61” and in their places adding “Agency Decisionmaker”, “§ 386.22”, and “§ 386.61”, respectively.

The revision reads as follows:

§ 386.2 Definitions.

* * * * *

Agency Decisionmaker means the FMCSA official authorized to issue a final decision and order of the Agency in an administrative proceeding under this part. The Agency Decisionmaker is an FMCSA official appointed by the President or otherwise duly authorized.

* * * * *

§ 386.3 [Amended]

■ 59. Amend § 386.3 by, in paragraph (e), removing the words “agency decisionmakers” and in their place adding the words “Agency Decisionmakers”.

§ 386.12 [Amended]

■ 60. Amend § 386.12 by removing “1–800–DOT–SAFT (1–800–368–7238)” in each place that it appears and in its place adding “1–888–DOT–SAFT (1–888–368–7238)”.

§ 386.14 [Amended]

■ 61. Amend § 386.14 by:

■ a. In paragraph (c)(1):

■ i. Removing “paragraph (a)” and in its place adding “paragraph (a) of this section”; and

■ ii. Removing the words “Final Agency Order” in each place that they appear and in their place adding the words “Final Order”;

■ b. In paragraph (c)(2), removing the words “Final Agency Order” and in their place adding the words “Final Order”; and

■ c. In paragraph (c)(3):

■ i. Adding the words “Final Order that has become a” before the words “Final Agency Order”; and

■ ii. Removing “Subpart” and adding in its place “subpart”.

§ 386.16 [Amended]

■ 62. Amend § 386.16 by:

■ a. Removing the words “Final Agency Order” in each place that they appear

and in their place adding the words “Final Order”; and

■ b. In paragraph (a)(5), removing the words “and order”.

§ 386.31 [Amended]

- 63. Amend § 386.31 by:
- a. Removing the words “Final Agency Order” and in their place adding the words “Final Order”; and
- b. Removing “of this part”.

§ 386.36 [Amended]

- 64. Amend § 386.36 by removing the words “final agency order” and “Final Agency Order” and in their places adding the words “Final Order”.

§ 386.61 [Amended]

- 65. Amend § 386.61 by, in paragraph (b), removing the words “Final Agency Order” and in their place adding the words “Final Order”.

§ 386.64 [Amended]

- 66. Amend § 386.64 by:
- a. In paragraph (a), removing the words “Final Agency Order” and in their place adding the words “Final Order”; and
- b. In paragraph (b), removing the words “Final Agency Order” in each place that they appear and in their place adding the words “Final Order”.

PART 387—MINIMUM LEVELS OF FINANCIAL RESPONSIBILITY FOR MOTOR CARRIERS

- 67. The authority citation for part 387 continues to read as follows:

Authority: 49 U.S.C. 13101, 13301, 13906, 13908, 14701, 31138, 31139; sec. 204(a), Pub. L. 104–88, 109 Stat. 803, 941; and 49 CFR 1.87.

- 68. In § 387.9, amend table 1 by revising entry (2) to read as follows:

§ 387.9 Financial responsibility, minimum levels.

* * * * *

TABLE 1 TO § 387.9—SCHEDULE OF LIMITS—PUBLIC LIABILITY

Type of carriage	Commodity transported	January 1, 1985
* * *	* * *	*
(2) For-hire and Private (In interstate, foreign, or intrastate commerce, with a gross vehicle weight rating of 10,001 or more pounds).	Hazardous substances, as defined in 49 CFR 171.8, transported in bulk in cargo tanks, portable tanks, or hopper-type vehicles with capacities in bulk; in bulk Division 1.1, 1.2 or 1.3 materials; in bulk Division 2.3, Hazard Zone A material; in bulk Division 6.1, Packing Group I, Hazard Zone A material; in bulk Division 2.1 or 2.2 material; or highway route controlled quantities of a Class 7 material, as defined in 49 CFR 173.403.	5,000,000
* * *	* * *	*

PART 389—RULEMAKING PROCEDURES—FEDERAL MOTOR CARRIER SAFETY REGULATIONS

- 69. The authority citation for part 389 continues to read as follows:

Authority: 49 U.S.C. 113, 501 *et seq.*, subchapters I and III of chapter 311, chapter 313, and 31502; sec. 5204 of Pub. L. 114–94, 129 Stat. 1312, 1536; 42 U.S.C. 4917; and 49 CFR 1.87.

§ 389.3 [Amended]

- 70. Amend § 389.3 by, in the definition of “Act”, adding the words “or commercial activity” after the words “motor carrier safety”.

§ 389.5 [Amended]

- 71. Amend § 389.5 by, in paragraph (b)(2), removing “Web site” and “http” and in their places adding “website” and “https”, respectively.

§ 389.31 [Amended]

- 72. Amend § 389.31 by, in paragraph (b)(1), removing the address “www.FMCSA.gov” and in its place adding the address “www.FMCSA.dot.gov”.

PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL

- 73. The authority citation for part 390 continues to read as follows:

Authority: 49 U.S.C. 113, 504, 508, 31132, 31133, 31134, 31136, 31137, 31144, 31149, 31151, 31502; sec. 114, Pub. L. 103–311, 108 Stat. 1673, 1677; secs. 212 and 217, Pub. L. 106–159, 113 Stat. 1748, 1766, 1767; sec. 229, Pub. L. 106–159 (as added and transferred by sec. 4115 and amended by secs. 4130–4132, Pub. L. 109–59, 119 Stat. 1144, 1726, 1743, 1744), 113 Stat. 1748, 1773; sec. 4136, Pub. L. 109–59, 119 Stat. 1144, 1745; secs. 32101(d) and 32934, Pub. L. 112–141, 126 Stat. 405, 778, 830; sec. 2, Pub. L. 113–125, 128 Stat. 1388; secs. 5403, 5518, and 5524, Pub. L. 114–94, 129 Stat. 1312, 1548, 1558, 1560; sec. 2, Pub. L. 115–105, 131 Stat. 2263; and 49 CFR 1.81, 1.81a, 1.87.

- 74. Amend § 390.5 by:

- a. Lifting the suspension of the section;
- b. Revising the definitions for “Employer”, “Medical variance”, and “Special agent”; and
- c. Suspending the section indefinitely.
- The revisions read as follows:

§ 390.5 Definitions.

* * * * *

Employer means any person engaged in a business affecting interstate commerce who owns or leases a

commercial motor vehicle in connection with that business, or assigns employees to operate it, but such term does not include the United States, any State, any political subdivision of a State, or an agency established under a compact between States approved by the Congress of the United States.

* * * * *

Medical variance means a driver has received one of the following from FMCSA that allows the driver to be issued a medical certificate:

(1) An exemption letter permitting operation of a commercial motor vehicle pursuant to part 381, subpart C, of this chapter; or

(2) A skill performance evaluation certificate permitting operation of a commercial motor vehicle pursuant to § 391.49 of this chapter.

* * * * *

Special agent. See appendix B to this part.

* * * * *

- 75. Amend § 390.5T by revising the definitions for “Employer”, “Medical variance”, and “Special agent” to read as follows:

390.5T Definitions.

* * * * *

Employer means any person engaged in a business affecting interstate

commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it, but such term does not include the United States, any State, any political subdivision of a State, or an agency established under a compact between States approved by the Congress of the United States.

* * * * *

Medical variance means a driver has received one of the following from FMCSA that allows the driver to be issued a medical certificate:

(1) An exemption letter permitting operation of a commercial motor vehicle pursuant to part 381, subpart C, of this chapter; or

(2) A skill performance evaluation certificate permitting operation of a

commercial motor vehicle pursuant to § 391.49 of this chapter.

* * * * *

Special agent. See appendix B to this part.

* * * * *

§ 390.15 [Amended]

■ 76. Amend § 390.15 by, in paragraph (a)(1), removing the words “third party” and in their place adding the words “third-party”.

§ 390.19 [Amended]

■ 77. Amend § 390.19 by:

■ a. Lifting the suspension of the section;

■ b. In paragraphs (c) and (d), removing the words “Web site” and in their place adding the word “website”;

■ c. In paragraph (c), removing “http” and in its place adding “https”; and

■ d. Suspending the section indefinitely.

§ 390.19T [Amended]

■ 78. Amend § 390.19T by:

■ a. In paragraphs (c) and (d), removing the words “Web site” and in their place adding the word “website”; and

■ b. In paragraph (c), removing “http” and in its place adding “https”.

§ 390.25 [Amended]

■ 79. Amend § 390.25 by, in the last sentence, removing the words “he or she” and adding the word “it” in their place.

■ 80. Amend § 390.27 by, in the table, revising the entry for “Southern” to read as follows:

§ 390.27 Locations of motor carrier safety service centers.

Service center	Territory included	Location of office
* * * * *	* * * * *	* * * * *
Southern	Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee.	61 Forsyth Street SW, Suite 3M40, Atlanta, GA 30303.
* * * * *	* * * * *	* * * * *

* * * * *

Subpart E [Suspension Lifted]

■ 81. Lift the suspension of subpart E, consisting of §§ 390.201 through 390.209.

§ 390.200T [Amended]

■ 82. Amend § 390.200T by, in paragraph (b), removing “Web site” and “http” and in their places adding “website” and “https”, respectively.

§ 390.201 [Amended]

■ 83. Amend § 390.201 by, in paragraphs (e) and (f), removing “Web site” and “http” and in their places adding “website” and “https”, respectively.

§§ 390.201 through 390.209 [Suspended]

■ 84. Suspend §§ 390.201 through 390.209 indefinitely.

PART 391—QUALIFICATIONS OF DRIVERS AND LONGER COMBINATION VEHICLE (LCV) DRIVER INSTRUCTORS

■ 85. The authority citation for part 391 continues to read as follows:

Authority: 49 U.S.C. 504, 508, 31133, 31136, 31149, 31502; sec. 4007(b), Pub. L. 102–240, 105 Stat. 1914, 2152; sec. 114, Pub. L. 103–311, 108 Stat. 1673, 1677; sec. 215, Pub. L. 106–159, 113 Stat. 1748, 1767; sec. 32934, Pub. L. 112–141, 126 Stat. 405, 830; secs. 5403 and 5524, Pub. L. 114–94, 129 Stat. 1312, 1548, 1560; sec. 2, Pub. L. 115–105, 131 Stat. 2263; and 49 CFR 1.87.

■ 86. Amend § 391.23 by revising paragraph (a)(1) to read as follows:

§ 391.23 Investigation and inquiries.

(a) * * *

(1) An inquiry, within 30 days of the date the driver’s employment begins, to each State where the driver held or holds a motor vehicle operator’s license or permit during the preceding 3 years, to obtain that driver’s motor vehicle

record covering that driver’s prior 3-year driving history.

* * * * *

§ 391.43 [Amended]

■ 87. Amend § 391.43 by:

■ a. Removing and reserving paragraph (e);

■ b. In paragraphs (g)(5)(i)(B) and (g)(5)(ii), removing the words “Web site” and in their place adding the word “website”; and

■ c. In paragraph (g)(5)(i)(B), removing “this subpart E” and in its place adding “this subpart”.

■ 88. Effective January 16, 2024, further amend § 391.43 by revising paragraph (f) and (h) to read as follows:

§ 391.43 Medical examination; certificate of physical examination.

* * * * *

(f) The medical examination shall be performed, and its results shall be recorded on the Medical Examination Report Form, MCSA–5875, set out in this paragraph (f):

BILLING CODE 4910-EX-P

Form MCSA-5875

OMB No.: 2126-0006

	Public Burden Statement 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 2126-0006. Public reporting for this collection of information is estimated to be approximately 25 minutes per response, including the time for reviewing instructions, gathering 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 Motor Carrier Safety Administration, MC-RRA, 1200 New Jersey Avenue, SE, Washington, D.C. 20590.
	Medical Examination Report Form (for Commercial Driver Medical Certification)

U.S. Department of Transportation
Federal Motor Carrier
Safety Administration

MEDICAL RECORD #

(or sticker)

SECTION 1. Driver Information (to be filled out by the driver)

PERSONAL INFORMATION	
Last Name: _____	First Name: _____ Middle Initial: _____ Date of Birth: _____ Age: _____
Street Address: _____	City: _____ State/Province: _____ Zip Code: _____
Driver's License Number: _____	Issuing State/Province: _____ Phone: _____
E-Mail (optional): _____	CLP/CDL Applicant/Holder*: ☐ Yes ☐ No
Driver ID Verified By**: _____	
Has your USDOT/FMCSA medical certificate ever been denied or issued for less than 2 years? ☐ Yes ☐ No ☐ Not Sure	
*CLP/CDL Applicant/Holder: See instructions for definitions. **Driver ID Verified By: Record what type of photo ID was used to verify the identity of the driver, e.g., CDL, driver's license, passport.	
DRIVER HEALTH HISTORY	
Have you ever had surgery? If "yes," please list and explain below. ☐ Yes ☐ No ☐ Not Sure	
Are you currently taking medications (prescription, over-the-counter, herbal remedies, diet supplements)? ☐ Yes ☐ No ☐ Not Sure	
If "yes," please describe below.	

(Attach additional sheets if necessary)

This document contains sensitive information and is for official use only. Improper handling of this information could negatively affect individuals. Handle and secure this information appropriately to prevent inadvertent disclosure by keeping the documents under the control of authorized persons. Properly dispose of this document when no longer required to be maintained by regulatory requirements.

Form MCSA-5875

OMB No.: 2126-0006

Last Name: _____ First Name: _____ DOB: _____ Exam Date: _____

DRIVER HEALTH HISTORY *(continued)*

Do you have or have you ever had:	Yes	No	Not Sure		Yes	No	Not Sure
1. Head/brain injuries or illnesses (e.g., concussion)	☐	☐	☐	16. Dizziness, headaches, numbness, tingling, or memory loss	☐	☐	☐
2. Seizures/epilepsy	☐	☐	☐	17. Unexplained weight loss	☐	☐	☐
3. Eye problems (except glasses or contacts)	☐	☐	☐	18. Stroke, mini-stroke (TIA), paralysis, or weakness	☐	☐	☐
4. Ear and/or hearing problems	☐	☐	☐	19. Missing or limited use of arm, hand, finger, leg, foot, toe	☐	☐	☐
5. Heart disease, heart attack, bypass, or other heart problems	☐	☐	☐	20. Neck or back problems	☐	☐	☐
6. Pacemaker, stents, implantable devices, or other heart procedures	☐	☐	☐	21. Bone, muscle, joint, or nerve problems	☐	☐	☐
7. High blood pressure	☐	☐	☐	22. Blood clots or bleeding problems	☐	☐	☐
8. High cholesterol	☐	☐	☐	23. Cancer	☐	☐	☐
9. Chronic (long-term) cough, shortness of breath, or other breathing problems	☐	☐	☐	24. Chronic (long-term) infection or other chronic diseases	☐	☐	☐
10. Lung disease (e.g., asthma)	☐	☐	☐	25. Sleep disorders, pauses in breathing while asleep, daytime sleepiness, loud snoring	☐	☐	☐
11. Kidney problems, kidney stones, or pain/problems with urination	☐	☐	☐	26. Have you ever had a sleep test (e.g., sleep apnea)?	☐	☐	☐
12. Stomach, liver, or digestive problems	☐	☐	☐	27. Have you ever spent a night in the hospital?	☐	☐	☐
13. Diabetes or blood sugar problems	☐	☐	☐	28. Have you ever had a broken bone?	☐	☐	☐
Insulin used	☐	☐	☐	29. Have you ever used or do you now use tobacco?	☐	☐	☐
14. Anxiety, depression, nervousness, other mental health problems	☐	☐	☐	30. Do you currently drink alcohol?	☐	☐	☐
15. Fainting or passing out	☐	☐	☐	31. Have you used an illegal substance within the past two years?	☐	☐	☐
				32. Have you ever failed a drug test or been dependent on an illegal substance?	☐	☐	☐

Other health condition(s) not described above:

☐ Yes ☐ No ☐ Not Sure

Did you answer "yes" to any of questions 1-32? If so, please comment further on those health conditions below:

☐ Yes ☐ No ☐ Not Sure*(Attach additional sheets if necessary)***CMV DRIVER'S SIGNATURE**

I certify that the above information is accurate and complete. I understand that inaccurate, false or missing information may invalidate the examination and my Medical Examiner's Certificate, that submission of fraudulent or intentionally false information is a violation of [49 CFR 390.35](#), and that submission of fraudulent or intentionally false information may subject me to civil or criminal penalties under [49 CFR 390.37](#) and [49 CFR 386](#) Appendices A and B.

Driver's Signature: _____ Date: _____

SECTION 2. Examination Report *(to be filled out by the medical examiner)***DRIVER HEALTH HISTORY REVIEW**

Review and discuss pertinent driver answers and any available medical records. Comment on the driver's responses to the "health history" questions that may affect the driver's safe operation of a commercial motor vehicle (CMV).

(Attach additional sheets if necessary)

Form MCSA-5875

OMB No.: 2126-0006

Last Name: _____ First Name: _____ DOB: _____ Exam Date: _____

TESTING

Pulse Rate: _____ Pulse rhythm regular: ☐ Yes ☐ No Height: _____ feet _____ inches Weight: _____ pounds

Blood Pressure	Systolic	Diastolic	Urinalysis	Sp. Gr.	Protein	Blood	Sugar
Sitting			Urinalysis is required. Numerical readings must be recorded.				
Second reading (optional)							

Other testing if indicated

Protein, blood, or sugar in the urine may be an indication for further testing to rule out any underlying medical problem.

Vision

Standard is at least 20/40 acuity (Snellen) in each eye with or without correction. At least 70° field of vision in horizontal meridian measured in each eye. The use of corrective lenses should be noted on the Medical Examiner's Certificate.

Acuity	Uncorrected	Corrected	Horizontal Field of Vision
Right Eye:	20/ _____	20/ _____	Right Eye: _____ degrees
Left Eye:	20/ _____	20/ _____	Left Eye: _____ degrees
Both Eyes:	20/ _____	20/ _____	

Applicant can recognize and distinguish among traffic control signals and devices showing red, green, and amber colors

Monocular vision

Referred to ophthalmologist or optometrist?

Received documentation from ophthalmologist or optometrist?

Yes No
☐ ☐

☐ ☐

☐ ☐

☐ ☐

Hearing

Standard: Must first perceive whispered voice at not less than 5 feet **OR** average hearing loss of less than or equal to 40 dB, in better ear (with or without hearing aid).

Check if hearing aid used for test: ☐ Right Ear ☐ Left Ear ☐ Neither

Whisper Test Results Right Ear Left Ear
Record distance (in feet) from driver at which a forced whispered voice can first be heard _____

OR

Audiometric Test Results

Right Ear:			Left Ear:		
500 Hz	1000 Hz	2000 Hz	500 Hz	1000 Hz	2000 Hz

Average (right): _____ Average (left): _____

PHYSICAL EXAMINATION

The presence of a certain condition may not necessarily disqualify a driver, particularly if the condition is controlled adequately, is not likely to worsen, or is readily amenable to treatment. Even if a condition does not disqualify a driver, the Medical Examiner may consider deferring the driver temporarily. Also, the driver should be advised to take the necessary steps to correct the condition as soon as possible, particularly if neglecting the condition could result in a more serious illness that might affect driving.

Check the body systems for abnormalities.

Body System	Normal	Abnormal	Body System	Normal	Abnormal
1. General	☐	☐	8. Abdomen	☐	☐
2. Skin	☐	☐	9. Genito-urinary system including hernias	☐	☐
3. Eyes	☐	☐	10. Back/spine	☐	☐
4. Ears	☐	☐	11. Extremities/joints	☐	☐
5. Mouth/throat	☐	☐	12. Neurological system including reflexes	☐	☐
6. Cardiovascular	☐	☐	13. Gait	☐	☐
7. Lungs/chest	☐	☐	14. Vascular system	☐	☐

Discuss any abnormal answers in detail in the space below and indicate whether it would affect the driver's ability to operate a CMV. Enter applicable item number before each comment.

(Attach additional sheets if necessary)

Form MCSA-5875

OMB No.: 2126-0006

Last Name: _____ First Name: _____ DOB: _____ Exam Date: _____

Please complete only one of the following (Federal or State) Medical Examiner Determination sections:**MEDICAL EXAMINER DETERMINATION (Federal)***Use this section for examinations performed in accordance with the Federal Motor Carrier Safety Regulations (49 CFR 391.41-391.49):*

- ☐ Does not meet standards (specify reason): _____
- ☐ Meets standards in 49 CFR 391.41; qualifies for 2-year certificate
- ☐ Meets standards, but periodic monitoring required (specify reason): _____
- Driver qualified for: ☐ 3 months ☐ 6 months ☐ 1 year ☐ other (specify): _____
- ☐ Wearing corrective lenses ☐ Wearing hearing aid ☐ Accompanied by a waiver/exemption (specify type): _____
- ☐ Accompanied by a Skill Performance Evaluation (SPE) Certificate
- ☐ Driving within an exempt intracity zone (see 49 CFR 391.62) (Federal)
- ☐ Determination pending (specify reason): _____
- ☐ Return to medical exam office for follow-up on (must be 45 days or less): _____
- ☐ Medical Examination Report amended (specify reason): _____
- (if amended) Medical Examiner's Signature: _____ Date: _____
- ☐ Incomplete examination (specify reason): _____

If the driver meets the standards outlined in 49 CFR 391.41, then complete a Medical Examiner's Certificate as stated in 49 CFR 391.43(h), as appropriate.

I have performed this evaluation for certification. I have personally reviewed all available records and recorded information pertaining to this evaluation, and attest that, to the best of my knowledge, I believe it to be true and correct.

Medical Examiner's Signature: _____

Medical Examiner's Name (please print or type): _____

Medical Examiner's Address: _____ City: _____ State: _____ Zip Code: _____

Medical Examiner's Telephone Number: _____ Date Certificate Signed: _____

Medical Examiner's State License, Certificate, or Registration Number: _____ Issuing State: _____

☐ MD ☐ DO ☐ Physician Assistant ☐ Chiropractor ☐ Advanced Practice Nurse☐ Other Practitioner (specify): _____

National Registry Number: _____

Medical Examiner's Certificate Expiration Date: _____

Form MCSA-5875

OMB No.: 2126-0006

Last Name: _____ First Name: _____ DOB: _____ Exam Date: _____

MEDICAL EXAMINER DETERMINATION (State)*Use this section for examinations performed in accordance with the Federal Motor Carrier Safety Regulations (49 CFR 391.41-391.49) with any applicable State variances (which will only be valid for intrastate operations):*

- ☐ Does not meet standards in 49 CFR 391.41 with any applicable State variances (specify reason): _____
- ☐ Meets standards in 49 CFR 391.41 with any applicable State variances
- ☐ Meets standards, but periodic monitoring required (specify reason): _____
- Driver qualified for: ☐ 3 months ☐ 6 months ☐ 1 year ☐ other (specify): _____
- ☐ Wearing corrective lenses ☐ Wearing hearing aid ☐ Accompanied by a waiver/exemption (specify type): _____
- ☐ Accompanied by a Skill Performance Evaluation (SPE) Certificate ☐ Grandfathered from State requirements (State)

If the driver meets the standards outlined in 49 CFR 391.41, with applicable State variances, then complete a Medical Examiner's Certificate, as appropriate.

I have performed this evaluation for certification. I have personally reviewed all available records and recorded information pertaining to this evaluation, and attest that, to the best of my knowledge, I believe it to be true and correct.

Medical Examiner's Signature: _____

Medical Examiner's Name (please print or type): _____

Medical Examiner's Address: _____ City: _____ State: _____ Zip Code: _____

Medical Examiner's Telephone Number: _____ Date Certificate Signed: _____

Medical Examiner's State License, Certificate, or Registration Number: _____ Issuing State: _____

☐ MD ☐ DO ☐ Physician Assistant ☐ Chiropractor ☐ Advanced Practice Nurse☐ Other Practitioner (specify): _____

National Registry Number: _____

Medical Examiner's Certificate Expiration Date: _____

Instructions for Completing the Medical Examination Report Form (MCSA-5875)

I. Step-By-Step Instructions

Driver:

Section 1: Driver Information

- **Personal Information:** Please complete this section using your name as written on your driver's license, your current address and phone number, your date of birth, age, driver's license number and issuing state.
 - **CLP/CDL Applicant/Holder:** Check "yes" if you are a commercial learner's permit (**CLP**) or commercial driver's license (**CDL**) holder, or are applying for a CLP or CDL. CDL means a license issued by a State or the District of Columbia which authorizes the individual to operate a class of a commercial motor vehicle (**CMV**). A CMV that requires a CDL is one that: (1) has a gross combination weight rating or gross combination weight of 26,001 pounds or more inclusive of a towed unit with a gross vehicle weight rating (**GVWR**) or gross vehicle weight (**GVW**) of more than 10,000 pounds; or (2) has a GVWR or GVW of 26,001 pounds or more; or (3) is designed to transport 16 or more passengers, including the driver; or (4) is used to transport either hazardous materials requiring hazardous materials placards on the vehicle or any quantity of a select agent or toxin.
 - **Driver ID Verified By:** The Medical Examiner/staff completes this item and notes the type of photo ID used to verify the driver's identity such as, commercial driver's license, driver's license, or passport, etc.
 - **Has your USDOT/FMCSA medical certificate ever been denied or issued for less than two years?** Please check the correct box "yes" or "no" and if you aren't sure check the "not sure" box.
- **Driver Health History:**
 - **Have you ever had surgery:** Please check "yes" if you have ever had surgery and provide a written explanation of the details (type of surgery, date of surgery, etc.)
 - **Are you currently taking medications (prescription, over-the-counter, herbal remedies, diet supplements):** Please check "yes" if you are taking any diet supplements, herbal remedies, or prescription or over the counter medications. In the box below the question, indicate the name of the medication and the dosage.
 - **#1-32:** Please complete this section by checking the "yes" box to indicate that you have, or have ever had, the health condition listed or the "No" box if you have not. Check the "not sure" box if you are unsure.
 - **Other Health Conditions not described above:** If you have, or have had, any other health conditions not listed in the section above, check "Yes" and in the box provided and list those condition(s).
 - **Any yes answers to questions #1-32 above:** If you have answered "yes" to any of the questions in the Driver Health History section above, please explain your answers further in the box below the question. For example, if you answered "yes" to question #5 regarding heart disease, heart attack, bypass, or other heart problem, indicate which type of heart condition. If you checked "yes" to question #23 regarding cancer, indicate the type of cancer. Please add any information that will be helpful to the Medical Examiner.
- **CMV Driver Signature and Date:** Please read the certification statement, sign and date it, indicating that the information you provided in Section 1 is accurate and complete.

Medical Examiner:**Section 2: Examination Report**

- **Driver Health History Review:** Review answers provided by the driver in the driver health history section and discuss any “yes” and “not sure” responses. In addition, be sure to compare the medication list to the health history responses ensuring that the medication list matches the medical conditions noted. Explore with the driver any answers that seem unclear. Record any information that the driver omitted. As the Medical Examiner conducting the driver’s physical examination you are required to complete the entire medical examination even if you detect a medical condition that you consider disqualifying, such as deafness. Medical Examiners are expected to determine the driver’s physical qualification for operating a commercial vehicle safely. Thus, if you find a disqualifying condition for which a driver may receive a Federal Motor Carrier Safety Administration medical exemption, please record that on the driver’s Medical Examiner’s Certificate, Form MCSA-5876, as well as on the Medical Examination Report Form, MCSA-5875.
- **Testing:**
 - **Pulse rate and rhythm, height, and weight:** record these as indicated on the form.
 - **Blood Pressure:** record the blood pressure (systolic and diastolic) of the driver being examined. A second reading is optional and should be recorded if found to be necessary.
 - **Urinalysis:** record the numerical readings for the specific gravity, protein, blood and sugar.
 - **Vision:** The current vision standard is provided on the form. When other than the Snellen chart is used, give test results in Snellen-comparable values. When recording distance vision, use 20 feet as normal. Record the vision acuity results and indicate if the driver can recognize and distinguish among traffic control signals and devices showing red, green, and amber colors; has monocular vision; has been referred to an ophthalmologist or optometrist; and if documentation has been received from an ophthalmologist or optometrist.
 - **Hearing:** The current hearing standard is provided on the form. Hearing can be tested using either a whisper test or audiometric test. Record the test results in the corresponding section for the test used.
- **Physical Examination:** Check the body systems for abnormalities and indicate normal or abnormal for each body system listed. Discuss any abnormal answers in detail in the space provided and indicate whether it would affect the driver’s ability to safely operate a commercial motor vehicle.

In this next section, you will be completing either the Federal or State determination, not both.

- **Medical Examiner Determination (Federal):** Use this section for examinations performed in accordance with the FMCSRs ([49 CFR 391.41-391.49](#)). Complete the medical examiner determination section completely. When determining a driver’s physical qualification, please note that English language proficiency ([49 CFR part 391.11](#): General qualifications of drivers) is not factored into that determination.
 - **Does not meet standards:** Select this option when a driver is determined to be not qualified and provide an explanation of why the driver does not meet the standards in [49 CFR 391.41](#).
 - **Meets standards in [49 CFR 391.41](#); qualifies for 2-year certification:** Select this option when a driver is determined to be qualified and will be issued a 2-year Medical Examiner’s Certificate.

Instructions MCSA-5875

- **Meets standards, but periodic monitoring is required:** Select this option when a driver is determined to be qualified but needs periodic monitoring and provide an explanation of why periodic monitoring is required. Select the corresponding time frame that the driver is qualified for, and if selecting "other" specify the time frame.
 - **Determination that driver meets standards:** Select all categories that apply to the driver's certification (e.g., wearing corrective lenses, accompanied by a waiver/exemption, driving within an exempt intracity zone, etc.).
- **Determination pending:** Select this option when more information is needed to make a qualification decision and specify a date, on or before the 45 day expiration date, for the driver to return to the medical exam office for follow-up. This will allow for a delay of the qualification decision for as many as 45 days. If the disposition of the pending examination is not updated via the National Registry on or before the 45 day expiration date, FMCSA will notify the examining medical examiner and the driver in writing that the examination is no longer valid and that the driver is required to be re-examined.
 - **MER amended:** A Medical Examination Report Form (MER), MCSA-5875, may only be amended while in determination pending status for situations where new information (e.g., test results, etc.) has been received or there has been a change in the driver's medical status since the initial examination, but prior to a final qualification determination. Select this option when a Medical Examination Report Form, MCSA-5875, is being amended; provide the reason for the amendment, sign and date. In addition, initial and date any changes made on the Medical Examination Report Form, MCSA-5875. A Medical Examination Report Form, MCSA-5875, cannot be amended after an examination has been in determination pending status for more than 45 days or after a final qualification determination has been made. The driver is required to obtain a new physical examination and a new Medical Examination Report Form, MCSA-5875, should be completed.
- **Incomplete examination:** Select this when the physical examination is not completed for any reason (e.g., driver decides they do not want to continue with the examination and leaves) other than situations outlined under determination pending.
- **Medical Examiner information, signature and date:** Provide your name, address, phone number, occupation, license, certificate, or registration number and issuing state, national registry number, signature and date.
- **Medical Examiner's Certificate Expiration Date:** Enter the date the **driver's** Medical Examiner's Certificate (MEC) expires.
- **Medical Examiner Determination (State):** Use this section for examinations performed in accordance with the FMCSRs (49 CFR 391.41-391.49) with any applicable State variances (which will only be valid for intrastate operations). Complete the medical examiner determination section completely.
 - **Does not meet standards in 49 CFR 391.41 with any applicable State variances:** Select this option when a driver is determined to be not qualified and provide an explanation of why the driver does not meet the standards in 49 CFR 391.41 with any applicable State variances.
 - **Meets standards in 49 CFR 391.41 with any applicable State variances:** Select this option when a driver is determined to be qualified and will be issued a 2-year Medical Examiner's Certificate.

Instructions MCSA-5875

- **Meets standards, but periodic monitoring is required:** Select this option when a driver is determined to be qualified but needs periodic monitoring and provide an explanation of why periodic monitoring is required. Select the corresponding time frame that the driver is qualified for, and if selecting "other" specify the time frame.
 - **Determination that driver meets standards:** Select all categories that apply to the driver's certification (e.g., wearing corrective lenses, accompanied by a waiver/exemption, etc.).
 - **Medical Examiner information, signature and date:** Provide your name, address, phone number, occupation, license, certificate, or registration number and issuing state, national registry number, signature and date.
 - **Medical Examiner's Certificate Expiration Date:** Enter the date the **driver's** Medical Examiner's Certificate (MEC) expires.
- II. If updating an existing exam, you must resubmit the new exam results, via the Medical Examination Results Form, MCSA-5850, to the National Registry, and the most recent dated exam will take precedence.**
- III. To obtain additional information regarding this form go to the Medical Program's page on the Federal Motor Carrier Safety Administration's website at <http://www.fmcsa.dot.gov/regulations/medical>.**

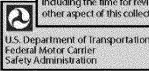
* * * * *

(h) The medical examiner's certificate shall be completed in accordance with

the following Form MCSA-5876, Medical Examiner's Certificate:

Form MCSA-5876

OMB No: 2126-0006

Public Burden Statement 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 2126-0006. Public reporting for this collection of information is estimated to be approximately one minute per response, including the time for reviewing instructions, gathering 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 Office, Federal Motor Carrier Safety Administration, MC-899, 1200 New Jersey Avenue, SE, Washington, D.C. 20590.		
 Medical Examiner's Certificate (An Commercial Driver Medical Certification)		
I certify that I have examined Last Name: _____ First Name: _____ in accordance with <i>(please check only one)</i> : ☐ the Federal Motor Carrier Safety Regulations (49 CFR 391.41-391.49) and, with knowledge of the driving duties, I find this person is qualified, and, if applicable, only when <i>(check all that apply)</i> OR ☐ the Federal Motor Carrier Safety Regulations (49 CFR 391.41-391.49) with any applicable State variances (which will only be valid for intrastate operations), and, with knowledge of the driving duties, I find this person is qualified, and, if applicable, only when <i>(check all that apply)</i> : ☐ Wearing corrective lenses ☐ Wearing hearing aid ☐ Accompanied by a _____ waiver/exemption ☐ Accompanied by a Skill Performance Evaluation (SPE) Certificate ☐ Driving within an exempt intracity zone (49 CFR 391.62) (Federal) ☐ Grandfathered from State requirements (State)		
The information I have provided regarding this physical examination is true and complete. A complete Medical Examination Report Form, MCSA-5875, with any attachments, embodies my findings completely and correctly, and is on file in my office.		Medical Examiner's Certificate Expiration Date _____
Medical Examiner's Signature _____ Medical Examiner's Name <i>(please print or type)</i> _____ Medical Examiner's State License, Certificate, or Registration Number _____	Medical Examiner's Telephone Number _____ Issuing State _____	Date Certificate Signed _____ ☐ MD ☐ Physician Assistant ☐ Advanced Practice Nurse ☐ DO ☐ Chiropractor ☐ Other Practitioner <i>(specify)</i> _____ National Registry Number _____
Driver's Signature _____ Driver's Address Street Address: _____ City: _____ State/Province: _____ Zip Code: _____	Driver's License Number _____	Issuing State/Province _____ CLP/CDL Applicant/Holder ☐ Yes ☐ No

This document contains sensitive information and is for official use only. Improper handling of this information could negatively affect individuals. Handle and secure this information appropriately to prevent inadvertent disclosure by keeping the documents under the control of authorized persons. Properly dispose of this document when no longer required to be maintained by regulatory requirements.

BILLING CODE 4910-EX-C

* * * * *

§ 391.45 [Amended]

■ 89. Amend § 391.45 by removing and reserving paragraph (d).

■ 90. Amend § 391.47 by:

■ a. Revising paragraphs (b)(1), (2), and (7); and

■ b. In paragraphs (c), (d), and (f), removing the text “(MC-PS)”.

The revisions read as follows.

§ 391.47 Resolution of conflicts of medical evaluation.

* * * * *

(b) * * *

(1) The application must contain the name and address of the driver, motor carrier, and all medical examiners and medical specialists involved in the proceeding.

(2) The applicant must submit proof that there is a disagreement between the medical examiner for the driver and the medical examiner for the motor carrier concerning the driver's qualifications.

* * * * *

(7) The applicant must submit all medical records and statements of the medical examiners and medical

specialists who have given opinions on the driver's qualifications.

* * * * *

PART 395—HOURS OF SERVICE OF DRIVERS

■ 91. The authority citation for part 395 continues to read as follows:

Authority: 49 U.S.C. 504, 21104(e), 31133, 31136, 31137, 31502; sec. 113, Pub. L. 103–311, 108 Stat. 1673, 1676; sec. 229, Pub. L. 106–159 (as added and transferred by sec. 4115 and amended by secs. 4130–4132, Pub. L. 109–59, 119 Stat. 1144, 1726, 1743, 1744), 113 Stat. 1748, 1773; sec. 4133, Pub. L. 109–59, 119 Stat. 1144, 1744; sec. 32934, Pub. L. 112–141, 126 Stat. 405, 830; sec. 5206(b), Pub. L. 114–94, 129 Stat. 1312, 1537; and 49 CFR 1.87.

■ 92. Amend § 395.2 by revising paragraph (1) of the definition for “Utility service vehicle” to read as follows:

§ 395.2 Definitions.

* * * * *

Utility service vehicle * * *

(1) Used in the furtherance of repairing, maintaining, or operating any structures or any other physical facilities necessary for the delivery of

public utility services, including the furnishing of electric, gas, water, sanitary sewer, telephone, television cable or community antenna service, and broadband-internet and cellular telephone operations;

* * * * *

§ 395.13 [Amended]

■ 93. Amend § 395.13 by, in paragraph (a), removing the words “appendix B to this subchapter” and adding in their place the words “appendix B to part 390 of this chapter”.

§ 395.22 [Amended]

■ 94. Amend § 395.22 by, in paragraph (a), removing the words “Web site” and in their place adding the word “website”.

Appendix A to Subpart B of Part 395 [Amended]

■ 95. Amend appendix A to subpart B of part 395 by removing the words “Web site” in each place that they appear and in their place adding the word “website”.

PART 396—INSPECTION, REPAIR, AND MAINTENANCE

■ 96. The authority citation for part 396 continues to read as follows:

Authority: 49 U.S.C. 504, 31133, 31136, 31151, 31502; sec. 32934, Pub. L. 112–141, 126 Stat. 405, 830; sec. 5524, Pub. L. 114–94, 129 Stat. 1312, 1560; and 49 CFR 1.87.

§ 396.9 [Amended]

■ 97. Amend § 396.9 by, in paragraph (a), removing the words “appendix B to this subchapter” and adding in their place “appendix B to part 390 of this chapter”.

PART 398—TRANSPORTATION OF MIGRANT WORKERS

■ 98. The authority citation for part 398 continues to read as follows:

Authority: 49 U.S.C. 13301, 13902, 31132, 31133, 31136, 31502, 31504; sec. 204, Pub. L. 104–88, 109 Stat. 803, 941; sec. 212, Pub. L. 106–159, 113 Stat. 1748, 1766; and 49 CFR 1.87.

§ 398.8 [Amended]

■ 99. Amend § 398.8 by, in paragraph (a), removing the words “Appendix B of chapter III of this title” and adding in their place “appendix B to part 390 of this chapter”.

Issued under authority delegated in 49 CFR 1.87.

Robin Hutcheson,
Administrator.

[FR Doc. 2023–24160 Filed 11–16–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 216**

[Docket No. 231109–0265]

RIN 0648–BK06

Modification of Deadlines Under the Fish and Fish Product Import Provisions of the Marine Mammal Protection Act

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to revise the regulations implementing the import provisions of the Marine Mammal Protection Act (MMPA). This final rule extends, by two years, the exemption period to end December 31, 2025.

DATES: This final rule is effective November 17, 2023.

FOR FURTHER INFORMATION CONTACT: Kellie Foster-Taylor, Office of International Affairs and Commerce, NMFS by email mmppa.loff@noaa.gov or by phone at 301–427–7721.

SUPPLEMENTARY INFORMATION:**Background***The 2016 Final Rule*

On August 15, 2016, NMFS published a final rule (81 FR 54390) implementing the MMPA Import Provisions (Section 101(a)(2)). Section 101(a)(2) of the MMPA prohibits “the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards.” 16 U.S.C. 1371(a)(2). In the 2016 final rule, NMFS explained that “a fish or fish product caught with commercial fishing technology which results in the incidental mortality or incidental serious injury of marine mammals in excess of U.S. standards is any fish or fish product harvested in an exempt or export fishery for which a valid comparability finding is not in effect.” 50 CFR 216.24(h)(1)(i). A “comparability finding” is “a finding by the Assistant Administrator [for Fisheries] that the harvesting nation for an export or exempt fishery has met the applicable conditions specified in [50 CFR 216.24(h)(6)(iii)] subject to the additional considerations for comparability determinations set out in [50 CFR 216.24(h)(7)].” *Id.* § 216.3. The 2016 final rule set forth those conditions in detail, which measure the effectiveness of the harvesting nation’s regulatory program as compared to the U.S. regulatory program, as well as the procedure for issuing a comparability finding. The rule established that fish and fish products from fisheries identified in the List of Foreign Fisheries (LOFF) can be imported into the United States only if the harvesting nation has applied for and received such a comparability finding from NMFS.

The 2016 final rule provided, however, that this import prohibition “shall not apply during the exemption period” (50 CFR 216.24(h)(2)(ii)), which the rule initially defined as a five-year period. NMFS explained that this exemption period was necessary to provide harvesting nations with adequate time to assess marine mammal stocks, estimate bycatch, and develop regulatory programs that mitigate that bycatch. The 2016 final rule stated that

NMFS “shall determine whether to issue” comparability findings “[n]o later than November 30th of the year when the exemption period . . . is to expire.” *Id.* § 216.24(h)(6)(ii); *see also* 50 CFR 216.24(h)(8)(i) (“No later than November 30th of the year when the exemption period . . . is to expire, the Assistant Administrator shall publish in the **Federal Register**, by harvesting nation, a notice of the harvesting nations and fisheries for which it has issued or denied a comparability finding and the specific fish and fish products that as a result are subject to import prohibitions under paragraphs (h)(1) and (9) of this section.”).

Subsequent Extensions of the Exemption Period

On November 3, 2020, NMFS issued an interim final rule (IFR) (85 FR 69515), which extended the exemption period for one year and requested public comment. The 2020 interim final rule sought to provide additional time for harvesting nations to apply for comparability findings and to comply with the requirements for such findings set forth in the 2016 final rule in light of the disruptions caused by the coronavirus pandemic. On October 21, 2022, NMFS issued a final rule (87 FR 63955), which responded to the comments received in response to the 2020 IFR and revised that rule to extend the exemption period by an additional year, until December 31, 2023, to give NMFS additional time to complete its assessment of the applications for comparability findings.

Under the current exemption period, therefore, NMFS must “determine whether to issue” comparability findings by “[n]o later than November 30th of” 2023 (50 CFR 216.24(h)(6)(ii)).

Current Rule: Further Extension of the Exemption Period

NMFS received 134 applications for comparability findings from nations involving almost 2,500 foreign fisheries. Nations apply for comparability findings for each of their fisheries on the LOFF; however, comparability determinations are made on a fishery-by-fishery basis, not by country. Thus, individual determinations need to be made for each fishery. To review applications for comparability findings, NMFS evaluates each nation’s regulatory programs to address incidental and intentional mortality and serious injury of marine mammals in each fishery that exports fish and fish products to the United States. The evaluation includes assessing information provided in the applicants’ submissions and readily available

scientific information. The process also includes, when necessary, consulting with applicant nations to clarify ambiguous statutory or regulatory text, address data gaps, or request elaboration on their marine mammal bycatch mitigation regulatory program. Ultimately, the Nation's regulatory program, as described in its application, must be evaluated for consistency with the MMPA import provisions and the MMPA domestic statutory and regulatory provisions governing marine mammal bycatch in U.S. fisheries.

After careful deliberation, the Department of Commerce and NMFS have determined that additional time is necessary to complete the evaluation process, given the large number of foreign fisheries, the evolving nature of fisheries data, and the practical challenges of assessing the comparability of the regulatory programs in foreign countries. This extension would allow time to ensure that comparability determinations are fairly and consistently applied across harvesting nations and their fisheries. In the event NMFS identifies a need to further extend the exemption period or otherwise amend the 2016 final rule to ensure the effectiveness of the regulatory measures of foreign fisheries, NMFS intends to provide prior notice, solicit public comment, and finalize any such amendments within the extended exemption period provided under this rule.

Therefore, NMFS is extending the exemption period by two years to December 31, 2025.

Classification

This rule is published under the authority of the Marine Mammal Protection Act, 16 U.S.C. 1371. The NMFS Assistant Administrator has determined that this final rule is consistent with the Marine Mammal Protection Act and other applicable laws. Under NOAA Administrative Order (NAO 216–6), the promulgation of regulations that are procedural and administrative in nature are categorically excluded from the requirement to prepare an Environmental Assessment.

Administrative Procedure Act

This final rule is exempt from the provisions of the Administrative Procedure Act (APA) that require advance notice and prior opportunity for public comment, as well as a 30-day delay in effectiveness, because it involves a “foreign affairs function of the United States” under 5 U.S.C.

553(a)(1). Courts have held that this foreign affairs exception covers certain rules involving restrictions on importation of foreign goods. *See Am. Ass'n of Exporters & Importers-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985) (applying the foreign affairs exemption because “[p]rior disclosure of the Government's intention . . . to impose stricter import restrictions would ‘provoke definitely undesirable international consequences’”); *Mast Industries, Inc. v. Regan*, 596 F. Supp. 1567, 1583 (Ct. Int'l Trade 1984) (“to the extent that the interim regulations define or alter quantitative limitations in bilateral trade agreements or unilaterally imposed restrictions on textile imports, they ‘clearly and directly’ involve a ‘foreign affairs function’ and are exempt from the prior notice and comment provisions of the APA”).

This rule falls under that exception. Under the 2016 final rule, as subsequently amended, the current exemption period is set to expire on December 31, 2023. And as explained above, NMFS is not able to finalize comparability findings by November 30, 2023 (as currently required under the 2016 final rule). Thus, if an extension of that exemption period is not in effect by December 31, 2023, importation of fish and fish products from all fisheries in the 134 countries that have applied for a comparability finding would be banned, thereby impairing U.S. trade interests and prompting “definitely undesirable international consequences.” H.R. Rep. No. 79–1980, at 257 (1946) (explaining that the foreign affairs exception applies to “‘affairs’ which so affect the relations of the United States with other governments that, for example, public rulemaking would provoke definitely undesirable international consequences”).

Pursuant to 5 U.S.C. 553(b)(B) and (d)(3), NMFS also finds good cause to issue this final rule without advance notice or prior opportunity for public comment, as well as a 30-day delay in effectiveness, because such notice and public procedure would be contrary to the public interest. Were NMFS to seek public comment, the inherent delay attendant to such procedure would make it practically infeasible to issue a final rule before the expiration of the current exemption period on December 31, 2023. And because NMFS is not able to issue comparability findings by November 30, 2023, without an extension, it would be unlawful as of January 1, 2024, for all 134 applicant

nations to export fish or fish products from any of the approximately 2,500 fisheries to the United States. Such consequences would undermine U.S. trade and adversely affect U.S. consumers.

Finally, this final rule is not subject to the 30-day delay in effectiveness for the additional reason pursuant to 5 U.S.C. 553(d)(1) that it “relieves a restriction.” This final rule does so by extending the current exemption period and thereby avoiding the impending ban on importation of fish and fish products from fisheries on the LOFF.

Executive Order 12866

This final rule has been determined to be not significant for purposes of Executive Order 12866, as amended by Executive Order 14094.

Paperwork Reduction Act

This final rule contains no new or revised collection-of-information requirements subject to the Paperwork Reduction Act.

List of Subjects in 50 CFR Part 216

Administrative practice and procedure, Exports, Marine mammals, Reporting and recordkeeping requirements.

Dated: November 13, 2023.

Janet Coit,

*Assistant Administrator for Fisheries,
National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 216 is amended as follows:

PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 216 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

■ 2. In § 216.3, the definition for “Exemption period” is revised to read as follows:

§ 216.3 Definitions.

* * * * *

Exemption period means the period during which commercial fishing operations that are the source of exports of commercial fish and fish products to the United States will be exempt from the prohibitions of § 216.24(h)(1). The exemption period extends through December 31, 2025.

* * * * *

[FR Doc. 2023–25399 Filed 11–16–23; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 88, No. 221

Friday, November 17, 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.

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 21, 50, and 52

[NRC–2023–0166]

Draft Regulatory Guide: Dedication of Commercial-Grade Items for Use in Nuclear Power Plants

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft guide; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment a draft Regulatory Guide (DG), DG–1415, “Dedication of Commercial-Grade Items for Use in Nuclear Power Plants.” This DG is the proposed Revision 1 of Regulatory Guide (RG) 1.164 of the same title. This DG describes methods that the NRC staff considers acceptable in meeting regulatory requirements for dedication of commercial-grade items and services used in nuclear power plants.

DATES: Submit comments by December 18, 2023. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

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

- *Federal rulemaking website:* Go to <https://www.regulations.gov> and search for Docket ID NRC–2023–0166. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: Stacy.Schumann@nrc.gov. For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION**

CONTACT section of this document.

- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–

0001, ATTN: Program Management, Announcements and Editing Staff.

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

FOR FURTHER INFORMATION CONTACT:

Amir Mobasheran, Office of Nuclear Regulatory Research, telephone: 301–415–8112; email: Amir.Mobasheran@nrc.gov and Deanna Zhang, Office of Nuclear Reactor Regulation, telephone: 301–415–1946; email: Deanna.Zhang@nrc.gov. Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0166 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–2023–0166.
- *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. DG–1415 is available in ADAMS under Accession No. ML23187A531.

- *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.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website ([https://](https://www.regulations.gov)

www.regulations.gov). Please include Docket ID NRC–2023–0166 in your comment submission.

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

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

II. Additional Information

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

The DG, entitled “Dedication of Commercial-Grade Items for Use in Nuclear Power Plants,” is temporarily identified by its task number, DG–1415.

This proposed revision of the guide (Revision 1) updates the guidance to provide additional clarification on NRC’s counterfeit, fraudulent, and suspect items definition. This proposed revision also adds regulatory language to provide additional clarity on requirements applicable to dedication of commercial-grade items. In addition, several editorial changes were made to conform to the current format and content of RGs.

The staff is also issuing for public comment a draft regulatory analysis (ADAMS Accession No. ML23187A534). The staff developed a regulatory analysis to assess the value of issuing or

revising a regulatory guide as well as alternative courses of action.

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

III. Backfitting, Forward Fitting, and Issue Finality

Issuance of DG–1415 as a final RG would not constitute backfitting as that term is defined in § 50.109 of title 10 of the *Code of Federal Regulations* (10 CFR), “Backfitting,” and as described in NRC Management Directive (MD) 8.4, “Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests;” affect the issue finality of an approval issued under 10 CFR part 52, “Licenses, Certifications, and Approvals for Nuclear Power Plants;” or constitute forward fitting as that term is defined and described in MD 8.4 because, as explained in DG–1415, licensees would not be required to comply with the positions set forth in the DG.

IV. Submitting Suggestions for Improvement of Regulatory Guides

A member of the public may, at any time, submit suggestions to the NRC for improvement of existing RGs or for the development of new RGs. Suggestions can be submitted on the NRC’s public website at <https://www.nrc.gov/reading-rm/doc-collections/reg-guides/contactus.html>. Suggestions will be considered in future updates and enhancements to the “Regulatory Guide” series.

Dated: November 13, 2023.

For the Nuclear Regulatory Commission.

Stephen M. Wyman,

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

[FR Doc. 2023–25422 Filed 11–16–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 21, 50, and 52

[NRC–2023–0167]

Draft Regulatory Guide: Evaluating Deviations and Reporting Defects and Noncompliance

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft guide; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing for public

comment a draft Regulatory Guide (DG), DG–1416, “Evaluating Deviations and Reporting Defects and Noncompliance.” This DG is the proposed Revision 1 of Regulatory Guide (RG) 1.234 of the same title. It describes methods that the NRC staff considers acceptable for complying with the provisions of NRC regulations.

DATES: Submit comments by December 18, 2023. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

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

- *Federal rulemaking website:* Go to <https://www.regulations.gov> and search for Docket ID NRC–2023–0167. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: Stacy.Schumann@nrc.gov. For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

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

FOR FURTHER INFORMATION CONTACT:

Amir Mobasheran, Office of Nuclear Regulatory Research, telephone: 301–415–8112; email: Amir.Mobasheran@nrc.gov and Deanna Zhang, Office of Nuclear Reactor Regulation, telephone: 301–415–1946; email: Deanna.Zhang@nrc.gov. Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0167 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–2023–0167.

- *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. DG–1416 is available in ADAMS under Accession No. ML23187A549.

- *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.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (<https://www.regulations.gov>). Please include Docket ID NRC–2023–0167 in your comment submission.

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

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

II. Additional Information

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

The DG, entitled “Evaluating Deviations and Reporting Defects and Noncompliance under 10 CFR part 21,” is temporarily identified by its task number, DG–1416.

This proposed revision of the guide (Revision 1) updates the guidance to provide additional clarification on NRC’s Counterfeit, Fraudulent, Suspect Items definition. In addition, several editorial changes were made to conform to the current format and content of RGs.

The staff is also issuing for public comment a draft regulatory analysis (ADAMS Accession No. ML23187A550). The staff developed a regulatory analysis to assess the value of issuing or revising a regulatory guide as well as alternative courses of action.

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

III. Backfitting, Forward Fitting, and Issue Finality

Issuance of DG–1416 as a final RG would not constitute backfitting as that term is defined in section 50.109 of title 10 of the *Code of Federal Regulations* (10 CFR), “Backfitting,” and as described in NRC Management Directive (MD) 8.4, “Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests,” affect the issue finality of an approval issued under 10 CFR part 52, “Licenses, Certifications, and Approvals for Nuclear Power Plants;” or constitutes forward fitting as that term is defined and described in MD 8.4 because, as explained in DG–1416, licensees would not be required to comply with the positions set forth in the DG.

IV. Submitting Suggestions for Improvement of Regulatory Guides

A member of the public may, at any time, submit suggestions to the NRC for improvement of existing RGs or for the development of new RGs. Suggestions can be submitted on the NRC’s public website at <https://www.nrc.gov/reading-rm/doc-collections/reg-guides/contactus.html>. Suggestions will be considered in future updates and enhancements to the “Regulatory Guide” series.

Dated: November 13, 2023.

For the Nuclear Regulatory Commission.
Stephen M. Wyman,
Acting Chief, Regulatory Guide and Programs Management Branch, Division of Engineering, Office of Nuclear Regulatory Research.
 [FR Doc. 2023–25421 Filed 11–16–23; 8:45 am]
BILLING CODE 7590–01–P

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1090

[Docket No. CFPB–2023–0053]

RIN 3170–AB17

Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications

AGENCY: Consumer Financial Protection Bureau.

ACTION: Proposed rule; request for public comment.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) proposes a rule to define a market for general-use digital consumer payment applications. The proposed market would cover providers of funds transfer and wallet functionalities through digital applications for consumers’ general use in making payments to other persons for personal, family, or household purposes. Larger participants of this market would be subject to the CFPB’s supervisory authority under the Consumer Financial Protection Act (CFPA).

DATES: Comments should be received on or before January 8, 2024.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2023–0053 or RIN 3170–AB17, by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments. A brief summary of this document will be available at <https://www.regulations.gov/docket/CFPB-2023-0053>.

- *Email:* 2023-NPRM-PaymentApps@cfpb.gov. Include Docket No. CFPB–2023–0053 or RIN 3170–AB17 in the subject line of the message.

- *Mail/Hand Delivery/Courier:* Comment Intake—LP Payment Apps Rulemaking, Consumer Financial Protection Bureau, c/o Legal Division Docket Manager, 1700 G Street NW, Washington, DC 20552. Because paper mail in the Washington, DC area and at the CFPB is subject to delay, commenters are encouraged to submit comments electronically.

Instructions: The CFPB encourages the early submission of comments. All submissions should include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. In general, all comments received will be posted without change to <https://www.regulations.gov>.

All comments, including attachments and other supporting materials, will become part of the public record and are subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT:

Christopher Young, Deputy Assistant Director, and Owen Bonheimer, Senior Counsel, Office of Supervision Policy, at 202–435–7700. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION:

I. Overview

Section 1024 of the CFPA,¹ codified at 12 U.S.C. 5514, gives the CFPB supervisory authority over all nonbank covered persons² offering or providing three enumerated types of consumer financial products or services: (1) Origination, brokerage, or servicing of consumer loans secured by real estate and related mortgage loan modification or foreclosure relief services; (2) private education loans; and (3) payday loans.³ The CFPB also has supervisory authority over “larger participant[s] of a market for other consumer financial products or services,” as the CFPB defines by rule.⁴ In addition, the CFPB has the authority to supervise any nonbank covered person that it “has reasonable cause to determine by order, after notice to the covered person and a reasonable opportunity . . . to respond . . . is engaging, or has engaged, in

¹ Consumer Financial Protection Act of 2010, Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376, 1955 (2010) (hereinafter, “CFPA”).

² The provisions of 12 U.S.C. 5514 apply to certain categories of covered persons, described in section (a)(1), and expressly excludes from coverage persons described in 12 U.S.C. 5515(a) or 5516(a). The term “covered person” means “(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described [in (A)] if such affiliate acts as a service provider to such person.” 12 U.S.C. 5481(6).

³ 12 U.S.C. 5514(a)(1)(A), (D), (E).

⁴ 12 U.S.C. 5514(a)(1)(B), (a)(2); *see also* 12 U.S.C. 5481(5) (defining “consumer financial product or service”).

conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.”⁵

This proposed rule (the Proposed Rule) would be a sixth in a series of CFPB rulemakings to define larger participants of markets for consumer financial products and services for purposes of CFPB section 1024(a)(1)(B).⁶ The Proposed Rule would establish the CFPB’s supervisory authority over certain nonbank covered persons participating in a market for “general-use digital consumer payment applications.”⁷ In establishing the CFPB’s supervisory authority over such persons, the Proposed Rule would not impose new substantive consumer protection requirements or alter the scope of the CFPB’s other authorities. In addition, some nonbank covered persons that would be subject to the CFPB’s supervisory authority under the Proposed Rule also may be subject to other CFPB supervisory authorities under CFPB section 1024, including, for example, as a larger participant in another market defined by a previous CFPB larger participant rule. Finally, regardless of whether they are subject to the CFPB’s supervisory authority, nonbank covered persons generally are

subject to the CFPB’s regulatory and enforcement authority.

The proposed market would include providers of funds transfer and wallet functionalities through digital applications for consumers’ general use in making payments to other persons for personal, family, or household purposes. Examples include many consumer financial products and services that are commonly described as “digital wallets,” “payment apps,” “funds transfer apps,” “person-to-person payment apps,” “P2P apps,” and the like. Providers of consumer financial products and services delivered through these digital applications help consumers to make a wide variety of consumer payment transactions, including payments to friends and family and payments for purchases of nonfinancial goods and services.

The CFPB is authorized to supervise nonbank covered persons subject to CFPB section 1024 for purposes of (1) assessing compliance with Federal consumer financial law; (2) obtaining information about such persons’ activities and compliance systems or procedures; and (3) detecting and assessing risks to consumers and consumer financial markets.⁸ The CFPB conducts examinations, of various scopes, of supervised entities. In addition, the CFPB may, as appropriate, request information from supervised entities prior to or without conducting examinations.⁹ Section 1090.103(d) of the CFPB’s existing larger participant regulations provides that the CFPB may require submission of certain records, documents, and other information for purposes of assessing whether a person is a larger participant of a covered market.¹⁰

The CFPB prioritizes supervisory activity among nonbank covered persons on the basis of risk, taking into account, among other factors, the size of each entity, the volume of its transactions involving consumer financial products or services, the size and risk presented by the market in which it is a participant, the extent of relevant State oversight, and any field and market information that the CFPB has on the entity.¹¹ Such field and

market information can include, for example, information from complaints and any other information the CFPB has about risks to consumers and to markets posed by a particular entity.

The specifics of how an examination takes place vary by market and entity. However, the examination process generally proceeds as follows. CFPB examiners contact the entity for an initial conference with management and often request records and other information. CFPB examiners ordinarily also review the components of the supervised entity’s compliance management system. Based on these discussions and a preliminary review of the information received, examiners determine the scope of an on-site or remote examination and then coordinate with the entity to initiate this portion of the examination. While on-site or working remotely, examiners spend some time discussing with management the entity’s compliance policies, processes, and procedures; reviewing documents and records; testing transactions and accounts for compliance; and evaluating the entity’s compliance management system. Examinations may involve issuing confidential examination reports, supervisory letters, and compliance ratings. In addition to the process described above, the CFPB also may conduct other supervisory activities, such as periodic monitoring.¹²

II. Summary of the Proposed Rule

The CFPB is authorized to define larger participants in markets for consumer financial products or services. Subpart A of the CFPB’s existing larger-participant rule, 12 CFR part 1090, prescribed procedures, definitions, standards, and protocols that apply for all markets in which the CFPB defines larger participants.¹³ Those generally-applicable provisions also would apply to the general-use digital consumer payment application market described by the Proposed Rule. The definitions in § 1090.101 should be used to interpret terms in the Proposed Rule unless otherwise specified.

The CFPB includes relevant market descriptions and associated larger-participant tests, as it develops them, in

⁵ 12 U.S.C. 5514(a)(1)(C); *see also* 12 CFR part 1091 (prescribing procedures for making determinations under 12 U.S.C. 5514(a)(1)(C)). In addition, the CFPB has supervisory authority over very large depository institutions and credit unions and their affiliates. 12 U.S.C. 5515(a). Furthermore, the CFPB has certain authorities relating to the supervision of other depository institutions and credit unions. 12 U.S.C. 5516(c)(1). One of the CFPB’s mandates under the CFPB is to ensure that “Federal consumer financial law is enforced consistently without regard to the status of a person as a depository institution, in order to promote fair competition.” 12 U.S.C. 5511(b)(4).

⁶ The first five rules defined larger participants of markets for consumer reporting, 77 FR 42874 (July 20, 2012) (Consumer Reporting Rule), consumer debt collection, 77 FR 65775 (Oct. 31, 2012) (Consumer Debt Collection Rule), student loan servicing, 78 FR 73383 (Dec. 6, 2013) (Student Loan Servicing Rule), international money transfers, 79 FR 56631 (Sept. 23, 2014) (International Money Transfer Rule), and automobile financing, 80 FR 37496 (June 30, 2015) (Automobile Financing Rule).

⁷ As the CFPB noted in its first larger participant rule covering the consumer reporting market, the CFPB’s supervisory authority “is not limited to the products or services that qualified the person for supervision, but also includes other activities of such a person that involve other consumer financial products or services or are subject to Federal consumer financial law.” 77 FR 42874, 42880 (July 20, 2012), *cited by* Larger Participant Debt Collection Rule, 77 FR 65775, 65776 n.15 (Oct. 31, 2012). For example, selling, providing, or issuing of stored value or payment instruments is associated with the activity that falls within the proposed market definition, and may constitute a consumer financial product or service that the CFPB may supervise when examining a larger participant of the proposed market.

⁸ 12 U.S.C. 5514(b)(1). The CFPB’s supervisory authority also extends to service providers of those covered persons that are subject to supervision under 12 U.S.C. 5514(a)(1). 12 U.S.C. 5514(e); *see also* 12 U.S.C. 5481(26) (defining “service provider”).

⁹ *See* 12 U.S.C. 5514(b) (authorizing the CFPB both to conduct examinations and to require reports from entities subject to supervision).

¹⁰ 12 CFR 1090.103(d).

¹¹ For further description of the CFPB’s supervisory prioritization process, *see* CFPB Supervision and Examination Manual (updated

September 2023), part I.A at 11–12, *available at* <https://www.consumerfinance.gov/compliance/supervision-examinations/> (last visited Oct. 27, 2023).

¹² The CFPB is aware that States have been active in regulation of money transmission by money services businesses and that many States actively examine money transmitters. If the CFPB adopts the Proposed Rule, the CFPB would coordinate with appropriate State regulatory authorities in examining larger participants.

¹³ 12 CFR 1090.100 through 103.

subpart B.¹⁴ Accordingly, the Proposed Rule defining larger participants of a market for general-use digital consumer payment applications would become § 1090.109 in subpart B.

The Proposed Rule would define a market for general-use digital consumer payment applications that would cover specific activities. The proposed market definition generally includes nonbank covered persons that provide funds transfer or wallet functionalities through a digital application for consumers' general use in making consumer payments transactions as defined in the Proposed Rule. The Proposed Rule defines "consumer payment transactions" to include payments to other persons for personal, household, or family purposes, excluding certain transactions as described in more detail in the section-by-section analysis in part IV below. The Proposed Rule also provides specific examples of digital payment applications that do not fall within the proposed market definition because they do not have general use for purposes of the Proposed Rule.

The Proposed Rule would set forth a test to determine whether a nonbank covered person is a larger participant of the general-use digital consumer payment applications market. A nonbank covered person would be a larger participant if it satisfies two criteria. First, the nonbank covered person (together with its affiliated companies) must provide general-use digital consumer payment applications with an annual volume of at least five million consumer payment transactions. Second, the nonbank covered person must not be a small business concern based on the applicable Small Business Administration (SBA) size standard. As prescribed by existing § 1090.102, any nonbank covered person that qualifies as a larger participant would remain a larger participant until two years from the first day of the tax year in which the person last met the larger-participant test.¹⁵

As noted above, § 1090.103(d) of the CFPB's existing larger participant regulation provides that the CFPB may require submission of certain records, documents, and other information for purposes of assessing whether a person is a larger participant of a covered market.¹⁶ This authority would be available to facilitate the CFPB's

identification of larger participants of the general-use digital consumer payment applications market, just as in other markets defined in subpart B. In addition, pursuant to existing § 1090.103(a), a person would be able to dispute whether it qualifies as a larger participant in the general-use digital payment applications market. The CFPB would notify an entity when the CFPB intended to undertake supervisory activity; the entity would then have an opportunity to submit documentary evidence and written arguments in support of its claim that it was not a larger participant.¹⁷

The CFPB invites comment on all aspects of this notice of proposed rulemaking and on the specific issues on which it solicits comment elsewhere herein, including on any appropriate modifications or exceptions to the Proposed Rule.

III. Legal Authority and Procedural Matters

A. Rulemaking Authority

The CFPB is issuing the Proposed Rule pursuant to its authority under the CFPA, as follows: (1) sections 1024(a)(1)(B) and (a)(2), which authorize the CFPB to supervise nonbanks that are larger participants of markets for consumers financial products or services, as defined by rule;¹⁸ (2) section 1024(b)(7), which, among other things, authorizes the CFPB to prescribe rules to facilitate the supervision of covered persons under section 1024;¹⁹ and (3) section 1022(b)(1), which grants the CFPB the authority to prescribe rules as may be necessary or appropriate to enable the CFPB to administer and carry out the purposes and objectives of Federal consumer financial law, and to prevent evasions of such law.²⁰

B. Consultation With Other Agencies

In developing the Proposed Rule, the CFPB has consulted with or provided an opportunity for consultation and input to the Federal Trade Commission (FTC), as well as with the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Federal Deposit Insurance Corporation, the Financial Crimes Enforcement Network, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Securities and Exchange Commission, on, among other things, consistency with any prudential,

market, or systemic objectives administered by such agencies.²¹

C. Proposed Effective Date of Final Rule

The Administrative Procedure Act generally requires that rules be published not less than 30 days before their effective dates.²² The CFPB proposes that, once issued, the final rule for this proposal would be effective 30 days after it is published in the **Federal Register**.

IV. Section-by-Section Analysis

Part 1090

Subpart B—Markets

Section 1090.109 General-Use Digital Consumer Payment Applications Market

The Proposed Rule would add a new § 1090.109 to existing subpart B of part 1090 of the CFPB's rules to establish CFPB supervisory authority over nonbank covered persons who are larger participants in a market for general-use digital consumer payment applications.²³ Proposed § 1090.109 includes the proposed market definition and market-related definitions in paragraph (a) and a test to define larger participants in a market for general-use digital consumer payment applications in paragraph (b).

Many nonbanks provide consumer financial products and services that allow consumers to use digital applications accessible through personal computing devices, such as mobile phones, tablets, smart watches, or computers, to transfer funds to other persons. Some nonbanks also provide consumer financial products and services that allow consumers to use digital applications on their personal computing devices to store payment credentials they can then use to purchase goods or services at a variety

²¹ Specifically, 12 U.S.C. 5514(a)(2) directs the CFPB to consult, prior to issuing a final rule to define larger participants of a market pursuant to CFPA section 1024(a)(1)(B), with the FTC. In addition, 12 U.S.C. 5512(b)(2)(B) directs the CFPB to consult, before and during the rulemaking, with appropriate prudential regulators or other Federal agencies, regarding consistency with objectives those agencies administer. The manner and extent to which provisions of 12 U.S.C. 5512(b)(2) apply to a rulemaking of this kind that does not establish standards of conduct are unclear. Nevertheless, to inform this rulemaking more fully, the CFPB performed the consultations described in those provisions of the CFPA.

²² 5 U.S.C. 553(d).

²³ As discussed further below, the general-use digital payment applications described in the Proposed Rule are "financial products or services" under the CFPA. 12 U.S.C. 5481(15)(A)(iv), (vii). Nonbanks that offer or provide such financial products or services to consumers primarily for personal, family, or household purposes are covered persons under the CFPA. 12 U.S.C. 5481(5)(A), (6).

¹⁴ 12 CFR 1090.104 (consumer reporting market); 12 CFR 1090.105 (consumer debt collection market); 12 CFR 1090.106 (student loan servicing market); 12 CFR 1090.107 (international money transfer market); 12 CFR 1090.108 (automobile financing market).

¹⁵ 12 CFR 1090.102.

¹⁶ 12 CFR 1090.103(d).

¹⁷ 12 CFR 1090.103(a).

¹⁸ 12 U.S.C. 5514(a)(1)(B), (a)(2).

¹⁹ 12 U.S.C. 5514(b)(7).

²⁰ 12 U.S.C. 5512(b)(1).

of stores, whether by communicating with a checkout register or a self-checkout machine, or by selecting the payment credential through a checkout process at ecommerce websites. Subject to the definitions, exclusions, limitations, and clarifications discussed below, the proposed market definition generally would cover these consumer financial products and services.

The CFPB is proposing to establish supervisory authority over nonbank covered persons who are larger participants in this market because this market has large and increasing significance to the everyday financial lives of consumers.²⁴ Consumers are growing increasingly reliant on general-use digital consumer payment applications to initiate payments.²⁵

²⁴ In proposing a larger participant rule for this market, the CFPB is not proposing to determine the relative risk posed by this market as compared to other markets. As explained in its previous larger participant rulemakings, “[t]he Bureau need not conclude before issuing a [larger participant rule] that the market identified in the rule has a higher rate of non-compliance, poses a greater risk to consumers, or is in some other sense more important to supervise than other markets.” 77 FR 65779.

²⁵ See CFPB, “Issue Spotlight: Analysis of Deposit Insurance Coverage Through Payment Apps” (June 1, 2023), available at <https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-analysis-of-deposit-insurance-coverage-on-funds-stored-through-payment-apps/full-report/> (last visited Oct. 23, 2023); see also McKinsey & Company, “Consumer digital payments: Already mainstream, increasingly embedded, still evolving” (Oct. 20, 2023) (describing results of consulting firm’s annual survey reporting that for the first time, more than 90 percent of U.S. consumers surveyed in August 2023 reported using some form of digital payment over the course of a year), available at <https://www.mckinsey.com/industries/financial-services/our-insights/banking-matters/consumer-digital-payments-already-mainstream-increasingly-embedded-still-evolving> (last visited Oct. 30, 2023); J.D. Power, “Banking and Payments Intelligence Report” (Jan. 2023) (reporting results of a survey of Americans that found that from the first quarter of 2021 to the third quarter of 2022, the number of respondents who had used a mobile wallet in the past three months rose from 38 percent to 49 percent), available at <https://www.jdpower.com/business/resources/mobile-wallets-gain-popularity-growing-number-americans-still-prefer-convenience> (last visited Oct. 23, 2023); “PULSE Study Finds Debit Issuers Focused on Digital Payments, Mobile Self-Service, Fraud Mitigation” (Aug. 17, 2023) (reporting that nearly 80 percent of debit card issuers reported increases in consumers’ use of mobile wallets in 2022), available at <https://www.pulsenetwork.com/public/insights-and-news/news-release-2023-debit-issuer-study/> (last visited Oct. 30, 2023); FIS, “The Global Payments Report” (2023) at 174 (industry study reporting that in 2022 digital wallets became the leading payment preference of U.S. consumers shopping online), available at <https://www.fisglobal.com/en/global-payments-report> (last visited Oct. 30, 2023); “Digital Payment Industry in 2023: Payment methods, trends, and tech processing payments electronically,” Insider Intelligence (Jan. 9, 2023) (projecting 2023 P2P volume in the United States to reach over \$1.1 trillion), available at <https://www.insiderintelligence.com/insights/digital-payment-services> (last visited Oct. 30, 2023);

Recent market research indicates that 76 percent of Americans have used at least one of four well-known P2P payment apps, representing substantial growth since the first of the four was established in 1998.²⁶ Even among consumers with annual incomes lower than \$30,000 who have more limited access to digital technology,²⁷ 61 percent reported using P2P payment apps.²⁸ And higher rates of use by U.S. adults in lower age brackets may drive further growth well into the future.²⁹ Across the United States, merchant

Consumer Reports Survey Group, “Peer-to-Peer Payment Services” (Jan. 10, 2023) (Consumer Reports P2P Survey) at 2 (reporting results from a survey finding that four in ten Americans use P2P services at least once a month), available at <https://advocacy.consumerreports.org/wp-content/uploads/2023/01/P2P-Report-4-Surveys-2022.pdf> (last visited Oct. 23, 2023); Kevin Foster, Claire Greene, and Joanna Stavins, “2022 Survey and Diary of Consumer Payment Choice: Summary Results” (Sept. 17, 2022) at 8 (reporting results of 2022 survey conducted by Federal Reserve System staff reporting that two thirds of consumers had adopted one or more online payment accounts in the previous 12 months—a share that was nearly 20 percent higher than five years earlier), available at https://www.atlantafed.org/-/media/documents/banking/consumer-payments/survey-diary-consumer-payment-choice/2022/sdpcp_2022_report.pdf (last visited Oct. 30, 2023); FDIC, “FDIC National Survey of Unbanked and Underbanked Households” (2021) at 33 (Table 6.4 reporting finding that nearly half of all households (46.4 percent) used a nonbank app in 2021), available at <https://www.fdic.gov/analysis/household-survey/2021report.pdf> (last visited Oct. 23, 2023).

²⁶ See, e.g., Monica Anderson, “Payment apps like Venmo and Cash App bring convenience—and security concerns—to some users” (Sept. 8, 2022), available at <https://www.pewresearch.org/short-reads/2022/09/08/payment-apps-like-venmo-and-cash-app-bring-convenience-and-security-concerns-to-some-users/> (last visited Oct. 23, 2023).

²⁷ Emily A. Vogels, “Digital divide persists even as Americans with lower incomes make gains in tech adoption” (June 22, 2021) (reporting results of early 2021 survey by Pew Research Center, finding 76 percent of adults with annual household incomes less than \$30,000 have a smartphone and 59 percent have a desktop or laptop computer, compared with 87 percent and 84 percent respectively of adults with household incomes between \$30,000 and \$99,999, and 97 percent and 92 percent respectively of adults with household incomes of \$100,000 or more), available at <https://www.pewresearch.org/short-reads/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/> (last visited Oct. 23, 2023).

²⁸ Consumer Reports P2P Survey at 2.

²⁹ See *id.* (85 percent of surveyed consumers aged 18 to 29 and 85 percent of surveyed consumers aged 30 to 44 reported using a digital payment application, compared with 67 percent of consumers aged 45 to 59 and 46 percent of consumers aged 60 and over); see also Ariana-Michele Moore, “The U.S. P2P Payments Market: Surprising Data Reveals Banks are Missing the Mark” (June 2023 AiteNovarica Impact Report) at 8 (Figure 13 reporting 94 percent and 86 percent adoption of P2P accounts and digital wallets among the youngest adult cohort born between 1996 and 2002, compared with 57 percent and 40 percent among the oldest cohort born before 1995), available at <https://aite-novarica.com/report/us-p2p-payments-market-surprising-data-reveals-banks-are-missing-mark> (last visited Oct. 23, 2023).

acceptance of general-use digital consumer payment applications also has rapidly expanded as businesses seek to make it as easy as possible for consumers to make purchases through whatever is their preferred payment method.³⁰

Consumers rely on general-use digital consumer payment applications for many aspects of their everyday lives. In general, consumers make payments to other individuals for a variety of reasons, including sending gifts or making informal loans to friends and family and purchasing goods and services, among many others.³¹ Consumers can use digital applications to make payments to individuals for these purposes, as well as to make payments to businesses, charities, and other organizations. According to one recent market report, nonbank digital payment apps have rapidly grown in the past few years to become the most popular way to send money to other individuals other than cash,³² and are used for a higher number of such transactions than cash.³³ For many consumers, general-use digital consumer payment applications offer an alternative, technological replacement for non-digital payment methods.³⁴

³⁰ See Geoff Williams, “Retailers are embracing alternative payment methods, though cards are still king” (Dec. 1, 2022) (National Retail Federation article citing its 2022 report indicating that 80 percent of merchants accept Apple Pay or plan to do so in the next 18 months, and 65 percent of merchants accept Google Pay or plan to do so in the next 18 months), available at <https://nrf.com/blog/retailers-are-embracing-alternative-payment-methods-though-cards-are-still-king> (last visited Oct. 23, 2023); see also The Strawhecker Group (TSG), “Merchants respond to Consumer Demand by Offering P2P Payments” (June 8, 2022) (reporting results of TSG and Electronic Transactions Association survey of over 500 small businesses merchants finding that 82 percent accept payment through at least one digital P2P option), available at <https://thestravgroup.com/merchants-respond-to-consumer-demand-by-offering-p2p-payments/> (last visited Oct. 23, 2023).

³¹ June 2023 AiteNovarica Impact Report at 8 (Figure 1 reporting 66 percent of 5,895 consumers surveyed reported making at least one domestic P2P payment in 2022 whether via digital means or not, and of consumers who made P2P payments in 2022, 70 percent did so for birthday gifts, 64 percent for holiday gifts, 49 percent for other gift occasions, 46 percent to lend money, 41 percent to make a charitable contribution, 39 percent paid for services, 39 percent purchased items, 31 percent provided funds in an emergency situation, and 18 percent provided financial support).

³² *Id.* at 25 (Figure 14 reporting that 74 percent of consumers made P2P payments in cash and 69 percent used certain alternative digital P2P payment services).

³³ *Id.* at 27–28 (Figure 15 reporting that, compared with 20 percent of transactions in cash, 37 percent of P2P transactions made through alternative P2P payment services, even before including Zelle, prepaid cards, and domestic money transfer services).

³⁴ See Marqueta, “2022 State of Consumer Money Movement Report” (May 26, 2022) at 5 (reporting

Consumers increasingly have adopted general-use digital consumer payment applications³⁵ as part of a broader movement toward noncash payments.³⁶ Amid growing merchant acceptance of general-use digital consumer payment applications, consumers with middle and lower incomes use digital consumer payment applications for a share of their overall retail spending that rivals or exceeds their use of cash.³⁷ Such applications now have a share of ecommerce payments volume that is similar to or greater than other traditional payment methods such as credit cards and debit cards used outside of such applications.³⁸ Such applications also have been gaining an increasing share of in-person retail spending.³⁹

results of industry survey finding that 56 percent of US consumers felt comfortable leaving their non-digital wallet at home and taking their phone with them to make payments), available at <https://www.marqeta.com/resources/2022-state-of-consumer-money-movement> (last visited Oct. 23, 2023).

³⁵ June 2023 AiteNovarica Impact Report at 24 (Figure 13 reporting 81 percent of U.S. adults surveyed held one or more P2P accounts and 69 percent had one or more digital wallets).

³⁶ “The Federal Reserve Payments Study: 2022 Triennial Initial Data Release” (indicating a rapid increase in core non-cash payments between 2018 and 2021 and a rapid decline in ATM cash withdrawals during the same period), available at <https://www.federalreserve.gov/paymentsystems/fr-payments-study.htm> (last visited Oct. 23, 2023).

³⁷ PYMNTS, “Digital Economy Payments: The Ascent of Digital Wallets” (Feb. 2023) at 16–17 (December 2022 survey finding 6.1 percent of overall consumer spending by consumers with lower incomes made using digital consumer payment applications, compared with 9.9 percent of consumer spending by consumers with middle-level incomes), available at <https://www.pymnts.com/study/digital-economy-payments-ecommerce-shopping-retail-consumer-spending/> (last visited Oct. 23, 2023).

³⁸ See FIS, “Global Payments Report” (2023) at 176 (reporting 32 percent share of ecommerce transactions, by value, made using a digital wallet, compared with 30 percent by credit card and 20 percent by debit card), available at <https://www.fisglobal.com/en/global-payments-report> (last visited Oct. 23, 2023).

³⁹ See, e.g., “2023 Pulse Debit Issuer Study” (Aug. 17, 2023) at 11 (reporting that mobile wallet use at point of sale doubled in 2022, representing nearly 10 percent of total debit card purchase transactions in 2022), available at <https://www.pulsenetwork.com/public/debit-issuer-study/> (last visited Oct. 30, 2023); “Digital Economy Payments: The Ascent of Digital Wallets” at 12 (December 2022 survey finding 7.5 percent of in-person consumer purchase volume made with a digital consumer payment application). See also CFPB Issue Spotlight, “Big Tech’s Role in Contactless Payments: Analysis of Mobile Devices Operating Systems and Tap-to-Pay Practices” (Sept. 7, 2023) (Competition Spotlight) (describing market report by Juniper Research forecasting that the value of digital wallet tap-to-pay transactions will grow by over 150 percent by 2028), available at <https://www.consumerfinance.gov/data-research/research-reports/big-techs-role-in-contactless-payments-analysis-of-mobile-device-operating-systems-and-tap-to-pay-practices/full-report/> (last visited Oct. 23, 2023).

The Proposed Rule would bring nonbanks that are larger participants in a market for general-use digital consumer payment applications within the CFPB’s supervisory jurisdiction.⁴⁰ Supervision of larger participants, who engage in a substantial portion of the overall activity in this market, would help to ensure that they are complying with applicable requirements of Federal consumer financial law, such as the CFPB’s prohibition against unfair, deceptive, and abusive acts and practices, the privacy provisions of the Gramm-Leach-Bliley Act and its implementing Regulation P,⁴¹ and the Electronic Fund Transfer Act and its implementing Regulation E.⁴² In addition, as firms increasingly offer funds transfer and wallet functionalities through general-use digital consumer payment applications, the rule would enable the CFPB to monitor for new risks to both consumers and the market.⁴³ The CFPB’s ability to monitor for emerging risks is critical as new product offerings blur the traditional lines of banking and commerce.⁴⁴

Finally, the Proposed Rule can help level the playing field between nonbanks and depository institutions, which the CFPB regularly supervises and which also provide general-use digital consumer payment applications.⁴⁵ Greater supervision of nonbanks in this market therefore would further the CFPB’s statutory objective of ensuring that Federal consumer financial law is enforced consistently between nonbanks and depository institutions in order to promote fair competition.

⁴⁰ 12 U.S.C. 5514(a)(1)(B).

⁴¹ See generally 12 CFR part 1016 (CFPB’s Regulation P implementing 15 U.S.C. 6804).

⁴² 15 U.S.C. 1693 *et seq.*, implemented by Regulation E, 12 CFR part 1005. See, e.g., 12 CFR 1005.11 (Procedures for financial institutions to resolve errors). This incentive for improved compliance applies not only to nonbank covered persons when providing a general-use digital consumer payment application, but also when providing related products, such as stored value accounts.

⁴³ See, e.g., CFPB, “The Convergence of Payments and Commerce: Implications for Consumers” (Aug. 2022) at sec. 4.1 (highlighting the potential that consumer financial data and behavioral data are used together in increasingly novel ways), available at https://files.consumerfinance.gov/f/documents/cfpb_convergence-payments-commerce-implications-consumers_report_2022-08.pdf (last visited Oct. 27, 2023).

⁴⁴ See generally *id.*

⁴⁵ For example, some depository institutions and credit unions provide general bill payment services and other types of electronic fund transfers through digital applications for consumer deposit accounts.

109(a)(1) Market Definition—Providing a General-Use Digital Consumer Payment Application

Proposed § 1090.109(a)(1) would describe the market for consumer financial products or services covered by the Proposed Rule as encompassing “providing a general-use digital consumer payment application.” The term would be defined to mean providing a covered payment functionality through a digital application for consumers’ general use in making consumer payment transaction(s). This term incorporates other terms defined in proposed § 1090.109(a)(2): “consumer payment transaction(s),” “covered payment functionality,” “digital application,” and “general use.” The term “covered payment functionality” includes a “funds transfer functionality” and a “wallet functionality,” terms which proposed § 1090.109(a)(2) also defines. The term “consumer payment transaction(s)” also incorporates another term—“State,” which proposed § 1090.109(a)(2) defines. The section-by-section analysis of proposed § 1090.109(a)(2) below discusses these and other aspects of the proposed definitions of these terms.

The CFPB seeks comment on all aspects of the proposed market definition, including whether the market definition in proposed § 1090.109(a)(1) or the market-related definitions in proposed § 1090.109(a)(2), discussed in the section-by-section analysis below, should be expanded, narrowed, or otherwise modified.

109(a)(2) Market-Related Definitions

Proposed § 1090.109(a)(2) would define several terms that are relevant to the market definition described above.

Consumer Payment Transaction(s)

The proposed market definition applies to providing covered payment functionalities through a digital application for a consumer’s general use in making consumer payment transactions. Proposed § 1090.109(a)(2) would define the term “consumer payment transactions” to mean the transfer of funds by or on behalf of a consumer physically located in a State to another person primarily for personal, family, or household purposes. The proposed definition would clarify that, except for transactions excluded under paragraphs (A) through (D), the term applies to transfers of consumer funds and transfers made by extending consumer credit. Paragraphs (A) through (D) of the proposed definition would exclude the

following four types of transactions: (A) An international money transfer as defined in § 1090.107(a) of this part; (B) A transfer of funds that is (1) linked to the consumer's receipt of a different form of funds, such as a transaction for foreign exchange as defined in 12 U.S.C. 5481(16), or (2) that is excluded from the definition of "electronic fund transfer" under § 1005.3(c)(4) of this chapter; (C) A payment transaction conducted by a person for the sale or lease of goods or services that a consumer selected from an online or physical store or marketplace operated prominently in the name or such person or its affiliated company; and (D) An extension of consumer credit that is made using a digital application provided by the person who is extending the credit or that person's affiliated company.⁴⁶

The Proposed Rule would define the term "consumer payment transaction" for purposes of the Proposed Rule. Payment transactions that are excluded from, or otherwise do not meet, the definition of "consumer payment transaction" in the Proposed Rule would not be covered by the market definition in the Proposed Rule. However, persons facilitating those transactions may still be subject to other aspects of the CFPB's authorities besides its larger participant supervisory authority established by the Proposed Rule.

The first component of the proposed definition of "consumer payment transaction" is that the payment transaction must result in a transfer of funds by or on behalf of the consumer. This component therefore focuses on the sending of a payment, and not on the receipt. The proposed definition would encompass a consumer's transfer of their own funds—such as funds held in a linked deposit account or in a stored value account. It also would encompass a creditor's transfer of funds to another person on behalf of the consumer as part of a consumer credit transaction.⁴⁷ For example, a nonbank's wallet functionality may hold a credit card account or payment credential that a consumer uses to obtain an extension of credit from an unaffiliated depository institution. If the consumer uses the digital wallet functionality to purchase nonfinancial goods or services using

such a credit card, the credit card issuing bank may settle the transaction by transferring funds to the merchant's bank for further transfer to the merchant, and a charge may appear on the consumer's credit card account. That transfer of funds may constitute part of a consumer payment transaction under the Proposed Rule regardless of whether it is an electronic fund transfer subject to Regulation E.⁴⁸

The CFPA does not include a specific definition for the term "funds," but that term is used in various provisions of the CFPA, including in section 1002(15)(A)(iv), which defines the term "financial product or service" to include "engaging in deposit-taking activities, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer."⁴⁹ Without fully addressing the scope of that term, the CFPB believes that, consistent with its plain meaning, the term "funds" in the CFPA is not limited to fiat currency or legal tender, and includes digital assets that have monetary value and are readily useable for financial purposes, including as a medium of exchange. Crypto-assets, sometimes referred to as virtual currency, are one such type of digital asset.⁵⁰ For example, relying on plain meaning dictionary definitions, courts have found that certain crypto-assets, including Bitcoin, constitute "funds" for purposes of other Federal statutes because they "can be easily purchased in exchange for ordinary currency, acts as a denominator of value, and is used to conduct financial transactions."⁵¹ For these reasons,

⁴⁸ See also generally § 1005.12(a) (describing relationship between Regulation E and other laws including the Truth in Lending Act and its implementing regulation, Regulation Z).

⁴⁹ 12 U.S.C. 5481(15)(A)(iv).

⁵⁰ See generally FSOC, "Report on Digital Asset Financial Stability Risks and Regulation" (Oct. 3, 2022) at 7 ("For the purposes of this report, the term 'digital assets' refers to two categories of products: 'central bank digital currencies' (CBDCs) and 'crypto-assets.' This report largely focuses on crypto-assets. Crypto-assets are a private sector digital asset that depends primarily on cryptography and distributed ledger or similar technology. For the purpose of this report, the term crypto-assets encompasses many assets that are commonly referred to as 'coins' or 'tokens' by market participants."), available at <https://home.treasury.gov/system/files/261/FSOC-Digital-Assets-Report-2022.pdf> (last visited Oct. 23, 2023).

⁵¹ *United States v. Faiella*, 39 F. Supp. 3d 544, 545 (S.D.N.Y. 2014) (citing examples of financial transactions that can be conducted using Bitcoin as including purchases of goods and services); see also *United States v. Iossifov*, 45 F.4th 899, 913 (6th Cir. 2022) (Bitcoin); *United States v. Murgio*, 209 F. Supp. 3d 698, 707 (S.D.N.Y. 2016) (Bitcoin); *United States v. Ulbricht*, 31 F. Supp. 3d 540, 570 (S.D.N.Y. 2014) (Bitcoin); *United States v. Budovsky*, No. 13-CR-368-DLC, 2015 WL 5602853 at *14 (S.D.N.Y. Sept. 23, 2015) (E-Gold).

under the Proposed Rule, the transfer of funds in the form of the digital assets described above by or on behalf of a consumer physically located in a State to another person primarily for person, family, or household purposes would qualify as a "consumer payment transaction" unless one of the proposed exclusions to the definition of that term applies. And, by extension, providing a covered payment functionality through a digital application for consumers' general use in making such consumer payment transactions would fall within the proposed market definition.

The second component of the proposed definition of "consumer payment transaction" is that the consumer must be physically located in a State, a term the proposal would define by reference to jurisdictions that are part of the United States as discussed in the section-by-section analysis below. This component would be satisfied, for example, when the consumer uses a general-use digital consumer payment application on a personal computing device or at a point of sale that is physically located in a State. By contrast, with this limitation, if a consumer is physically located outside of any State at the time of engaging in a payment transaction, then the payment transaction would not be a consumer payment transaction covered by the Proposed Rule.⁵² Thus, this limitation would clarify that the proposed market definition does not include payments initiated by a consumer physically located in a foreign country.⁵³ Based on its understanding of the market, the CFPB expects that participants in the proposed market will generally be aware of indicators regarding the consumer's location at the time of a transaction (e.g., based on the point of sale, the location of the consumer's device, or the consumer's residence). The CFPB requests comment on this limitation.

The third component of the proposed definition of "consumer payment transaction" is that the funds transfer must be made to another person besides the consumer. For example, the other person could be another consumer, a business, or some other type of entity. This component would distinguish the

⁵² This definitional limitation is for purposes of defining the market in the Proposed Rule. Transactions excluded from the definition of consumer payment transaction in this rule may still be payment transactions with a consumer purpose.

⁵³ In addition, when a consumer located in a foreign country makes a payment received at a location in the United States, that payment would not count as an international money transfer as defined in that larger participant rule because the payment is not made to be received by a designated recipient at a location in a foreign country.

⁴⁶ Subpart A of the CFPB's existing larger-participant rule includes a definition of "affiliated company" that would apply to the use of that term in the Proposed Rule. See 12 CFR 1090.101.

⁴⁷ In certain circumstances, consumer credit transactions would be excluded from the proposed definition of "consumer payment transaction," for example as described in the exclusion in paragraph (D) discussed below.

proposed market for general-use digital payment applications that facilitate payments consumers make to other persons from adjacent but distinct markets that include other consumer financial products and services, including the activities of taking deposits; selling, providing, or issuing of stored value; and extending consumer credit by transferring funds directly to the consumer. For example, this component of the proposed definition would exclude transfers between a consumer's own deposit accounts, transfers between a consumer deposit account and the same consumer's stored value account held at another financial institution, such as loading or redemptions, as well as a consumer's withdrawals from their own deposit account such as by an automated teller machine (ATM).

The fourth component of the proposed definition of "consumer payment transaction" is that the funds transfer must be primarily for personal, family, or household purposes. The proposed definition of "consumer payment transaction" includes this component to define those payment transactions that are, by their nature, consumer transactions. Under a relevant definition of consumer financial products and services in CFPB section 1002(5)(A), a financial product or service is a consumer financial product or service when it is offered or provided for use by consumers primarily for personal, family, or household purposes.⁵⁴ The Proposed Rule would define a consumer payment transaction as one that is primarily for personal, family, or household purposes, and would define the relevant market activity (providing a general-use digital consumer payments application) by reference to its use with respect to consumer payment transactions. Although a general-use digital consumer payment application also could help individuals to make payments that are not for personal, family, or household purposes, such as purely commercial (or business-to-business) payments, those payments would not fall within the proposed definition of "consumer payment transaction."

In addition, the proposed definition of "consumer payment transaction" would exclude four types of transfers. First, paragraph (A) of the proposed definition would exclude international money transfers as defined in § 1090.107(a). In its 2014 international money transfer larger participant rulemaking, the CFPB determined that the complexities involved in international money

transfers, such as foreign exchange rates, foreign taxes, and legal, administrative, and language complexities, as well as the CFPB's remittances rule, justified treating that market as a separate market from the domestic money transfer market for purposes of that larger participant rule.⁵⁵ In proposing this larger participant rule, the CFPB is not proposing to alter the international money transfer larger participant rule. Rather, the CFPB is proposing this larger participant rule to define a separate market, focused on the use of digital payment technologies to help consumers make payment transactions that are not international money transfers as defined in the international money transfer larger participant rule. Accordingly, the proposed definition of "consumer payment transaction" would exclude an international money transfer as defined in § 1090.107(a). To the extent that nonbank international money transfer providers facilitate those transactions, whether through a digital application or otherwise,⁵⁶ that activity remains part of the international money transfer market, and the CFPB may be able to supervise such a nonbank if it meets the larger-participant test in the international money transfer larger participant rule.

Second, for clarity, paragraph (B) of the proposed definition of "consumer payment transaction" would exclude a transfer of funds by a consumer (1) that is linked to the consumer's receipt of a different form of funds, such as a transaction for foreign exchange as defined in 12 U.S.C. 5481(16), or (2) that is excluded from the definition of "electronic fund transfer" under § 1005.3(c)(4) of this chapter. Paragraph (1) of this proposed exclusion would clarify, for example, that the market as defined in the Proposed Rule does not include transactions consumers conduct for the purpose of exchanging one type of funds for another, such as exchanges of fiat currencies (*i.e.*, the exchange of currency issued by the United States or of a foreign government for the currency of a different government), a purchase of a crypto-asset using fiat currency, a sale of a crypto-asset in which the seller

receives fiat currency in return, or the exchange of one type of crypto-asset for another type of crypto-asset. Paragraph (2) would clarify that transfers of funds the primary purpose of which is the purchase or sale of a security or commodity in circumstances described in Regulation E section 3(c)(4) and its associated commentary also would not qualify as consumer payment transactions for purposes of the Proposed Rule.⁵⁷

Third, paragraph (C) would exclude a payment transaction conducted by a person for the sale or lease of goods or services that a consumer selected from an online or physical store or marketplace operated prominently in the name of such person or its affiliated company.⁵⁸ This exclusion would clarify that, when a consumer selects goods or services in a store or website operated in the merchant's name and the consumer pays using account or payment credentials stored by the merchant who conducts the payment transaction, such a transfer of funds generally is not a consumer payment transaction covered by the Proposed Rule.

This exclusion also would clarify that when a consumer selects goods or services in an online marketplace and pays using account or payment credentials stored by the online marketplace operator or its affiliated company,⁵⁹ such a transfer of funds generally is not a consumer payment transaction covered by the Proposed Rule. For such transactions to qualify for this exclusion, the funds transfer must be for the sale or lease of a good or service the consumer selected from a digital platform operated prominently in the name (whether entity or trade name) of an online marketplace operator or their affiliated company.⁶⁰ However,

⁵⁷ 12 CFR 1005.3(c)(4).

⁵⁸ See 12 CFR 1090.101 (definition of "affiliated company").

⁵⁹ A common industry definition of an online marketplace operator is an entity that engages in certain activities, including "[b]ring[ing] together [consumer payment card holders] and retailers on an electronic commerce website or mobile application" where "[i]ts name or brand is: [] Displayed prominently on the website or mobile application; [] Displayed more prominently than the name and brands of retailers using the Marketplace; and is [] Part of the mobile application name or [uniform resource locator.]" VISA, "Visa Core Rules and Visa Product and Service Rules" (Apr. 15, 2023) ("VISA Rules"), Rule 5.3.4.1 (defining the criteria for an entity to qualify as a "Marketplace" for purposes of the VISA Rules), available at <https://usa.visa.com/dam/VCOM/download/about-visa-visa-rules-public.pdf> (last visited Oct. 23, 2023).

⁶⁰ This aspect of the example is consistent with the understanding of some significant payments industry participants as to what is considered a digital marketplace. See *id.*

⁵⁵ 79 FR 56631, 56635 (Sept. 3, 2014). For additional information regarding the remittance rule, see CFPB, "Remittance Transfers," available at <https://www.consumerfinance.gov/compliance/compliance-resources/deposit-accounts-resources/remittance-transfer-rule/> (last visited Oct. 22, 2023).

⁵⁶ See CFPB, "Remittance Rule Assessment Report" (Oct. 2018, rev. April 2019) at 143 (describing trends including "widespread use of mobile phones to transfer remittances and the growth of online-only providers"), available at https://files.consumerfinance.gov/f/documents/bcftp_remittance-rule-assessment_report.pdf (last visited Oct. 25, 2023).

⁵⁴ 12 U.S.C. 5481(5)(A).

this exclusion does not apply when a consumer uses a payment or account credential stored by a general-use digital consumer payment application provided by an unaffiliated person to pay for goods or services on the merchant's website or an online marketplace. For example, when a consumer selects goods or services for purchase or lease on a website of a merchant, and then from within that website chooses an unaffiliated person's general-use digital consumer payment application as a payment method, then paragraph (C) would not exclude the resulting consumer payment transaction.

The purpose of this proposed exclusion to the definition of "consumer payment transaction" is to clarify the scope of the proposed market and to clarify which transactions count toward the proposed threshold in the larger-participant test in proposed § 1090.109(b). For example, some online marketplace operators may provide general-use digital consumer payment applications for consumers to use for the purchase or lease of goods or services the consumer selects on websites of unaffiliated merchants. Absent the exclusion in paragraph (C), the providing of such a general-use digital consumer payment application could result in counting all transactions through such an application, including for goods and services the consumer selects from the online marketplace, toward the larger-participant test threshold in proposed § 1090.109(b). Yet the CFPB is not seeking to define a market or determine larger-participant status in this rulemaking by reference to payment transactions conducted by merchants or online marketplaces through their own payment functionalities for their own sales transactions. How a merchant or online marketplace conducts payments to itself for sales through its own platform raises distinct consumer protection concerns from the concerns raised by general-use digital consumer payment applications that facilitate consumers' payments to third parties. The CFPB therefore believes it appropriate to exclude the former type of payment transactions from the market defined in the Proposed Rule.

In this regard, the scope of the term "consumer payment transaction" is narrower than the CFPB's authority under the CFPA, which can extend to payment transactions conducted by merchants or online marketplaces for sales through their own platforms under certain circumstances. The CFPA defines a consumer financial product or service to include "providing payments

or other financial data processing products or services to a consumer by any technological means, including processing or storing financial or banking data for any payment instrument" ⁶¹ Such activities generally are consumer financial products or services under the CFPA unless a narrow exclusion for financial data processing in the context of the direct sale of nonfinancial goods or services applies. ⁶² That exclusion would not apply if a merchant or online marketplace's digital consumer application stores, transmits, or otherwise processes payments or financial data for any purpose other than initiating a payments transaction by the consumer to pay the merchant or online marketplace operator for the purchase of a nonfinancial good or service sold directly by that merchant or online marketplace operator. Other purposes beyond payments for direct sales could include using or sharing such data for targeted marketing, data monetization, or research purposes. The exclusion also would not apply if an online marketplace operator's digital consumer application processes payments or other financial data associated with the consumer's purchase of goods or services at unaffiliated online or physical stores or third-party goods or services on the operator's online marketplace.

Finally, paragraph (D) would exclude an extension of consumer credit that is made using a digital application provided by the person who is extending the credit or that person's affiliated company. The CFPB is proposing this exclusion so that the market definition does not encompass consumer lending activities by lenders through their own digital applications. In this rulemaking, the CFPB is not proposing to define a market for extending consumer credit, as it did, for example, in the larger participant rule for the automobile financing market. ⁶³ As a result of this proposed exclusion, for example, a nonbank would not be participating in the proposed market

simply by providing a digital application through which it lends money to consumers to buy goods or services. Thus, to the extent consumer credit transactions would fall within the proposed definition of consumer payment transactions, this would be because the relevant market participant engages in covered payment-related activities beyond extending credit to the consumer. For example, a nonbank may provide a wallet functionality through a digital application that stores payment credentials for a credit card through which an unaffiliated depository institution or credit union extends consumer credit. The CFPB is proposing a market definition that would reach that nonbank covered person's activities because their role in the transaction is to help the consumer to make a payment, not to themselves extend credit to the consumer.

Covered Payment Functionality

The proposed market definition applies to providing covered payment functionalities through a digital application for a consumer's general use in making payment transactions. Proposed § 1090.109(a)(2) would define two types of payment functionalities as covered payment functionalities: a funds transfer functionality and a wallet functionality. Proposed § 1090.109(a)(2) would define each of those two functionalities as described below.

A nonbank covered person would be participating in the proposed market if its market activity includes only one of the two functionalities, or both functionalities. Similarly, a particular digital application may provide one or both functionalities. A nonbank's level of participation in the proposed market would not be based on which functionality is involved; rather, it would be based on the annual covered payment transaction volume as defined in proposed § 1090.109(b).

The CFPB proposes to treat these two covered payment functionalities as part of a single market for general-use digital consumer payment applications. The technological and commercial processes these two payment functionalities use to facilitate consumer payments may differ in some ways. However, consumers can use both types of covered payment functionalities for the same common purposes, such as to make payments for retail spending and sending money to friends and family. For example, a funds transfer functionality may transfer a consumer's funds in a linked stored value account to a merchant to pay for goods or services, or to friends or family. Similarly, a wallet functionality may transmit a stored payment

⁶¹ 12 U.S.C. 5481(15)(A)(vii).

⁶² "[A] person shall not be deemed to be a covered person with respect to financial data processing solely because the person . . . is a merchant, retailer, or seller of any nonfinancial good or service who engages in financial data processing by transmitting or storing payments data about a consumer exclusively for purpose of initiating payments instructions by the consumer to pay such person for the purchase of, or to complete a commercial transaction for, such nonfinancial good or service sold directly by such person to the consumer." 12 U.S.C. 5481(15)(A)(vii)(I). The CFPB concludes that this narrow exclusion is descriptive of the limited role that many merchants play in processing consumer payments or financial data.

⁶³ 12 CFR 1090.108.

credential to facilitate a consumer's payment to a merchant or to friends and family. Indeed, the same nonbank covered person may provide a digital application that encompasses both functionalities depending on the payment method a consumer chooses. For example, a nonbank covered person's digital application may allow the consumer to access a wallet functionality to make a payment using a credit card for which a third party extends credit, or a funds transfer functionality to make a payment from a stored value account the nonbank provides. The role these two functionalities play in a single market therefore is driven by their common uses, not their specific technological and commercial processes.

(A) Funds Transfer Functionality

The first payment functionality included in the definition in covered payment functionality in proposed § 1090.109(a)(2) is a funds transfer functionality. Paragraph (A) would define the term "funds transfer functionality" for the purpose of this rule to mean, in connection with a consumer payment transaction: (1) receiving funds for the purpose of transmitting them; or (2) accepting and transmitting payment instructions.⁶⁴ These two types of funds transfer functionalities generally describe how nonbanks help to transfer a consumer's funds to other persons, sometimes referred to as P2P transfers. The nonbank either already holds or receives the consumer's funds for the purpose of transferring them, or it transmits the consumers payment instructions to another person who does so. Paragraph (1), for example, would apply to a nonbank transferring funds it holds for the consumer, such as in a stored value account, to another person for personal, family, or household purposes. Even if the nonbank providing the funds transfer functionality does not hold or

receive the funds to be transferred, it generally would qualify under paragraph (2) by transmitting the consumer's payment instructions to the person that does hold or receive the funds for transfer. Paragraph (2), for example, would apply to a nonbank that accepts a consumer's instruction to send money from the consumer's banking deposit account to another person for personal, family, or household purposes, and then transmits that instruction to other persons to accomplish the fund transfer. A common way a nonbank may engage in such activities is by acting as a third-party intermediary to initiate an electronic fund transfer through the automated clearinghouse (ACH) network. Another common way to do so is to transmit the payment instructions to a partner depository institution. However, in some circumstances, a nonbank may be able to execute a consumer's payment instructions on its own, such as by debiting the consumer's account and crediting the account of the friend or family member, without transmitting the payment instructions to another person. In those circumstances, the nonbank generally would be covered by paragraph (1) because, to conduct the transaction in this manner, the nonbank typically would be holding or receiving the funds being transferred.

The CFPB requests comment on the proposed definition of funds transfer functionality, and whether it should be modified, and if so, how and why.

(B) Wallet Functionality

The other payment functionality included in the definition in covered payment functionality in proposed § 1090.109(a)(1) is a wallet functionality. Paragraph (B) would define the term wallet functionality as a product or service that: (1) stores account or payment credentials, including in encrypted or tokenized form; and (2) transmits, routes, or otherwise processes such stored account or payment credentials to facilitate a consumer payment transaction.⁶⁵

⁶⁵ The wallet functionality as described here is a consumer financial product or service under the CFPA. See 12 U.S.C. 5481(15)(A)(vii) (defining "financial product or service" to include "providing payments or other financial data processing products or services to a consumer by any technological means, including processing or storing financial or banking data for any payment instrument, or through any payments systems or network used for processing payments data, including payments made through an online banking system or mobile telecommunications network," subject to certain exceptions); see also 12 U.S.C. 5481(5)(A) (defining "consumer financial product or service" to mean a financial product or service "offered or provided for use by consumers

Through this proposed definition, the proposed market would include payment functionalities that work together first to store account or payment credentials and second, to process such data to facilitate a consumer payment transaction.

As indicated above, paragraph (B)(1) of the proposed definition of "wallet functionality" would clarify that "account or payment credentials" can take the form of encrypted or tokenized data. Storage of account or payment credentials in these forms would satisfy the first prong of the "wallet functionality" definition. For example, the first prong would be satisfied by storing an encrypted version of a payment account number or a token⁶⁶ that is specifically derived from or otherwise associated with a consumer's payment account number.

Paragraph (B)(2) of the proposed definition of "wallet functionality" would describe the types of processing of stored account or payment credentials that would fall within the definition. For example, consumers commonly use wallet functionalities provided through digital applications to pay for purchases of goods or services on merchant websites. To facilitate such a consumer payment transaction, a consumer financial product or service may transmit a stored payment credential to a merchant, its payment processor, or its website designed to accept payment credentials provided by the wallet functionality. This type of product or service would be covered by paragraph (B)(2).

primarily for personal, family, or household purposes").

⁶⁶ Tokens now are often used for wallets to store a variety of payment credentials including network-branded payment cards. See, e.g., Manya Sini, "Visa tokens overtake payments giant's physical cards in circulation," *Reuters.com* (Aug. 24, 2022) (describing how VISA's token service "replaces 16-digit Visa account numbers with a token that only Visa can unlock, protecting the underlying account information."), available at <https://www.reuters.com/business/finance/visa-tokens-overtake-payments-giants-physical-cards-circulation-2022-08-24/> (last visited Oct. 23, 2023); *In re Mastercard Incorporated*, FTC Docket No. C-4795 (May 13, 2023) ¶¶ 24–32 (describing how payment cards are "tokenized" for use digital wallets by "replacing the cardholder's primary account number (PAN) [] with a different number to protect the PAN during certain stages of the [] transaction."), available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/mastercard-inc-matter> (last visited Oct. 23, 2023); American Express, "American Express Tokenization Service," available at <https://network.americanexpress.com/globalnetwork/products-and-services/security/tokenization-service/> (last visited Oct. 23, 2023); Discover Digital Exchange, "Powering digital payment experiences," available at <https://www.discoverglobalnetwork.com/solutions/technology-payment-platforms/discover-digital-exchange-ddx/> (last visited Oct. 23, 2023).

⁶⁴ Such funds transfer services are consumer financial products or services under the CFPA. See 12 U.S.C. 5481(5)(A) (defining "consumer financial product or service" to mean a financial product or service "offered or provided for use by consumers primarily for personal, family, or household purposes"). The CFPA defines a "financial product or service" to include "engaging in deposit-taking activities, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer." 12 U.S.C. 5481(15)(A)(iv); see also 12 U.S.C. 5481(29) (defining "transmitting or exchanging funds"). The CFPA also defines a "financial product or service" to include generally "providing payments or other financial data processing products or services to a consumer by any technological means, including processing or storing financial or banking data for any payment instrument," subject to certain exceptions. 12 U.S.C. 5481(15)(A)(vii).

The CFPB requests comment on the proposed definition of the term wallet functionality, whether it sufficiently encompasses digital wallets in the market today, and whether it should be modified, and if so, how and why.

Digital Application

The proposed market definition applies to providing covered payment functionalities through a digital application for a consumer's general use in making consumer payment transactions. Proposed § 1090.109(a)(2) would define the term "digital application" as a software program accessible to a consumer through a personal computing device, including but not limited to a mobile phone, smart watch, tablet, laptop computer, or desktop computer.⁶⁷ The proposed definition would specify that the term includes a software program, whether downloaded to a personal computing device, accessible from a personal computing device via a website using an internet browser, or activated from a personal computing device using a consumer's biometric identifier, such as a fingerprint, palmprint, face, eyes, or voice.⁶⁸

Market participants may provide covered payment functionalities through digital applications in many ways. For example, a consumer may access a nonbank covered person's covered payment functionality through a digital application provided by that nonbank covered person. Or, a consumer may access a nonbank covered person's covered payment functionality through a digital application provided by an unaffiliated third-party such as another nonbank, a bank, or a credit union.⁶⁹ In either case,

a consumer typically first opens the digital application on a personal computing device and follows instructions for associating their deposit account, stored value account, or other payment account information with the covered payment functionality for use in a future consumer payment transaction. Then, when the consumer is ready to initiate a payment, the consumer may access the digital application again to authorize the payment.

Moreover, consumers have many ways to access covered payment functionalities through digital applications to initiate consumer payment transactions. To make a P2P payment, a consumer may use an internet browser or other app on a mobile phone or computer to access a nonbank covered person's funds transfer functionality, such as a feature to initiate a payment to friends or family or to access a general-use bill payment function. The consumer then may direct the nonbank covered person to transmit funds to the recipient or the consumer may provide payment instructions for the nonbank covered person to relay to the person holding the funds to be transferred. Or, in an online retail purchase transaction, a consumer may access a wallet functionality by clicking on or pressing a payment button on a checkout screen on a merchant website. The consumer then may log into the digital application or display a biometric identifier to their personal computing device to authorize the use of a previously-stored payment credential. Or, in an in-person retail purchase transaction, a consumer may activate a covered payment functionality by placing their personal computing device next to a merchant's retail payment terminal. The digital application then may transmit payment instructions or payment credentials to a merchant payment processor. For example, a mobile phone may transmit such data by using near-field communication (NFC) technology built into the mobile phone,⁷⁰ by generating a payment-specific quick response (QR) code on the mobile phone screen that the consumer displays to the merchant payment terminal, or by using the internet, a text messaging system, or other communications network accessible through the mobile phone.

Through the proposed definition of digital application, the Proposed Rule

excludes from the proposed market payment transactions that do not rely upon use of a digital applications. For example, gateway terminals merchants obtain to process the consumer's personal card information are not personal computing devices of the consumer. Merchants generally select these types of payment processing services, which are provided to consumers at the point of sale to pay for the merchant's goods or services. Their providers may be participating in a market that is distinct in certain ways from a market for general-use digital consumer payment applications. In addition, the proposed definition of "digital application" would not cover the consumer's presentment of a debit card, a prepaid card, or a credit card in plastic, metallic, or similar form at the point of sale. In using physical payment cards at the point of sale, a consumer generally is not relying upon a "digital application" because the consumer is not engaging with software through a personal computing device to complete the transaction. However, when a consumer uses the same payment card account in a wallet functionality provided through a digital application, then those transactions would fall within the market definition.

In addition, there are other examples of payment transactions that do not rely upon the use of a digital application, including transactions relying upon the in-person payment of physical fiat currency (cash), and transactions where a consumer mails or hand delivers a paper payment instrument such as a paper check.

The CFPB requests comment on the proposed definition of "digital application," and whether it should be modified, and if so, how and why. For example, the CFPB requests comment regarding whether defining the term "digital application" by reference to software accessible through a personal computing device is appropriate, and if so, why, and if not, why not and what alternative approach should be used and why.

General Use

The proposed market definition applies to providing covered payment functionalities through a digital application for a consumer's general use in making consumer payment transactions. Proposed § 1090.109(a)(2) would define the term "general use" as the absence of significant limitations on the purpose of consumer payment transactions facilitated by the covered payment functionality provided through the digital consumer payment application. In proposing the general

⁶⁷ For purposes of the Proposed Rule, what matters is whether the digital application is accessible through a personal computing device, not whether a particular payment is made using a computing device that a consumer personally owns. For example, if a consumer logs into a digital application through a website using a work or library computer and makes a consumer payment transaction, the transfer would be subject to the Proposed Rule if that digital application is one a consumer also may access through a personal computing device.

⁶⁸ For example, some nonbanks allow consumers to use interactive voice technology to operate the nonbank's application that resides on the phone itself. See, e.g., Lory Seraydarian, "Voice Payments: The Future of Payment Technology?" PlatAI Blog (Mar. 7, 2022) (software firm analysis reporting that major P2P participants "allow their customers to use voice commands for peer-to-peer transfers."), available at <https://plat.ai/blog/voice-payments/> (last visited Oct. 23, 2023).

⁶⁹ If a nonbank covered person provides a covered payment functionality a consumer may access through a digital application provided by a bank or credit union, the Proposed Rule would only apply to the nonbank. Depository institutions and credit unions are not subject to the CFPB's larger

participant rules, which rely upon authority in CFPB section 1024 that applies to nonbanks. 12 U.S.C. 5514.

⁷⁰ See generally CFPB Competition Spotlight, *supra* n.39.

use qualification in the market definition, the CFPB seeks to confine the market definition to those digital payment applications that consumers can use for a wide range of purposes. Digital payment applications with general use as described in the Proposed Rule can serve broad functions for consumers, such as sending funds to friends and family, buying a wide range of goods or services at different stores, or both. As reflected in the non-exhaustive list of examples discussed below, other consumer financial products and services provide payment functionalities for more limited purposes. While those other products and services also serve important functions for consumers, they do not have the same broad use cases for consumers. As a result, those products participate in a market or markets distinguishable from a market from general-use digital consumer payment applications.

The proposed definition of general use would clarify that a digital consumer payment application that would facilitate person-to-person, or peer-to-peer (P2P), transfers of funds would qualify as having general use. Even if a payment functionality provided through a digital application is limited to P2P payments, and that constitutes a limitation on the purpose of payments, that limitation would not be significant for purposes of the proposed market definition. For example, a P2P application that permits a consumer to send funds to any family member, friend, or other person would qualify as general use, even if that P2P application could not be used as a payment method at checkout with merchants, retailers, or other sellers of goods or services. A P2P application also would have general use for purposes of the Proposed Rule even if it can only transfer funds to recipients who also register with the application provider, or otherwise participate in a certain network (sometimes referred to as “closed loop” P2P systems). Although the network of potential recipients in a closed loop system may be limited in certain respects, often any potential recipient may have the option of joining such a system (and many consumers already may have joined such systems), so the universe of potential recipients for such payments often is still broad. Moreover, a digital consumer payment application still may have general use even when the universe of potential recipients for a funds transfer is fixed, such as when a consumer can only make a transfer of funds to friends or family located in a

prison, jail, or other secure facility. Such funds may be available to the recipient for a variety of purposes, including to purchase food, toiletries, medical supplies, or phone credits while incarcerated, and, if not used by the recipient while incarcerated, may revert to an unrestricted account.⁷¹

To provide clarity as to the proposed market definition, the proposed definition of general use would include examples of limitations that would be significant for purposes of the proposal, such that a covered payment functionality offered through a digital consumer payment application with such limitations would not have general use.⁷² The examples would illustrate some types of digital consumer payment applications that would not have general use. The list of examples is not exhaustive, and other types of digital consumer payment applications would not have general use to the extent they cannot be used for a wide range of purposes.

In addition, some payment functionalities may be provided through two different digital consumer applications. For example, from a merchant’s ecommerce digital application, a consumer may click on a payment button that links to a third-party general-use digital consumer payment application, where the consumer authenticates their identity and provides payment instructions or otherwise authorizes the payment. Even if the merchant’s digital application would not itself qualify as having general use, the consumer’s use of the third-party general-use digital consumer payment application would still constitute covered market activity with respect to the third-party provider.

The first example of a payment functionality that would not have general use, in paragraph (A) of the proposed definition of general use, would be a digital consumer payment application whose payment

functionality is used solely to purchase or lease a specific type of services, goods, or property, such as transportation, lodging, food, an automobile, a dwelling or real property, or a consumer financial products and service. For example, when a consumer uses a payment functionality in a digital application for a consumer financial product or service to pay for that consumer financial product or service, such as by providing payment card information to a credit monitoring app to pay for credit monitoring services, this limited purpose for that payment functionality would not have general use under the Proposed Rule.⁷³ Paragraph (A) of the proposed definition specifies these examples of significant limitations, such that a payment functionality provided through digital consumer payment application with these limitations would not have general use.

Second, as indicated in paragraph (B) of the proposed definition of general use, accounts that are expressly excluded from the definition of “prepaid account” in paragraphs (A), (C), and (D) of § 1005.2(b)(3)(ii) of Regulation E,⁷⁴ also would not have general use for purposes of the Proposed Rule. Those provisions in Regulation E exclude certain tax-advantaged health medical spending accounts, dependent care spending accounts, transit or parking reimbursement arrangements, closed-loop accounts for spending at certain military facilities, and many types of gift certificates and gift cards. While these types of accounts may support payments through digital applications with varied purposes to different types of recipients, the accounts remain sufficiently restricted as to the purpose to warrant exclusion from the proposed market here.

Third, as indicated in paragraph (C), a payment functionality provided through a digital consumer payment application that solely supports payments to pay a specific debt or type of debt or repayment of an extension of consumer credit does not have general use. For example, a consumer mortgage lender’s mobile app or website may provide a functionality that allows a

⁷¹ See, e.g., CFPB Report, “Justice-Involved Individuals and the Consumer Financial Marketplace” (Jan. 2022) at sec. 3.1 (n.87 describing uses of these types of funds transfers) & sec. 4.1 (describing how, as observed in a CFPB enforcement action and an investigative report on prison release cards, “[w]hen released, people exiting jail receive money they had when arrested, and prisons disburse the balance of a person’s commissary account, including wages from prison jobs, public benefits, and money sent by friends and family”), available at https://files.consumerfinance.gov/f/documents/cfpb_jic_report_2022-01.pdf (last visited Oct. 23, 2023).

⁷² The Proposed Rule includes these examples to illustrate the scope of the term “general use” in the Proposed Rule, and thus the scope of the proposed market definition. The examples are not a statement of the CFPB’s views regarding the scope of its authority over consumer financial products and services under the CFPA.

⁷³ The term “consumer financial product or service” is defined in CFPA section 1002(5) and includes a range of consumer financial products and services including those in markets that the CFPB supervises, described earlier in the Proposed Rule, as well as other consumer financial products and services outside of supervised markets over which the CFPB generally has enforcement and market monitoring authority. See generally 12 U.S.C. 5481(5) (definition of “consumer financial product or service”) & 12 U.S.C. 5481(15) (definition of “financial product or service”).

⁷⁴ 12 CFR 1005.2(b)(3)(ii).

consumer to pay a loan. Or a debt collector's website may provide a means for a consumer to pay a debt. These digital consumer payment applications have a use that is significantly limited, to only pay a specific debt or type of debt. In general, digital applications that solely support payments to specific lenders, loan servicers, and debt collectors would not be within the proposed market definition.⁷⁵ The CFPB considers such digital applications generally to be more part of the markets for consumer lending, loan servicing, and debt collection. The CFPB has issued separate larger participant rules for such markets and CFPB section 1024(a) also grants the CFPB supervisory authority over participants in certain lending markets, including mortgage lending, private student lending, and payday lending. In addition, other digital applications may only help a consumer to pay certain other types of debts, such as taxes or other amounts owed to the government, including fines. Under this proposed example, those payment functionalities provided through those applications also would not have general use.

Fourth, as indicated in paragraph (D), a payment functionality provided through a digital application that solely helps consumers to divide up charges and payments for a specific type of goods or services would be excluded. Some payment applications, for example, may be focused solely on helping consumers to split a restaurant bill. This example is a corollary of the example in paragraph (A). Since a payment functionality limited to paying for food would not have general use under paragraph (A), paragraph (D) would clarify that neither would a payment functionality that enables splitting a bill for food have general use.

The CFPB requests comment on the proposed definition of general use and examples of significant limitations that take a payment functionality provided through a digital consumer application out of the general use category. The CFPB also requests comment on whether the examples of significant limitations should be changed or clarified, and whether additional examples of significant limitations should be included, and if so, what examples and why.

⁷⁵ By contrast, as noted in the section-by-section analysis of the exclusion in paragraph (C) of the definition of a "consumer payment transaction," if a consumer uses a general-use digital consumer payment application as a method of making a payment to such a payee, that general-use digital consumer payment application would be participating in the market for those consumer payment transactions.

State

Proposed § 1090.109(a) would define the term "State" to mean any State, territory, or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico; or any political subdivision thereof. For consistency, the CFPB is proposing to use the same definition of "State" as used in the international money transfer larger participant rule, § 1090.107(a), which drew its definition from Regulation E subpart A.⁷⁶ The CFPB requests comment on the proposed definition of State.

109(b) Test To Define Larger Participants

Proposed § 1090.109(b) would set forth a test to determine which nonbank covered persons are larger participants in a market for general-use digital consumer payment applications as described in proposed § 1090.109(a). Under the proposed test, a nonbank covered person would be a larger participant if it meets each of two criteria set forth in paragraphs (1) and (2) of proposed § 1090.109(b) respectively. First, paragraph (1) specifies that the nonbank covered person must provide annual covered consumer payment transaction volume as defined in paragraph (3) of proposed § 1090.109(b) of at least five million transactions. Second, paragraph (2) specifies that the nonbank covered person must not be a small business concern based on the applicable Small Business Administration (SBA) size standard listed in 13 CFR part 121 for its primary industry as described in 13 CFR 121.107. Paragraphs (1), (2), and (3) of this proposed definition are analyzed below.⁷⁷

Criteria

The CFPB has broad discretion in choosing criteria for assessing whether a nonbank covered person is a larger participant of a market.⁷⁸ The CFPB

⁷⁶ See International Money Transfer Larger Participant Final Rule, 79 FR 56641.

⁷⁷ Prior to issuing this proposal, the CFPB conducted analysis of data sources as described below and in part V and part VI to identify likely market participants, and, to the extent of available data, to: (1) to inform its general understanding of the market; and, relatedly, (2) to estimate the level of market activity by market participants, the degree to which market participants would be small entities, and the level of market activity by larger participants. These estimates therefore rely to some degree on preliminary entity-level analysis that is not dispositive of whether the CFPB would ever seek to initiate supervisory activity at a given entity or whether, in the event of a person's assertion that it is not a larger participant, the person would be found to be a larger participant.

⁷⁸ See, e.g., 77 FR 42887 (consumer reporting larger participant rule describing such discretion);

selects criteria that provide "a reasonable indication of a person's level of market participation and impact on consumers." ⁷⁹ As the CFPB has noted in previous larger participant rulemakings, for any given market, there may be "several criteria, used alone or in combination, that could be viewed as reasonable alternatives." ⁸⁰

Here, the CFPB is proposing to combine the two criteria described above: the annual covered consumer payment transaction volume and the size of the entity by reference to SBA size standards. The Proposed Rule's larger-participant test would combine these criteria as follows: a nonbank covered person would be a larger participant if its annual covered consumer payment transaction volume exceeded the proposed threshold, discussed in the section-by-section analysis further below, and, during the same time period (*i.e.*, the preceding calendar year), it was not a small business concern.

The first criterion would be based on the number of consumer payment transactions. Specifically, proposed § 1090.109(b)(3) would define the term "annual covered consumer payment transaction volume" as the sum of the number of the consumer payment transactions that the nonbank covered person and its affiliated companies facilitated by providing general-use digital consumer payment applications in the preceding calendar year.⁸¹ This is an appropriate criterion for a market defined by reference to products that facilitate certain consumer payments. Each transaction counted under this criterion also generally is a payment. In that way, a transaction is essentially a well-understood unit of market activity.

As in the CFPB's international money transfer larger participant rule, here the number of transactions also reflects the extent of interactions between the nonbank covered person providing the in-market consumer financial product or service. Each one-time consumer payment transaction typically results from a single interaction with at least

⁷⁷ FR 65785 (same, in consumer debt collection larger participant rule).

⁷⁹ 77 FR 42887 (consumer reporting larger participant rule); *see also* 80 FR 37513 (automobile financing larger participant rule describing how aggregate annual originations are a "meaningful measure" of such participation and impact); 78 FR 73393–94 (same, for account volume criterion in student loan servicing larger participant rule).

⁸⁰ 77 FR 65785 (consumer debt collection larger participant rule).

⁸¹ Under the CFPB, the activities of affiliated companies are to be aggregated for purposes of computing activity levels in larger participant rules. *See* 12 U.S.C. 5514(a)(1)(B), (3)(B).

one consumer.⁸² And, in the case of recurring consumer payment transactions, consumers also have at least one interaction with the covered persons in the market. The number of transactions also is a common indicator of market participation. State regulators, for example, require money transmitters to report this metric.⁸³

The CFPB considered proposing different criteria, such as the dollar value of transactions or the annual receipts from market activity. However, it is not proposing either of those alternatives. First, the proposed market includes digital wallets which often are used for consumer retail spending, which can grow in amount through inflation. For this market, a dollar value criterion may become affected by inflation or other factors. In addition, as discussed in the impacts analyses in parts V and VI, some of the data sources the CFPB relied upon in formulating the Proposed Rule may be overinclusive by including certain payments that are not within the market defined in the Proposed Rule, such as certain business-to-business payments. Those payments may have higher dollar values. By proposing number of transactions as a criterion, the Proposed Rule is less affected by those data distortions. At the same time, in general, a higher number of transactions also may often comprise a higher dollar value of transactions.

With respect to annual receipts, that data is less available, especially for market participants that are not publicly traded or that do not file call reports on money transmission at the State level. In addition, in the context of the market at issue in the Proposed Rule, an annual receipts criterion could miss significant market participation and consumer impacts, such as where a provider is subsidizing a product or otherwise not earning significant per-transaction revenues. For example, when a consumer links their deposit account directly to a general-use digital consumer payment application, the provider may receive lower revenue for funds sent to friends and family, compared with paying a merchant or using a network branded payment card (where there is an interchange fee that may provide a source of revenue). Yet, the risks to and impact on the consumer

may be just as significant from payments they make to individuals from a linked deposit account.

As noted above, the CFPB is proposing a second criterion that also must be satisfied for a nonbank covered person to be a larger participant, in addition to the annual covered payment volume criterion. Under the second criterion, the nonbank must not be a “small business concern” as that term is defined by section 3(a) of the Small Business Act, 15 U.S.C. 632(a), and implemented by the SBA under 13 CFR part 121, or any successor provisions. Thus, under the Proposed Rule, an entity would be a small business concern if its size were at or below the SBA standard listed in 13 CFR part 121 for its primary industry as described in 13 CFR 121.107.⁸⁴

The CFPB is proposing this second criterion because it does not seek to use this rulemaking as a means of expending its limited supervisory resources to examine small business concerns. The consumer digital payments applications market is potentially broad and dynamic, with rapid technological developments and new entrants. But many well-known market participants have large business operations that have an impact on millions of consumers. In light of its resources, the CFPB believes that it would be preferable to focus on larger entities, instead of requiring all entities with an annual covered consumer payment transaction volume over five million to be subject to supervisory review under the Proposed Rule. If a particular nonbank covered person were a small business concern participating in this market in a manner that posed risks to consumers, the CFPB has authority to pursue risk-based supervision of such an entity pursuant to CFPB section 1024(a)(1)(C).⁸⁵

The CFPB requests comment on its proposed criteria, including whether, instead of basing the annual volume criterion described above on number of consumer payment transactions, it should be based on a different metric, such as the dollar value of consumer payment transactions, and, if so, why.

Threshold

Under the Proposed Rule, a nonbank covered person would be a larger participant in the market for general-use digital consumer payment applications if the nonbank covered person satisfies two criteria. First, it must facilitate an “annual covered consumer payment transaction volume,” as defined in proposed § 1090.109(b)(3) and discussed above, of at least five million transactions. As explained in proposed § 1090.109(b)(3)(i) and discussed above, the volume is aggregated across affiliated companies. Thus, the proposed threshold includes the aggregate annual volume of both consumer-to-consumer or consumer-to-business transactions facilitated by all general-use digital consumer payment applications provided by the nonbank covered person and its affiliated companies in the preceding year.⁸⁶ Second, under proposed § 1090.109(b)(2) and explained above, the CFPB also proposes to exclude from larger-participant status any entity in the proposed market that is a small business concern based on applicable SBA size standards.⁸⁷ The CFPB

⁸⁶ The CFPB notes that the available data do not always conform to the precise market scope of covered consumer payment transactions. For example, the data do not always distinguish between transactions in which a business sent funds, which would not be covered consumer payment transactions, from transactions in which a consumer sent funds. In addition, in some cases the data may include funds a consumer transfers between one deposit or stored value account and another, both of which belong to the consumer. The current analysis includes transaction volume broadly defined, and the CFPB cannot distinguish between this overall activity and covered market activity (to the extent they differ). Therefore, the current analysis may be an overestimate of covered market activity and larger-participant status of providers of general-use digital consumer payment applications subject to the larger-participant threshold.

⁸⁷ As discussed above and below, the exclusion would apply to any nonbank that, together with its affiliated companies, is a small business concern based on the applicable SBA size standard listed in 13 CFR part 121 for its primary industry as described in 13 CFR 121.107. The SBA defines size standards using North American Industry Classification System (NAICS) codes. The CFPB believes that many—but not all—entities in the proposed market for general-use digital consumer payment applications are likely classified in NAICS code 522320, “Financial Transactions Processing, Reserve, and Clearinghouse Activities,” or NAICS code 522390, “Other Activities Related to Credit Intermediation.” Entities associated with NAICS code 522320 that have \$47 million or less in annual receipts are currently defined by the SBA as small business concerns; for NAICS code 522390, the size standard is \$28.5 million. However, other entities that the CFPB believes to be operating in the proposed market may be classified in other NAICS codes industries that use different standards, including non-revenue-based SBA size standards, such as the number of employees. While the CFPB has data to estimate the SBA size status of some

⁸² See, e.g., 79 FR 56641 (international money transfer larger participant rule noting that the absolute number of transactions “reflects the extent of interactions” between the provider and the consumer because “each transfer represents a single interaction with at least one consumer.”).

⁸³ See generally NMLS, “Money Services Business Call Report,” available at <https://mortgage.nationwidelicensingsystem.org/slr/common/Pages/MoneyServicesBusinessesCallReport.aspx> (last visited Oct. 23, 2023).

⁸⁴ In addition, under the SBA’s regulations, a concern’s size is measured by aggregating the relevant size metric across affiliates. See 13 CFR 121.103(a)(6) (“In determining the concern’s size, the SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.”).

⁸⁵ 12 U.S.C. 5514(a)(1)(C). See generally 12 CFR part 1091 (regulations implementing CFPB section 1024(a)(1)(C)).

believes that this proposed threshold and the proposed small entity exclusion, discussed above, are a reasonable means of defining larger participants in this market.⁸⁸

The CFPB estimates that the proposed threshold would bring within the CFPB's supervisory authority approximately 17 entities,⁸⁹ about 9 percent of all known nonbank covered persons in the market for general-use digital consumer payment applications.⁹⁰ The CFPB notes at the outset that this is a rough estimate because the available data on entities operating in the proposed market for

market participants, such as publicly-traded companies, the CFPB lacks data sufficient to estimate the SBA size status of some market participants. See SBA, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, effective March 17, 2023, Sector 52 (Finance and Insurance), available at <https://www.sba.gov/document/support-table-size-standards> (last visited Oct. 26, 2023).

⁸⁸ The CFPB has identified approximately 190 entities from available data that provide general-use digital consumer payment applications and may be subject to the Proposed Rule. Of those entities, the CFPB has data on about half sufficient to estimate larger-participant status, including whether those entities would be subject to the small business exclusion built into the larger-participant test. The estimate that approximately 17 entities would be larger participants is based on the set of entities for which the CFPB has sufficient information to estimate larger participant status.

⁸⁹ In developing this estimate of 17 entities, the CFPB excluded entities where either (1) available information indicates that the small entity exclusion applies or (2) the CFPB lacks sufficient information regarding the entity's size to assess whether the small entity exclusion applies.

⁹⁰ The CFPB based its market estimates on data from several sources. The CFPB obtained transaction and revenue data from six technology platforms offering payment services through a CFPB request pursuant to CFPA section 1022(c)(4). See "CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans," (Oct. 21, 2021), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-tech-giants-to-turn-over-information-on-their-payment-system-plans/> (last visited Oct. 23, 2023). The CFPB was also able to access nonpublic transaction and revenue data for potential larger participants from the Nationwide Mortgage Licensing System & Registry (NMLS), a centralized licensing database used by many States to manage their license authorities with respect to various consumer financial industries, including money transmitters. Specifically, the CFPB accessed quarterly 2022 and 2023 filings from nonbank money transmitters in the Money Services Businesses (MSB) Call Reports data (for a description of the types of data reported in MSB call reports, see <https://mortgage.nationwidelicencingsystem.org/slr/common/Pages/MoneyServicesBusinessesCallReport.aspx> (last visited Oct. 23, 2023)). Additionally, the CFPB compiled a list of likely market participants, as well as transaction and revenue data where available, from several industry sources (including Elliptic Enterprises Limited) and various public sources including the CFPB's Prepaid Card Agreement Database, available at <https://www.consumerfinance.gov/data-research/prepaid-accounts/search-agreements> (last visited Oct. 23, 2023), company websites, press releases, and annual report filings with the U.S. Securities and Exchange Commission.

general-use digital consumer payment applications is incomplete.⁹¹

The CFPB anticipates that the proposed annual covered consumer payment transaction volume threshold of five million would allow the CFPB to supervise market participants that represent a substantial portion of the market for general-use digital consumer payment applications and have a significant impact on consumers. Available data indicates that the market for general-use digital consumer payment applications is highly concentrated, with a few entities that facilitate hundreds of millions or billions of consumer payment transactions annually, and a much larger number of firms facilitating fewer transactions. The CFPB believes that a threshold of five million is reasonable, in part, because it would enable the CFPB to cover in its nonbank supervision program both the very largest providers of general-use digital consumer payment applications as well as a range of other providers of general-use digital consumer payment applications that play an important role in the marketplace. Further, certain populations of consumers, including more vulnerable consumers, may not transact with the very largest providers and instead may transact with the range of other providers that exceed the five million transaction threshold.

According to the CFPB's estimates, the approximately 17 providers of general-use digital consumer payment applications that meet the proposed threshold collectively facilitated about 12.8 billion transactions in 2021, with a total dollar value of about \$1.7 trillion. The CFPB estimates that these nonbanks are responsible for approximately 88 percent of known transactions in the nonbank market for general-use digital consumer payment applications.⁹² At the same time, this threshold would likely subject to the CFPB's supervisory authority only entities that can reasonably be considered larger participants of the market defined in the Proposed Rule.

Proposed § 1090.109(b)(3)(i) also would clarify how the activities of

⁹¹ The CFPB's estimate that approximately 190 entities are participating in the market may be an underestimate because, for certain entities, the CFPB lacks sufficient information to assess whether they provide a general-use digital consumer payment application. In addition, for some entities that are among the approximately 190 participants in the market, the CFPB lacks sufficient information to assess whether certain products they offer constitute a general-use digital consumer payment application.

⁹² See *supra* n.86–n.91. The 88 percent estimate is calculated among all of the entities for which the CFPB has transaction information.

affiliated companies of the nonbank covered person are included in the test when the affiliated companies also participate in the proposed market. It provides that, in aggregating transactions across affiliated companies, an individual consumer payment transaction would only be counted once even if more than one affiliated company facilitated the transaction. It also provides that the annual covered consumer payment transaction volumes of the nonbank covered person and its affiliated companies are aggregated for the entire preceding calendar year, even if the affiliation did not exist for the entire calendar year.

Because the general-use digital consumer payment applications market has evolved rapidly and market participants can grow quickly, the CFPB also is not proposing a test that is based on averaging multiple years of market activity. As a result, if an entity has less than the threshold amount for one or more calendar years but exceeds the threshold amount in the most recent calendar year, it would be a larger participant. This will ensure that the CFPB can supervise nonbanks that quickly become larger participants, without waiting several years.

The CFPB also is considering a lower or higher threshold. For example, an annual covered consumer payment transaction volume threshold of one million might allow the CFPB to supervise approximately 19 entities, still representing approximately 88 percent of activity in this market.⁹³ Lowering the threshold would not substantially increase the number of entities subject to supervision, in part because many entities that exceed a lower threshold would be excluded as small entities, and would result in only a marginal increase in market coverage. In comparison, the CFPB estimates that an annual covered consumer payment transaction volume threshold of 10 million would allow the CFPB to supervise approximately 14 entities, representing approximately 87 percent of activity in this market.⁹⁴ However, at this higher threshold the CFPB would not be able to supervise as varied a mix of nonbank larger participants that, as discussed above, have a substantial impact on the full spectrum of consumers in the market.

The CFPB seeks comment, including suggestions of alternatives on the proposed threshold for defining larger participants of the market for general-use digital consumer payment

⁹³ See *id.* & *supra* n.86–n.91.

⁹⁴ See *id.* & *supra* n.86–n.91.

applications as defined in the Proposed Rule.

V. Dodd-Frank Act Section 1022(b) Analysis

A. Overview

The CFPB is considering potential benefits, costs, and impacts of the Proposed Rule.⁹⁵ The CFPB requests comment on the preliminary analysis presented below as well as submissions of additional data that could inform the CFPB's analysis of the costs, benefits, and impacts of the Proposed Rule.

The Proposed Rule would define a category of nonbank covered persons that would be subject to the CFPB's nonbank supervision program pursuant to CFPB section 1024(a)(1)(B). The proposed category would include "larger participants" of a market for "general-use digital consumer payment applications" described in the Proposed Rule. Participation in this market would be measured on the basis of aggregate annual transactions, defined in the Proposed Rule as "annual covered consumer payment transaction volume." If a nonbank covered person, together with its affiliated companies, has an annual covered consumer payment transaction volume (measured for the preceding calendar year) of at least five million and is not a small business concern, it would be a larger participant in the market for general-use digital consumer payment applications. As prescribed by existing § 1090.102, any nonbank covered person that qualifies as a larger participant would remain a larger participant until two years after the first day of the tax year in which the person last met the larger-participant test.⁹⁶

B. Potential Benefits and Costs to Consumers and Covered Persons

This analysis considers the benefits, costs, and impacts of the key provisions of the Proposed Rule against a baseline

that includes the CFPB's existing rules defining larger participants in certain markets.⁹⁷ Many States have supervisory programs relating to money transfers, which may consider aspects of consumer financial protection law. However, at present, there is no Federal program for supervision of nonbank covered persons in the market for general-use digital consumer payment applications with respect to Federal consumer financial law compliance. The Proposed Rule extends the CFPB's supervisory authority to cover larger participants of the defined market for general-use digital consumer payment applications.

The CFPB notes at the outset that limited data are available with which to quantify the potential benefits, costs, and impacts of the Proposed Rule. As described above, the CFPB has utilized various sources for quantitative information on the number of market participants, their annual revenue, and their number and dollar volume of transactions.⁹⁸ However, the CFPB lacks detailed information about their rate of compliance with Federal consumer financial law and about the range of, and costs of, compliance mechanisms used by market participants. Further, as noted above in the section-by-section analysis of the proposed threshold, the CFPB lacks sufficient information on a substantial number of known market participants necessary to estimate their larger-participant status.⁹⁹

In light of these data limitations, this analysis generally provides a qualitative discussion of the benefits, costs, and impacts of the Proposed Rule. General economic principles, together with the limited data that are available, provided insight into these benefits, costs, and impacts. Where possible, the CFPB has made quantitative estimates based on these principles and data as well as on its experience of undertaking supervision in other markets.

The discussion below describes three categories of potential benefits and

costs. First, the Proposed Rule, if adopted, would authorize the CFPB's supervision of larger participants of a market for general-use digital consumer payment applications. Larger participants of the proposed market might respond to the possibility of supervision by changing their systems and conduct, and those changes might result in costs, benefits, or other impacts. Second, if the CFPB undertakes supervisory activity of specific providers of general-use digital consumer payment applications, those entities may incur costs from responding to supervisory activity, and the results of these individual supervisory activities might also produce benefits and costs. Third, the CFPB analyzes the costs that might be associated with entities' efforts to assess whether they would qualify as larger participants under the rule.

1. Benefits and Costs of Responses to the Possibility of Supervision

The Proposed Rule would subject larger participants of a market for general-use digital consumer payment applications to the possibility of CFPB supervision. That the CFPB would be authorized to undertake supervisory activities with respect to a nonbank covered person who qualified as a larger participant would not necessarily mean that the CFPB would in fact undertake such activities regarding that covered person in the near future. Rather, supervision of any particular larger participant as a result of this rulemaking would be probabilistic in nature. For example, the CFPB would examine certain larger participants on a periodic or occasional basis. The CFPB's decisions about supervision would be informed, as applicable, by the factors set forth in CFPB section 1024(b)(2),¹⁰⁰ relating to the size and transaction volume of individual participants, the risks their consumer financial products and services pose to consumers, the extent of State consumer protection oversight, and other factors the CFPB may determine are relevant. Each entity that believed it qualified as a larger participant would know that it might be supervised and might gauge, given its circumstances, the likelihood that the CFPB would initiate an examination or other supervisory activity.

The prospect of potential CFPB supervisory activity could create an incentive for larger participants to allocate additional resources and attention to compliance with Federal consumer financial law, potentially leading to an increase in the level of

⁹⁵ Specifically, 12 U.S.C. 5512(b)(2)(A) calls for the CFPB to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services, the impact on depository institutions and credit unions with \$10 billion or less in total assets as described in 12 U.S.C. 5516, and the impact on consumers in rural areas. In addition, 12 U.S.C. 5512(b)(2)(B) directs the CFPB to consult, before and during the rulemaking, with appropriate prudential regulators or other Federal agencies, regarding consistency with objectives those agencies administer. The manner and extent to which the provisions of 12 U.S.C. 5512(b)(2) apply to a rulemaking of this kind that does not establish standards of conduct are unclear. Nevertheless, to inform this rulemaking more fully, the CFPB performed the analysis and consultations described in those provisions of the CFPB.

⁹⁶ 12 CFR 1090.102.

⁹⁷ The CFPB has discretion in any rulemaking to choose an appropriate scope of analysis with respect to potential benefits and costs and an appropriate baseline. The CFPB, as a matter of discretion, has chosen to describe a broader range of potential effects to inform the rulemaking more fully.

⁹⁸ See *supra* n.90.

⁹⁹ As stated above, the CFPB estimates that approximately 190 entities operate in the market for providing general-use digital consumer payment applications defined in the Proposed Rule. Of those entities, the CFPB has data on roughly half sufficient to estimate larger-participant status, including whether those entities would be subject to the exclusion for small business concerns; approximately 17 of those would be larger participants under the proposed larger-participant test.

¹⁰⁰ 12 U.S.C. 5514(b)(2).

compliance. They might anticipate that by doing so (and thereby decreasing risk to consumers), they could decrease the likelihood of their actually being subject to supervisory activities as the CFPB evaluated the factors outlined above. In addition, an actual examination would be likely to reveal any past or present noncompliance, which the CFPB could seek to correct through supervisory activity or, in some cases, enforcement actions. Larger participants might therefore judge that the prospect of supervision increases the potential consequences of noncompliance with Federal consumer financial law, and they might seek to decrease that risk by taking steps to identify and cure or mitigate any noncompliance.

The CFPB believes it is likely that many market participants would increase compliance in response to the CFPB's supervisory activity authorized by the Proposed Rule. However, because finalization of the Proposed Rule itself would not require any provider of general-use digital consumer payment applications to alter its conduct, any estimate of the amount of increased compliance would require both an estimate of current compliance levels and a prediction of market participants' behavior in response to a final rule. The data that the CFPB currently has do not support a specific quantitative estimate or prediction. But, to the extent that nonbank entities allocate resources to increasing their compliance in response to the Proposed Rule, that response would result in both benefits and costs.¹⁰¹

Benefits From Increased Compliance

Increased compliance with Federal consumer financial laws by larger participants in the market for general-use digital consumer payment applications would be beneficial to consumers who use general-use digital payment applications. Increasing the rate of compliance with Federal consumer financial laws would benefit consumers and the consumer financial market by providing more of the protections mandated by those laws.

The CFPB would be examining for compliance with applicable provisions of Federal consumer financial laws, including the Electronic Fund Transfer Act and its implementing Regulation E,

as well as the privacy provisions of the Gramm-Leach-Bliley Act. In addition, the CFPB would be examining for whether larger participants of the market for general-use digital consumer payment applications engage in unfair, deceptive, or abusive acts or practices.¹⁰² Conduct that does not violate an express prohibition of another Federal consumer financial law may nonetheless constitute an unfair, deceptive, or abusive act or practice. To the extent that any provider of general-use digital consumer payment applications is currently engaged in any unfair, deceptive, or abusive acts or practices, the cessation of the unlawful act or practice would benefit consumers. Providers of general-use digital consumer payment applications might improve policies and procedures in response to possible supervision in order to avoid engaging in unfair, deceptive, or abusive acts or practices.

The possibility of CFPB supervision also may help make incentives to comply with Federal consumer financial laws more consistent between the likely larger participants and banks and credit unions, which are subject to Federal supervision with respect to Federal consumer financial laws. Although some nonbanks are already subject to State supervision, introducing the possibility of Federal supervision could encourage nonbanks that are likely larger participants to devote additional resources to compliance. It could also help ensure that the benefits of Federal oversight reach consumers who do not have ready access to bank-provided general-use digital consumer payment applications.

Costs of Increased Compliance

To the extent that nonbank larger participants would decide to increase resources dedicated to compliance in response to the possibility of increased supervision, the entities would bear any cost of any changes to their systems, protocols, or personnel. Whether and to what extent entities would increase resources dedicated to compliance and/or pass those costs to consumers would depend not only on the entities' current practices and the changes they decide to make, but also on market conditions. The CFPB lacks detailed information with which to predict the extent to which increased costs would be borne by providers or passed on to consumers, to predict how providers might respond to higher costs, or to predict how consumers might respond to increased prices.

2. Benefits and Costs of Individual Supervisory Activities

In addition to the responses of market participants anticipating supervision, the possible consequences of the Proposed Rule would include the responses to and effects of individual examinations or other supervisory activity that the CFPB might conduct in the market for general-use digital consumer payment applications.

Benefits of Supervisory Activities

Supervisory activity could provide several types of benefits. For example, as a result of supervisory activity, the CFPB and an entity might uncover compliance deficiencies indicating harm or risks of harm to consumers. In its supervision and examination program, the CFPB generally prepares a report of each examination. The CFPB would share examination findings with the entity because one purpose of supervision is to inform the entity of problems detected by examiners. Thus, for example, an examination might find evidence of widespread noncompliance with Federal consumer financial law, or it might identify specific areas where an entity has inadvertently failed to comply, or it may identify weaknesses in compliance management systems including policies and procedures. These examples are only illustrative of the kinds of information an examination might identify.

Detecting and informing entities about such problems should be beneficial to consumers. When the CFPB notifies an entity about risks associated with an aspect of its activities, the entity is expected to adjust its practices to reduce those risks. That response may result in increased compliance with Federal consumer financial law, with benefits like those described above. Or it may avert a violation that would have occurred if CFPB supervision did not detect the risk promptly. The CFPB may also inform entities about risks posed to consumers that fall short of violating the law. Action to reduce those risks would also be a benefit to consumers.

Given the obligations providers of general-use digital consumer payment applications have under Federal consumer financial law and the existence of efforts to enforce such law, the results of CFPB supervision also may benefit providers under supervision by detecting compliance problems early. When an entity's noncompliance results in litigation or an enforcement action, the entity must face both the costs of defending its action and the penalties for noncompliance, including potential

¹⁰¹ Another approach to considering the benefits, costs, and impacts of the Proposed Rule would be to focus almost entirely on the supervision-related costs for larger participants and omit a broader consideration of the benefits and costs of increased compliance. As noted above, the CFPB has, as a matter of discretion, chosen to describe a broader range of potential effects to inform the rulemaking more fully.

¹⁰² 12 U.S.C. 5531.

liability for damages to private plaintiffs. The entity must also adjust its systems to ensure future compliance. Changing practices that have been in place for long periods of time can be expected to be relatively difficult because they may be severe enough to represent a serious failing of an entity's systems. Supervision may detect flaws at a point when correcting them would be relatively inexpensive. Catching problems early can, in some situations, forestall costly litigation. To the extent early correction limits the amount of consumer harm caused by a violation, it can help limit the cost of redress. In short, supervision might benefit providers of general-use digital consumer payment applications under supervision by, in the aggregate, reducing the need for other more expensive activities to achieve compliance.¹⁰³

Costs of Supervisory Activities

The potential costs of actual supervisory activities would arise in two categories. The first would involve any costs to individual providers of general-use digital consumer payment applications of increasing compliance in response to the CFPB's findings during supervisory activity and to supervisory actions. These costs would be similar in nature to the possible compliance costs, described above, the larger participants in general might incur in anticipation of possible supervisory actions. This analysis will not repeat that discussion. The second category would be the cost of supporting supervisory activity.

Supervisory activity may involve requests for information or records, on-site or off-site examinations, or some combination of these activities. For example, in an on-site examination, CFPB examiners generally contact the entity for an initial conference with management. That initial contact is often accompanied by a request for

information or records. Based on the discussion with management and an initial review of the information received, examiners determine the scope of the on-site exam. While on-site, examiners spend some time in further conversation with management about the entity's policies, procedures, and processes. The examiners also review documents, records, and accounts to assess the entity's compliance and evaluate the entity's compliance management system. As with the CFPB's other examinations, examinations of nonbank larger participants in the market for general-use digital consumer payment applications could involve issuing confidential examination reports and compliance ratings. The CFPB's examination manual describes the supervision process and indicates what materials and information an entity could expect examiners to request and review, both before they arrive and during their time on-site.

The primary costs an entity would face in connection with an examination would be the cost of employees' time to collect and provide the necessary information. If the Proposed Rule is adopted, the frequency and duration of examinations of any particular entity would depend on a number of factors, including the size of the entity, the compliance or other risks identified, whether the entity has been examined previously, and the demands on the CFPB's supervisory resources imposed by other entities and markets. Nevertheless, some rough estimates may provide a sense of the magnitude of potential staff costs that entities might incur.

The cost of supporting supervisory activity may be calibrated using prior CFPB experience in supervision. Examinations of larger participants in the market for general-use digital consumer payment applications are anticipated to be approximately 8 weeks on average, with an additional two weeks of preparation.¹⁰⁴ This estimate assumes that each exam requires two weeks of preparation time by staff of providers of general-use digital consumer payment applications prior to the exam as well as on-site assistance by staff throughout the duration of the exam. The CFPB has not suggested that counsel or any particular staffing level

is required during an examination. However, for the purposes of this analysis, the CFPB assumes, conservatively, that an entity might dedicate the equivalent of one full-time compliance officer and one-tenth of the time of a full-time attorney to assist with an exam. The national average hourly wage of a compliance officer is \$37; the national average hourly wage for an attorney is \$71.¹⁰⁵ Assuming that wages and salaries account for 70.6 percent of total compensation for private industry workers, the total employer cost of labor to comply with an exam amounts to approximately \$25,001.¹⁰⁶

The overall costs of supervision in the market for general-use digital consumer payment applications would depend on the frequency and extent of CFPB examinations. Neither the CFPA nor the Proposed Rule specifies a particular level or frequency of examinations.¹⁰⁷ The frequency of examinations would depend on a number of factors, including the CFPB's understanding of the conduct of market participants and the specific risks they pose to consumers; the responses of larger participants to prior examinations; and the demands that other markets' make on the CFPB's supervisory resources. These factors can be expected to change over time, and the CFPB's understanding of these factors may change as it gathers more information about the market through its supervision and by other means. The CFPB therefore declines to predict, at this point, precisely how many examinations in the market for general-use digital consumer payment applications it would undertake in a given year.

¹⁰⁵ For current U.S. Bureau of Labor Statistics (BLS) estimates of mean hourly wages of these occupations, see BLS, "Occupational Employment and Wages, May 2022, 13–10141 Compliance Officers", available at [\(https://www.bls.gov/oes/current/oes131041.htm#\(1\)\)](https://www.bls.gov/oes/current/oes131041.htm#(1)) (last visited Oct. 26, 2023); BLS, "Occupational employment and Wages, May 2021, 23–1011 Lawyers," available at <https://www.bls.gov/oes/2021/may/oes231011.htm> (last visited Oct. 26, 2023).

¹⁰⁶ See BLS, "Employer Costs for Employee Compensation—June 2023" (Sept. 12, 2023) (Table 1 for 2023 Q2 estimates of the share of wages and salaries in total compensation of private sector workers), available at <https://www.bls.gov/news.release/pdf/cecc.pdf> (last visited Oct. 26, 2023). This cost is calculated as follows: $((0.1 \times \$71.17) + \$37.01 / 0.706) \times 40 \text{ hours} \times 10 \text{ weeks}$.

¹⁰⁷ The CFPB declines to predict at this time precisely how many examinations it would undertake at each provider of general-use digital consumer payment applications if the Proposed Rule is adopted. However, if the CFPB were to examine each entity that would be a larger participant of the market under the Proposed Rule once every two years, the expected annual labor cost of supervision per larger participant would be approximately \$12,500.50 (the cost of one examination, divided by two).

¹⁰³ Further potential benefits to consumers, covered persons, or both might arise from the CFPB's gathering of information during supervisory activities. The goals of supervision include informing the CFPB about activities of market participants and assessing risks to consumers and to markets for consumer financial products and services. The CFPB may use this information to improve regulation of consumer financial products and services and to improve enforcement of Federal consumer financial law, in order to better serve its mission of ensuring consumers' access to fair, transparent, and competitive markets for such products and services. Benefits of this type would depend on what the CFPB learns during supervision and how it uses that knowledge. For example, because the CFPB would examine a number of covered persons in the market for general-use digital consumer payment applications, the CFPB would build an understanding of how effective compliance systems and processes function in that market.

¹⁰⁴ For an estimate of the length of examination, see Board of Gov. of Fed. Res. System Office of Inspector General, "The Bureau Can Improve Its Risk Assessment Framework for Prioritizing and Scheduling Examination Activities" (Mar. 25, 2019) at 13, available at <https://oig.federalreserve.gov/reports/bureau-risk-assessment-framework-mar2019.pdf> (last visited Oct. 31, 2023).

3. Costs of Assessing Larger-Participant Status

A larger-participant rule does not require nonbanks to assess whether they are larger participants. However, the CFPB acknowledges that in some cases providers of general-use digital consumer payment applications might decide to incur costs to assess whether they qualify as larger participants or potentially dispute their status.

Larger-participant status would depend on both a nonbank's aggregate annual transaction volume and whether the entity is a small business concern based on the applicable SBA size standard. The CFPB expects that many market participants already assemble general data related to the number of transactions that they provide for general-use digital consumer payment applications. Moreover, many providers are required to report transaction data to State regulators.¹⁰⁸

To the extent that some providers of general-use digital consumer payment applications do not already know whether their transactions exceed the threshold, such nonbanks might, in response to the Proposed Rule, develop new systems to count their transactions in accordance with the proposed market-related definitions of "consumer payment transactions," "covered payment functionality," "general use," and "digital application" discussed above. The data that the CFPB currently has do not support a detailed estimate of how many providers of general-use digital consumer payment applications would engage in such development or how much they would spend. Regardless, providers of general-use digital consumer payment applications would be unlikely to spend significantly more on specialized systems to count transactions than it would cost to be supervised by the CFPB as larger participants.

The CFPB notes that larger-participant status also depends on whether an entity is subject to the proposed small business exclusion. In certain circumstances, larger-participant status

may depend on determinations of which SBA size standard applies, and by extension, which NAICS code is most applicable. Therefore, providers of general-use digital consumer payment applications may incur some administrative costs to evaluate whether the small business exclusion applies. However, providers would not need to engage in this evaluation if they could establish that their annual covered consumer payment transaction volume was below five million. In any event, the data that the CFPB currently has do not support a detailed estimate of how many providers of general-use digital consumer payment applications would engage in such efforts or how much they would spend.

It bears emphasizing that even if a nonbank market participant's expenditures on an accounting system enabled it to successfully prove that it was not a larger participant (which, again, it would not need to do if it was a small business concern according to SBA standards), it would not necessarily follow that this entity could not be supervised under other supervisory authorities the CFPB has that this rulemaking does not establish. For example, the CFPB can supervise a nonbank entity whose conduct the CFPB determines, pursuant to CFPA section 1024(a)(1)(C) and regulations implementing that provision, poses risks to consumers. Thus, a nonbank entity choosing to spend significant amounts on an accounting system directed toward the larger-participant transaction volume test could not be sure it would not be subject to CFPB supervision notwithstanding those expenses. The CFPB therefore believes very few if any nonbank entities would be likely to undertake such expenditures.

4. Considerations of Alternatives

The CFPB is considering one major alternative: choosing a different transaction volume threshold to define larger participants. One alternative would be to set the threshold substantially higher—for example at 10 million aggregate annual consumer-to-consumer or consumer-to-business transactions. Under such an alternative, the benefits of supervision to both consumers and covered persons would likely be reduced because entities impacting a substantial number of consumers and/or consumers in important market segments might be omitted. On the other hand, the potential costs to covered persons would of course be reduced if fewer entities were defined as larger participants and thus fewer were subject

to the CFPB's supervisory authority on that basis. Conversely, lowering the threshold would subject more entities to the CFPB's supervisory authority, but the total direct costs for actual examination activity might not change substantially because the CFPB conducts exams on a risk basis and would not necessarily examine more entities even if the rule's coverage were broader.

C. Potential Specific Impacts of the Proposed Rule

1. Depository Institutions and Credit Unions With \$10 Billion or Less in Total Assets, as Described in Dodd-Frank Act Section 1026

The Proposed Rule would not apply to depository institutions or credit unions of any size. However, as discussed in the section-by-section analysis of "digital application" above, it may apply to nonbank covered persons that provide covered payment functionalities through a digital application of a bank or credit union. In addition, it might have some competition-related impact on depository institutions or credit unions that provide general-use digital consumer payment applications. For example, if the relative price of nonbanks' general-use digital consumer payment applications were to increase due to increased costs related to supervision, then depository institutions or credit unions of any size might benefit by the relative change in costs. These effects, if any, would likely be small.

2. Impact of the Provisions on Consumers in Rural Areas

Because the Proposed Rule would apply uniformly to consumer payment transactions that both rural and non-rural consumers make through general-use digital consumer payment applications, the rule should not have a unique impact on rural consumers. The CFPB is not aware of any evidence suggesting that rural consumers have been disproportionately harmed by the failure of providers of general-use digital consumer payment applications to comply with Federal consumer financial law. The CFPB seeks information from commenters related to how digital consumer payments affect rural consumers.

VI. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires each agency to consider the potential impact of its regulations on

¹⁰⁸ The States have been active in regulation of money transmission by money services businesses, with 49 States and the District of Columbia requiring entities to obtain a license to engage in money transmission, as defined by applicable law. Further, many States also actively examine money transmitters, including the number of products and services they provide through general-use digital consumer payment applications. See, e.g., CSBS, Reengineering Nonbank Supervision, Ch. 4: Overview of Money Services Businesses (Oct. 2019) at 4 (discussing how providers of digital wallets hold and transmit monetary value), available at https://www.csbs.org/sites/default/files/other-files/Chapter%204%20-%20MSB%20Final%20FINAL_updated_0.pdf (last visited Oct. 27, 2023).

small entities, including small businesses, small governmental units, and small not-for-profit organizations.¹⁰⁹ The RFA defines a “small business” as a business that meets the size standard developed by the SBA pursuant to the Small Business Act.¹¹⁰

The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) of any proposed rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.¹¹¹ The CFPB also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small entity representatives prior to proposing a rule for which an IRFA is required.¹¹²

The Director of the CFPB certifies that the Proposed Rule, if adopted, would not have a significant economic impact on a substantial number of small entities and that an IRFA therefore is not required.

The Proposed Rule would define a class of providers of general-use digital consumer payment applications as larger participants of a market for general-use digital consumer payment applications and thereby authorize the CFPB to undertake supervisory activities with respect to those nonbank covered persons. The Proposed Rule would use a two-pronged test for determining larger-participant status. First, the proposed threshold for larger-

participant status would be five million in annual covered consumer payment transaction volume. Second, the proposed larger-participant test would incorporate a small entity exclusion. As a result, larger-participant status would only apply to a nonbank covered person that, together with its affiliated companies, both meets the proposed five-million transaction threshold and is not a small business concern based on the applicable SBA size standard. Because of that exclusion, the number of small entities participating in the market that would experience a significant economic impact due to the Proposed Rule is, by definition, zero.

Finally, CFPB section 1024(e) authorizes the CFPB to supervise service providers to nonbank covered persons encompassed by CFPB section 1024(a)(1), which includes larger participants.¹¹³ Because the Proposed Rule would not address service providers, effects on service providers need not be discussed for purposes of this RFA analysis. Even were such effects relevant, the CFPB believes that it would be very unlikely that any supervisory activities with respect to the service providers to the approximately 17 larger participants of the proposed nonbank market for general-use digital consumer payment applications would result in a significant economic impact on a substantial number of small entities.¹¹⁴

VII. Paperwork Reduction Act

The CFPB has determined that the Proposed Rule would not impose any new recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would constitute collections of information requirement approval under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*

VIII. Signing Authority

The Director of the CFPB, having reviewed and approved this document, is delegating the authority to electronically sign this document to Emily Ross, Executive Secretary, for purposes of publication in the **Federal Register**.

List of Subjects

Consumer protection, Electronic funds transfers, Electronic products.

Authority and Issuance

For the reasons set forth above, the CFPB proposes to amend 12 CFR part 1090 as follows:

PART 1090—DEFINING LARGER PARTICIPANTS OF CERTAIN CONSUMER FINANCIAL PRODUCT AND SERVICE MARKETS

■ 1. The authority citation for part 1090 continues to read as follows:

Authority: 12 U.S.C. 5514(a)(1)(B); 12 U.S.C. 5514(a)(2); 12 U.S.C. 5514(b)(7)(A); and 12 U.S.C. 5512(b)(1).

■ 2. Add § 1090.109 to read as follows:

§ 1090.109 General-use digital consumer payment applications market.

(a)(1) *Market definition.* Providing a general-use digital consumer payment application means providing a covered payment functionality through a digital application for consumers' general use in making consumer payment transaction(s) as defined in this subpart.

(2) *Market-related definitions.* As used in this section:

Consumer payment transaction(s) means, except for transactions excluded under paragraphs (A) through (D) of this definition, the transfer of funds by or on behalf of a consumer physically located in a State to another person primarily for personal, family, or household purposes. The term applies to transfers of consumer funds and transfers made by extending consumer credit, except for the following transactions:

(A) An international money transfer as defined in § 1090.107(a);

(B) A transfer of funds by a consumer:

(1) That is linked to the consumer's receipt of a different form of funds, such as a transaction for foreign exchange as defined in 12 U.S.C. 5481(16); or

(2) That is excluded from the definition of “electronic fund transfer” under § 1005.3(c)(4) of this chapter;

(C) A payment transaction conducted by a person for the sale or lease of goods or services that a consumer selected from an online or physical store or marketplace operated prominently in the name of such person or its affiliated company; and

(D) An extension of consumer credit that is made using a digital application provided by the person who is extending the credit or that person's affiliated company.

Covered payment functionality means a funds transfer functionality as defined in paragraph (A) of this definition, a wallet functionality as defined in paragraph (B) of this definition, or both.

(A) *Funds transfer functionality* means, in connection with a consumer payment transaction:

¹⁰⁹ 5 U.S.C. 601 *et seq.* The term “‘small organization’ means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes [an alternative definition after notice and comment].” 5 U.S.C. 601(4). The term “‘small governmental jurisdiction’ means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes [an alternative definition after notice and comment].” 5 U.S.C. 601(5). The CFPB is not aware of any small governmental units or small not-for-profit organizations to which the Proposed Rule would apply.

¹¹⁰ 5 U.S.C. 601(3). The CFPB may establish an alternative definition after consultation with SBA and an opportunity for public comment. As mentioned above, the SBA defines size standards using NAICS codes that align with an entity's primary line of business. The CFPB believes that many—but not all—entities in the proposed market for general-use digital consumer payment applications are primarily engaged in financial services industries. *See, e.g.,* SBA, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, effective March 17, 2023, Sector 52 (Finance and Insurance), available at <https://www.sba.gov/document/support-table-size-standards> (last visited Oct. 26, 2023).

¹¹¹ 5 U.S.C. 605(b).

¹¹² 5 U.S.C. 609.

¹¹³ 12 U.S.C. 5514(e); 12 U.S.C. 5514(a)(1).

¹¹⁴ The CFPB is aware that there are likely hundreds of service providers to potential larger participants of the proposed market, particularly in light of the market complexity.

(1) Receiving funds for the purpose of transmitting them; or

(2) Accepting and transmitting payment instructions.

(B) *Wallet functionality* means a product or service that:

(1) Stores account or payment credentials, including in encrypted or tokenized form; and

(2) Transmits, routes, or otherwise processes such stored account or payment credentials to facilitate a consumer payment transaction.

Digital application, for purposes of this subpart, means a software program a consumer may access through a personal computing device, including but not limited to a mobile phone, smart watch, tablet, laptop computer, desktop computer. Examples of digital applications covered by this definition include an application a consumer downloads to a personal computing device, a website a consumer accesses by using an internet browser on a personal computing device, or a program the consumer activates from a personal computing device using a consumer's biometric identifier, such as a fingerprint, palmprint, face, eyes, or voice.

General use, for purposes of this subpart, refers to the absence of significant limitations on the purpose of consumer payment transactions facilitated by the covered payment functionality provided through the digital consumer payment application. Restricting use of the covered payment functionality to person-to-person transfers is not an example of a significant limitation; such a covered payment functionality would have general use for purposes of this subpart. A payment functionality provided through a digital consumer payment application solely for the following consumer payment transactions would not have general use for purposes of this subpart:

(A) For purchase or lease of a specific type of services, goods, or other property, such as one of the following:

(1) Transportation;

(2) Lodging;

(3) Food;

(4) An automobile as defined in § 1090.108 of this subpart;

(5) A dwelling or real property;

(6) A consumer financial product or service as defined in 12 U.S.C. 5481(5);

(B) Using accounts described in § 1005.2(b)(3)(ii)(A), (C), or (D) of this chapter;

(C) To pay a specific debt or type of debt including repayment of an extension of consumer credit; or

(D) To split a charge for a specific type of goods or services (e.g., restaurant or other similar bill splitting).

State means any State, territory, or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico; or any political subdivision thereof.

(b) *Test to define larger participants*. A nonbank covered person is a larger participant of the general-use digital consumer payment application market if the nonbank covered person meets both of the following criteria:

(1) It provides annual covered consumer payment transaction volume as defined in paragraph (b)(3) of this section of at least five million transactions; and

(2) During the preceding calendar year it was not a "small business concern" as that term is defined by section 3(a) of the Small Business Act, 15 U.S.C. 632(a) and implemented by the Small Business Administration under 13 CFR part 121, or any successor provisions.

(3) *Annual covered consumer payment transaction volume* means the sum of the number of consumer payment transactions that the nonbank covered person and its affiliated companies facilitated in the preceding calendar year by providing general-use digital consumer payment applications.

(i) *Aggregating the annual covered consumer payment transaction volume of affiliated companies*. The annual covered consumer payment transaction volume of each affiliated company of a nonbank covered person is first calculated separately, treating the affiliated company as if it were an independent nonbank covered person for purposes of the calculation. The annual covered consumer payment transaction volume of a nonbank covered person then must be aggregated with the separately-calculated annual covered consumer payment transaction volume of any person that was an affiliated company of the nonbank covered person at any time in the preceding calendar year. However, if more than one affiliated company facilitates a single consumer payment transaction, that consumer payment transaction shall only be counted one time in the annual covered consumer payment volume calculation. The annual covered consumer payment transaction volumes of the nonbank covered person and its affiliated companies are aggregated for the entire preceding calendar year, even if the affiliation did not exist for the entire calendar year.

Emily Ross,

Executive Secretary, Consumer Financial Protection Bureau.

[FR Doc. 2023-24978 Filed 11-16-23; 8:45 am]

BILLING CODE 4810-AM-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2023-2151; Project Identifier AD-2023-00984-T]

RIN 2120-AA64

Airworthiness Directives; The Boeing Company 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 The Boeing Company Model 777 airplanes. This proposed AD was prompted by a report of a 5-inch crack on the right wing upper wing skin at a certain wing station. This proposed AD would require repetitive inspections for cracking of the upper wing skin common to certain fasteners and applicable on-condition actions. 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 January 2, 2024.

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](https://www.regulations.gov). Follow the instructions for submitting comments.

- *Fax:* 202-493-2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2023-2151; 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 Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Blvd., MC 110-SK57, Seal Beach, CA 90740-5600; telephone 562-797-1717; website myboeingfleet.com.

• You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at *regulations.gov* by searching for and locating Docket No. FAA–2023–2151.

FOR FURTHER INFORMATION CONTACT: Luis Cortez-Muniz, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone: 206–231–3958; email: *Luis.A.Cortez-Muniz@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–2023–2151; Project Identifier AD–2023–00984–T” 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 Luis Cortez-Muniz, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone: 206–231–3958; email: *Luis.A.Cortez-Muniz@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

The FAA has received a report indicating that an operator found a 5-inch crack on the right wing upper wing skin at wing station (WSTA) 460. The report was related to a 777–300ER airplane that had 69,000 flight hours and 8,600 flight cycles. It has been determined that combined local stresses caused by contributions from the main landing gear beam outboard support fitting tab out and the pad-up were larger than anticipated, contributing to premature fatigue cracking, and that existing inspections do not provide sufficient crack detection opportunities for the wing skin. An undetected upper wing skin crack, if not addressed, could result in the inability of the primary structural element to sustain limit load

and could adversely affect the structural integrity of the airplane, resulting in 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 Boeing Alert Requirements Bulletin 777–57A0125 RB, dated July 25, 2023. This service information specifies procedures for repetitive inspections for cracking of the upper wing skin common to certain fasteners and applicable on-condition actions. On-condition actions include repair.

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 accomplishing the actions specified in the service information already described, except for any differences identified as exceptions in the regulatory text of this proposed AD. For information on the procedures and compliance times, see this service information at *regulations.gov* under Docket No. FAA–2023–2151.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 323 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
Inspections	40 work-hours × \$85 per hour = \$3,400 per inspection cycle.	* \$1,480	\$4,880 per inspection cycle	\$1,576,240 per inspection cycle.

* An inspection kit is required.

The FAA has received no definitive data on which to base the cost estimates for the on-condition repairs specified in this proposed AD.

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some or all of the costs of this proposed AD may be covered under warranty, thereby

reducing the cost impact on affected operators.

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:

The Boeing Company: Docket No. FAA–2023–2151; Project Identifier AD–2023–00984–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by January 2, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model 777 airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 57, Wings.

(e) Unsafe Condition

This AD was prompted by a report of a 5-inch crack on the right wing upper wing skin at wing station (WSTA) 460. The FAA is issuing this AD to address the possibility of an undetected upper wing skin crack. The unsafe condition, if not addressed, could result in the inability of the primary structural element to sustain limit load and could adversely affect the structural integrity of the airplane, resulting in loss of control of the aircraft.

(f) Compliance

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

(g) Required Actions

Except as specified by paragraph (h) of this AD: At the applicable times specified in the “Compliance” paragraph of Boeing Alert Requirements Bulletin 777–57A0125 RB, dated July 25, 2023, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin 777–57A0125 RB, dated July 25, 2023.

Note 1 to paragraph (g): Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin 777–57A0125, dated July 25, 2023, which is referred to in Boeing Alert Requirements Bulletin 777–57A0125 RB, dated July 25, 2023.

(h) Exceptions to Service Information Specifications

(1) Where Boeing Alert Requirements Bulletin 777–57A0125 RB, dated July 25, 2023, uses the phrase “the original issue date of Requirements Bulletin 777–57A0125 RB,” this AD requires using “the effective date of this AD.”

(2) Where Boeing Alert Requirements Bulletin 777–57A0125 RB, dated July 25, 2023, specifies contacting Boeing for repair instructions: This AD requires doing the repair before further flight using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

(i) Terminating Action for Repetitive Inspections

Accomplishment of a repair specified in the Accomplishment Instructions of Boeing Alert Requirements Bulletin 777–57A0125 RB, dated July 25, 2023, terminates the repetitive inspections required by paragraph (g) of this AD at the repaired location only.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, AIR–520, Continued Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office,

send it to the attention of the person identified in paragraph (k) of this AD. Information may be emailed to: 9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, AIR–520, Continued Operational Safety Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(k) Related Information

For more information about this AD, contact Luis Cortez-Muniz, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone: 206–231–3958; email: Luis.A.Cortez-Muniz@faa.gov.

(l) 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) Boeing Alert Requirements Bulletin 777–57A0125 RB, dated July 25, 2023.

(ii) [Reserved]

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; website myboeingfleet.com.

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations or email fr.inspection@nara.gov.

Issued on November 13, 2023.

Caitlin Locke,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023–25340 Filed 11–16–23; 8:45 am]

BILLING CODE 4910–13–P

POSTAL REGULATORY COMMISSION**39 CFR Part 3050****[Docket No. RM2024–1; Order No. 6784]****Periodic Reporting****AGENCY:** Postal Regulatory Commission.**ACTION:** Notice of proposed rulemaking.

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

DATES: *Comments are due:* December 18, 2023.

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

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

SUPPLEMENTARY INFORMATION:**Table of Contents**

- I. Introduction
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I. Introduction

On November 8, 2023, the Postal Service filed a petition pursuant to 39 CFR 3050.11 requesting that the Commission initiate a rulemaking proceeding to consider changes to analytical principles related to periodic reports.¹ The Petition identifies the proposed analytical changes filed in this docket as Proposal Seven.

II. Proposal Seven

Background. Proposal Seven is a request to change the methodology for developing, attributing, and distributing Cost Segment 2 costs related to supervisors and technical personnel. Petition at 1. Proposal Seven stems from the Postal Service's identification of

supervisors and technicians costs as a medium-term area in need of study and is the result of that study.² Cost Segment 2 includes salaries, benefits, and other related costs of supervisors (except those associated with supervising vehicle maintenance and custodial employees) and technical personnel. Petition, Proposal Seven at 1. Cost Segment 2 also includes expenses associated with non-supervisory employees who work in the district offices such as customer service representatives and address management personnel. *Id.* at 1–2. Supervisors direct the activities for those employees that process, deliver, and transport the mail. *Id.* at 1. Technical personnel work to improve the efficiency of activities performed by postal employees and include industrial engineers, accountants, and human resources personnel and include staff working in district offices. *Id.*

Currently, accrued supervisor costs are apportioned to supervisor activities through In-Office Cost Systems (IOCS) observations and assignment of corresponding activity codes. *Id.* at 2. The costs associated with these activities are classified and distributed as variable to the same degree as the work activities supervised. *Id.* The Postal Service represents that in FY 2022, approximately 39,000 IOCS readings were used in determining the supervisors and technicians cost components for FY 2022. *Id.* According to the Postal Service, the IOCS readings are costly, consume valuable resources, and “by their nature do not yield measurements that supply product level detail.” *Id.*

Proposal. The Postal Service's proposal seeks to replace its use of IOCS readings with operational payroll data and “reasonable assumptions” in determining cost component totals. *Id.* at 3–4. According to the Postal Service, this would result in a set of eight cost components. *Id.* The current IOCS measurements divide the accrued costs in Segment 2 into sixteen cost components. *Id.* at 2–3. More specifically, the Postal Service proposes to use system payment data by Labor Distribution Code (LDC) to form these cost components, which would significantly reduce reliance on IOCS measurements. *Id.* at 1, 3–4. Under the proposed methodology, supervisor cost components would be formed by utilizing the ratio of total payroll salary and benefits by supervisor LDC and facility type and, for some LDCs, the

portion of labor costs for the employee craft type supervised. *Id.* at 7.

Additionally, the proposal seeks to tie Professional and Technical total costs to the Trial Balance total rather than relying on IOCS readings and modeling. *Id.* at 4. Currently, technician costs are categorized within the cost component for “Product Specific and Other S & T.” *Id.* The Postal Service proposes that these costs instead be separated into their own cost components based on the General Ledger amounts. *Id.* The Postal Service proposes to separate the remaining supervisor costs even further according to function (using the ratio of payroll data cost according to their function), including the following LDCs: function 1 (mail processing); function 2 (carriers); function 3 (vehicle service); and function 4 (customer service). *Id.* at 5. All remaining supervisor LDCs would be allocated to the Other Supervisors cost component. *Id.*

The Postal Service proposes further dividing function 1 costs into International Service Centers, Network Distribution Centers, and other costs based on the ratio of payroll costs by location (facility) and applying “more detailed support costs variabilities and distribution keys.” *Id.* at 5, 7. For supervisors that oversee activities of both function 2 and 4 employees (carriers, window clerks and back-office clerks), the Postal Service proposes summing the payroll costs of function 2 and function 4 and then using the underlying direct labor costs to reallocate the functional costs between the two functions. *Id.* at 6. Function 2 delivery costs will then further be separated into rural and city carrier supervision costs based on the nationwide proportions of routes by type of delivery. *Id.* Function 4 costs will then be further allocated to cost pools for Window and Non-MODS clerk supervision using direct labor cost proportions within function 4. *Id.*

Rationale. The Postal Service justifies the proposed changes as improving efficiency by using “passively available operational data,” to form cost components rather than costly IOCS measurements. *Id.* at 7. Additionally, the Postal Service justifies the change as an improvement because it would increase “the accuracy and efficiency of product cost estimation in Cost Segment 2.” *Id.* at 10. For instance, the Postal Service asserts that one significant improvement with this model is the increase in the rural delivery supervision cost component, which will result in a cost ratio “more aligned with operational reality.” *Id.* at 8–9. The Postal Service indicates that the current methodology's “extreme ratio” might be

¹Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposal Seven), November 8, 2023 (Petition). The Postal Service also filed a notice of filing of public and non-public material relating to Proposal Seven. Notice of Filing of USPS–RM2024–1–1 and USPS–RM2024–1–NP1 and Application for Nonpublic Treatment, November 8, 2023.

²Docket No. RM2022–1, Initial Comments of the United States Postal Service, March 25, 2022, at 7, 24–26, 38.

the result of the difficulty in IOCS sampling in rural areas. *Id.* at 9–10.

Impact. The Postal Service asserts that its proposal will result in “an overall decrease of approximately \$163 million in attributable costs due to the reformulation of the cost components,” mostly “due to the new Other Supervisors costs component, which if implemented would be classified as institutional.” *Id.* at 10. Overall, the proposal will result in a decrease in unit costs for most product classes, except for Market Dominant Services. *Id.* at 10–11.

III. Notice and Comment

The Commission establishes Docket No. RM2024–1 for consideration of matters raised by the Petition. More information on the Petition may be accessed via the Commission’s website at <https://www.prc.gov>. Interested persons may submit comments on the Petition and Proposal Seven no later than December 18, 2023. Pursuant to 39 U.S.C. 505, Almaroof Agoro is designated as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. RM2024–1 for consideration of the matters raised by the Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposal Seven), filed November 8, 2023.

2. Comments by interested persons in this proceeding are due no later than December 18, 2023.

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

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

By the Commission.

Erica A. Barker,
Secretary.

[FR Doc. 2023–25430 Filed 11–16–23; 8:45 am]

BILLING CODE 7710–FW–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 16

[EPA–HQ–OMS–2019–0371; FRL–10082–03–OMS]

Privacy Act Regulations for EPA–83

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA or Agency) is proposing to revise the Agency’s Privacy Act regulations to exempt a system of records, EPA–83, the Personnel Security System (PSS) 2.0, from certain requirements of the Privacy Act because the system will contain information relevant to insider threat inquiries and background investigations. If such information is not kept confidential, it could jeopardize EPA or a referring agency’s ability to conduct background investigations, insider threat inquiries, or any related inquiries. In the “Rules and Regulations” section of this **Federal Register**, EPA is simultaneously publishing the revision of the Agency’s Privacy Act Regulations to include EPA–83 as a direct final rule without a prior proposed rule. If the Agency receives no adverse comment, it will not take further action on this proposed rule.

DATES: Comments must be received on or before December 18, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OMS–2019–0371, at <https://www.regulations.gov/>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit

<https://www.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: John Goldsby, Personnel Security Branch, Environmental Protection Agency, William Jefferson Clinton North Building, Mail Code 3206A, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 564–1569; email address: Goldsby.John@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Why is EPA issuing this proposed rule?

The EPA proposes to revise the Agency’s Privacy Act regulations in order to exempt a system of records, EPA–83, the Personnel Security System (PSS) 2.0, from certain requirements of the Privacy Act. The EPA has published a direct final rule exempting this system of records in the “Rules and Regulations” section of this **Federal Register** because it views this as a noncontroversial action and anticipates no adverse comment. EPA explains its reasons for the direct final rule in the preamble to that rule. If EPA receives no adverse comment, it will not take further action on this proposed rule. If EPA receives adverse comment, it will withdraw the direct final rule and the rule will not take effect. EPA will address public comments in any subsequent final rule based on this proposed rule. EPA does not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information, please see the information provided in the **ADDRESSES** section of this document.

II. General Information

The EPA published a Privacy Act system of records notice for information collected and maintained in the Personnel Security System (PSS) 2.0 (85 FR 32380, May 29, 2020), and a Notice of a Modified System of Records concurrently with this proposed rule. PSS 2.0 supports the Personnel Security Branch (PSB) with tracking the documentation associated with background investigations for Federal and non-Federal personnel working for EPA. PSS 2.0 contains investigatory material compiled for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, Federal contracts, or access to classified information. Additionally, the PSB plans to update PSS 2.0 with a new module focused on providing the agency with insider threat inquiry management and coordination capabilities. The Insider Threat Program

module will contain information relevant to insider threat inquiries on cleared individuals with access to EPA resources, including facilities, information, equipment, networks, and systems. At a later date, and once relevant authorities are updated, the insider threat module will also contain information on uncleared individuals with access to EPA resources. Information maintained in the Insider Threat Program module may be directly collected by EPA's Office of Homeland Security (OHS) or may be obtained by OHS from law enforcement agencies or systems. Specifically, OHS will use the module to detect, deter, and mitigate potential insider threats before they harm national security. OHS will collect and maintain information in the module to identify potential insider threats, which may form the predicate of law enforcement investigations conducted by other law enforcement entities. Further, if an inquiry uncovers insider threat indicators, OHS may share relevant data from the module with authorized law enforcement organizations, like EPA's Office of Inspector General or the Federal Bureau of Investigation, for those organizations to conduct any necessary investigations.

Pursuant to the Privacy Act, when information is maintained for the purpose of civil actions, the relevant provision of the Privacy Act is 5 U.S.C. 552a(d)(5) which states "nothing in this [Act] shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding." 5 U.S.C. 552a(d)(5).

In addition, section (k)(2) of the Privacy Act provides that the head of an agency may promulgate regulations to exempt the system from certain provisions of the Act if the system "is investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2)" of 5 U.S.C. 552a. Accordingly, EPA proposes to exempt all such records in the PSS 2.0 system (including certain background investigation records and records maintained in the Insider Threat module) from 5 U.S.C. 552a(c)(3); (d); and (e)(1); for the following reasons:

(1) From subsection 552a(c)(3), because making available to a named individual an accounting of disclosures of records concerning him/her/them would alert the subjects of an investigation or inquiry to the existence of the investigation or inquiry. This could allow record subjects to impede the inquiry, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid inquiries or apprehension by law enforcement

personnel. Further, such a disclosure could reveal the identity of a confidential source and hamper the Agency's inquiry.

(2) From subsection 552(d), which requires an agency to permit an individual to gain access to records pertaining to him/her/them, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such records. Granting requesters access to information compiled for insider threat inquiries, PSS 2.0 background investigation information compiled to investigate personnel/an applicant that is/would be responsible for law enforcement and/or national security matters, or other PSS 2.0 information related to such insider threat inquiries or background investigations could inform the subject of an investigation/inquiry of an actual or potential criminal violation, of the existence of that investigation/inquiry, of the nature and scope of the information or evidence obtained as to their activities, and of the identity of confidential sources, witnesses, and law enforcement personnel. Such a disclosure could enable the subject to avoid detection or apprehension. Specifically, granting access to such information could seriously impede or compromise an investigation or inquiry; endanger the physical safety of confidential sources, witnesses, law enforcement personnel and their families; lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony; and could disclose sensitive or confidential investigative techniques and procedures.

(3) From subsections 552a(e)(1), which requires an agency to collect/maintain only information about an individual that is relevant and necessary to accomplish a purpose of the Agency, because the relevance of information obtained in the course of a background investigation or insider threat inquiry is not always known when collected. Material that may seem unrelated, or irrelevant when collected may take on added meaning or significance as the inquiry progresses. Also, it is appropriate to retain all information that may aid in establishing patterns of illegal or insider threat activity. Therefore, it would impede the inquiry process if it were necessary to assure the relevance of all information obtained at the time of collection.

Additionally, pursuant to 5 U.S.C. 552a(k)(5), an individual's request for access to his or her or their record(s) may be exempt from specific access provisions of the Privacy Act where the

information is investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information if disclosure of such material would reveal the identity of a confidential source who furnished information to the Government under an express promise that the source's identity would be kept confidential. Under 5 U.S.C. 552a(k)(5), EPA is proposing to exempt such materials stored in PSS 2.0 from 5 U.S.C. 552(a)(c)(3) and (d) for the following reason(s):

(1) From subsection 552a(c)(3), because an accounting of disclosures of records concerning the record subject may contain information about the identity of a confidential source, and if the Agency was required to disclose this information to the record subject, such a disclosure would reveal the identity of the confidential source, endangering the physical safety of the confidential source. Further, such a disclosure could allow record subjects to impede a background investigation or insider threat inquiry by contacting and intimidating confidential sources and those that are potential witnesses.

(2) From subsection 552a(d), which requires an agency to permit an individual to gain access to records pertaining to him/her/them, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such records. Granting such access could cause the identity of a confidential source to be revealed, endangering the physical safety of the confidential source, and could impair the ability of the EPA to compile, in the future, investigatory material for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, Federal contracts, or access to classified information.

III. 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 being 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 action contains no provisions constituting a collection of information under the PRA.

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.

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.

E. Executive Order 13132 (Federalism)

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

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

This action does not have tribal implications as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

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

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

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

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

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

List of Subjects in 40 CFR Part 16

Environmental protection, Administrative practice and procedure, Confidential business information, Government employees, Privacy.

Kimberly Y. Patrick,

Principal Deputy Assistant Administrator, Office of Mission Support.

For the reasons stated in the preamble, title 40, chapter I, part 16 of the Code of Federal Regulations is proposed to be amended as follows:

PART 16—IMPLEMENTATION OF PRIVACY ACT OF 1974

■ 1. The authority citation for part 16 continues to read as follows:

Authority: 5 U.S.C. 301, 552a (as revised).

■ 2. Amend § 16.12 by:

- a. Revising paragraphs (a)(1), (a)(4)(i), (a)(5) introductory text, and (b)(1);
- b. Adding paragraph (b)(4)(iii); and
- c. Revising paragraph (b)(5) introductory text.

The revisions and addition read as follows:

§ 16.12 Specific exemptions.

(a) * * *

(1) *Systems of records affected.* (i) EPA–17 Online Criminal Enforcement Activities Network (OCEAN).

(ii) EPA–21 External Compliance Case Tracking System (EXCATS).

(iii) EPA–30 Inspector General Enterprise Management System (IGEMS) Hotline Module.

(iv) EPA–40 Inspector General Enterprise Management System (IGEMS) Investigative Module.

(v) EPA–63 eDiscovery Enterprise Tool Suite.

(vi) EPA–79 NEIC Master Tracking System.

(vii) EPA–100 OIG Data Analytics Enterprise.

(viii) EPA–83 Personnel Security System (PSS) 2.0.

* * * * *

(4) * * *

(i) EPA systems of records 17, 30, 40, 63, 79, and 100 are exempted from the following provisions of the PA, subject to the limitations set forth in 5 U.S.C. 552a(k)(2); 5 U.S.C. 552a(c)(3); (d); and (e)(1). EPA system of records 21 is exempt from the following provisions of the PA, subject to limitations set forth in 5 U.S.C. 552a(k)(2); 5 U.S.C. 552a(c)(3), (d), and (e)(1). EPA system of records 83 is exempt from the following provisions of the PA, subject to the limitations set forth in 5 U.S.C. 552a(k)(2); 5 U.S.C. 552a(c)(3); (d); and (e)(1).

* * * * *

(5) *Reasons for exemption.* EPA systems of records 17, 21, 30, 40, 63, 79, 83, and 100 are exempted from the provisions of the PA in paragraph (a)(4) of this section for the following reasons:

* * * * *

(b) * * *

(1) *Systems of records affected.* (i) EPA 36 Research Grant, Cooperative Agreement, and Fellowship Application Files.

(ii) EPA 40 Inspector General Enterprise Management System (IGEMS) Investigative Module.

(iii) EPA 83 Personnel Security System (PSS) 2.0.

(iv) EPA 100 OIG Data Analytics Enterprise.

* * * * *

(4) * * *

(iii) EPA 83 is exempted from the following provisions of the PA, subject to the limitations of 5 U.S.C. 552a(k)(5); 5 U.S.C. 552a(c)(3), and (d).

* * * * *

(5) *Reasons for exemption.* EPA 36, 40, 83, and 100 are exempted from the above provisions of the PA for the following reasons:

* * * * *

[FR Doc. 2023–24668 Filed 11–16–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 355**

[EPA–HQ–OLEM–2023–0142; FRL–10285–01–OLEM]

RIN 2050–AH31

Potential Future Regulation for Emergency Release Notification Requirements for Animal Waste Air Emissions Under the Emergency Planning and Community Right-to-Know Act (EPCRA)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Advance Notice of Proposed Rulemaking (ANPRM).

SUMMARY: The Environmental Protection Agency (EPA or Agency) is soliciting information pertaining to and is requesting comments to assist in the potential development of regulations to reinstate the reporting of animal waste air emissions at farms under the Emergency Planning and Community Right-to-Know Act (EPCRA). The Agency is soliciting comments under five general categories: health impacts; implementation challenges; costs and benefits; small farm definition and potential reporting exemption; and national report on animal waste air emissions. Requiring reporting of animal waste air emissions may advance the community right-to-know aspect of EPCRA by providing the public with information that may impact their health and the environment. This information may advance EPA's environmental justice goals of increasing the awareness of the potential impact these emissions have on communities with environmental justice concerns. We solicit comments on all aspects of this potential action.

DATES: Comments must be received on or before February 15, 2024.

ADDRESSES: You may send comments, identified by Docket ID No. EPA-HQ-OLEM-2023-0142, by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov/> (our preferred method). Follow the online instructions for submitting comments.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, EPA-HQ-OLEM-2023-0142 Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: William Noggle, U.S. Environmental Protection Agency, Office of Emergency

Management, 1200 Pennsylvania Avenue NW, Washington, DC 20460; 202–566–1306; noggle.william@epa.gov.

SUPPLEMENTARY INFORMATION:

Organization of this document. The information in this preamble is organized as follows:

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 1. 2008 CERCLA/EPCRA Reporting Exemption Rule and Related Litigation
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 - C. Costs and Benefits
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 - E. National Report on Animal Waste Emissions
- V. Request for Comment and Additional Information
- VI. What are the next steps EPA will take?
- VII. Statutory and Executive Order Reviews

I. Public Participation

A. Written Comments

Submit your comments, identified by Docket ID No. EPA-HQ-OLEM-2023-0142, at <https://www.regulations.gov> (our preferred method), or the other methods identified in the **ADDRESSES**

section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit to EPA's docket at <https://www.regulations.gov> any information you consider to be Confidential Business Information (CBI), Proprietary Business Information (PBI), or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. 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). Please visit <https://www.epa.gov/dockets/commenting-epa-dockets> for additional submission methods; the full EPA public comment policy; information about CBI, PBI, or multimedia submissions; and general guidance on making effective comments.

B. Comment Headings

Commenters should review the discussions in the preamble and are encouraged to comment on any matter that is addressed by this ANPRM. For comments submitted through postal mail or <https://www.regulations.gov>, EPA is requesting that commenters identify their comments on specific issues by using the appropriate number and comment headings listed below to make it simpler for the Agency to process your comment. If your comment covers multiple issues, please use all the heading numbers and names that relate to that comment. These are the comment headings for specific issues in this ANPRM:

- #1—Health Impacts (see Section IV.A)
- #2—Emissions Estimating Methodologies (see Section IV.B.1)
- #3—2005 Compliance Agreement (see Section IV.B.1)
- #4—Emissions Calculator—General (see Section IV.B.2)
- #5—Emissions Calculator—Continuous Release Reporting (see Section IV.B.2)
- #6—Accuracy of Reported Release Quantity (see Section IV.B.2)
- #7—Turkey and Beef Contribution Factors (see Section IV.B.2)
- #8—Estimating Emissions from Less Common Species (see Section IV.B.2)
- #9—Estimating Emissions from Atypical Farming Operations (see Section IV.B.2)
- #10—Cutoffs for Estimating (see Section IV.B.2)
- #11—Other Guidance (see Section IV.B.2)
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#18—Citizen Suits—Wholly Past Violations (see Section IV.B.5)

#19—Citizen Suit Cost and Benefits (see Section IV.B.5)

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#21—Citizen Suit—Other (see Section IV.B.5)

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#23—Privacy Concerns—Other (see Section IV.B.6)

#24—National EPCRA Database—General (see Section IV.B.7)

#25—National Database—Managing Right-to-Know Data (see Section IV.B.7)

#26—National Database—Managing Reports from Facilities (see Section IV.B.7)
- #27—National Database—Animal Waste Air Emissions Reporting (see Section IV.B.7)

#28—National Database—Facility Benefits and Disadvantages (see Section IV.B.7)

#29—National Database—Managing FOIA Requests (see Section IV.B.7)

#30—National Database—Other (see Section IV.B.7)

#31—Regulated Universe—Number of Farms Reporting (see Section IV.C.1)

#32—Burden—Reporting Farms (see Section IV.C.2)

#33—Burden—Non-Reporting Farms (see Section IV.C.2)

#34—Burden—Small Farms (see Section IV.C.2)

#35—Burden—Qualitative Costs (see Section IV.C.2)

#36—Benefits—Environmental Justice (see Section IV.C.3)

#37—Indirect Benefits (see Section IV.C.3)

#38—Small Farm Exemption—General (see Section IV.D.1)

#39—Small Farm Exemption—Criteria (see Section IV.D.1)
- #40—Small Farm Definition (see Section IV.D.2)

#41—Small Farm—Waste Handling (see Section IV.D.3)

#42—Small Farm—Health Impacts (see Section IV.D.4)

#43—State, Local, and Tribal Impacts (see Section IV.D.5)

#44—RQ Adjustment—General (see Section IV.D.6)

#45—Industry-Specific RQ Adjustment (see Section IV.D.6)

#46—National Report based on USDA or State Data (see Section IV.E)

#47—Other Technology for Estimating Air Releases (see Section IV.E)

#48—Other Solutions (see Section IV.E)

Other Comments (Section V)

II. General Information

A. Does this ANPRM apply to me?

A list of entities that could be affected by a potential future rulemaking include, but are not limited to:

TABLE 1—ENTITIES POTENTIALLY AFFECTED BY A FUTURE RULEMAKING

Type of entity	Examples of potentially affected entities
Industry	NAICS Code 112—Animal Production.
State and/or Local Govern-ments.	NAICS Code 999200—State Government, excluding schools and hospitals.
	NAICS Code 999300—Local Government, excluding schools and hospitals.
	State Emergency Response Commissions, Tribal Emergency Response Commissions, Tribal Emergency Plan-ning Committees and Local Emergency Planning Committees.

NAICS = North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by a future rulemaking. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

B. What Is the purpose of this ANPRM?

On June 13, 2019, the Agency published a final rule (84 FR 27533) which exempted reporting of animal waste air emissions under EPCRA for all farms, regardless of size. The Agency is reconsidering that final rule and through this ANPRM is seeking information that may assist with a potential future rulemaking requiring farms to report air emissions of extremely hazardous substances from animal waste under EPCRA.

EPA is specifically soliciting information on the following five topics: (1) health impacts; (2) implementation challenges; (3) costs and benefits; (4) small farm definition and reporting exemption, and (5) a national report on animal waste air emissions. Information collected during the public comment period for this ANPRM will better inform the Agency on whether to pursue

a proposed rule, as well as assist the Agency on how best to implement the reinstating of EPCRA reporting from farms, if such a rule is finalized. The Agency is also requesting comments and information on any other topics relevant to conducting a future rulemaking on EPCRA reporting of air emissions from animal waste on farms. The solicitation of information in this ANPRM does not necessarily mean any action on farms will occur.

The solicitation of comment on these matters should not be read as EPA suggesting legal ambiguity in the relevant regulations or recognizing a particular interpretation by EPA of either EPCRA, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), or their implementing regulations. For purposes of this comment solicitation, exploration of ways to further clarify particular aspects of the existing regulations should not be viewed as an indication that the existing language is inadequate, or in any way be seen to undermine the Agency’s ability to enforce these regulations as written.

C. Legal authority

This advanced notice of proposed rulemaking (ANPRM) is being issued

under EPCRA, which was enacted as Title III of the Superfund Amendments and Reauthorization Act (SARA) of 1986 (Pub. L. 99–499). Any future rulemaking would fall under the authority of EPCRA section 304 (42 U.S.C. 11004) and the Agency’s general rulemaking authority under EPCRA section 328 (42 U.S.C. 11048).

III. Background

A. Overview

Animal waste air emissions reporting from farms has been subject to a complex history of EPA regulatory actions, subsequent legal challenges, and Congressional legislation. Animal waste can generate potentially harmful air emissions of ammonia and hydrogen sulfide,¹ which are listed as hazardous substances (HSs) under CERCLA and as extremely hazardous substances (EHSs) under EPCRA. The following sections provide a discussion of the regulatory reporting requirements and the history of prior regulatory and legal actions leading to this ANPRM.

¹ Air emissions from animal wastes on farms are generally a result of decomposition of the animal waste.

B. Release Reporting Requirements under CERCLA and EPCRA

CERCLA and EPCRA are separate, but interrelated, environmental statutes that work together to provide notification of qualifying releases of HSs and EHSs to the appropriate government authorities. In general, CERCLA section 103 provides for notice to federal officials, whereas EPCRA section 304 provides for notice to state, tribal, and local officials. Section 103 of CERCLA requires the person in charge of a vessel or facility to immediately notify the National Response Center (NRC)² when there is a release of an HS, as defined under CERCLA section 101(14), in an amount equal to or greater than the reportable quantity (RQ) for that substance within a 24-hour period. These requirements are codified in the CERCLA regulations at 40 CFR part 302. In addition to these CERCLA reporting requirements, EPCRA section 304 generally requires owners or operators of certain facilities³ to immediately notify state, tribal and local authorities when there is a release of an EHS, as defined under EPCRA section 302, or of a CERCLA hazardous substance in an amount equal to or greater than the RQ for that substance within a 24-hour period. These requirements are codified in the EPCRA regulations at 40 CFR part 355 subpart C.

Notice given to the NRC under CERCLA serves to inform the federal government of a release so that federal personnel can evaluate the need for a response in accordance with the National Oil and Hazardous Substances Contingency Plan (NCP), the federal government's framework for responding to both oil discharges and hazardous substance releases. Related, notice under EPCRA is given to the State or Tribal Emergency Response Commission (SERC or TERC)⁴ for any

state or tribal region likely to be affected by the release and to the community emergency coordinator for the Local or Tribal Emergency Planning Committee (LEPC or TEPC)⁵ for any area likely to be affected by the release so that state, tribal and local authorities have information to help protect the community. As stated in the title of the statute, EPCRA also has an important community right-to-know component that provides for public availability of release notifications pursuant to EPCRA section 324.

Release reporting under EPCRA depends, in part, on whether reporting is required under CERCLA. Specifically, EPCRA section 304(a) provides for reporting under the following three release scenarios:

1. EPCRA section 304(a)(1) requires notification if a release of an EPCRA EHS occurs from a facility at which a hazardous chemical is produced, used or stored, and such release requires a notification under CERCLA section 103(a).
2. EPCRA section 304(a)(2) requires notification if a release of an EPCRA EHS occurs from a facility at which a hazardous chemical is produced, used or stored, and such release is not subject to the notification requirements under CERCLA section 103(a), but only if the release:
 - Is not a federally permitted release as defined in CERCLA section 101(10),
 - Is in an amount in excess of the reportable quantity as determined by EPA, and
 - Occurs in a manner that would require notification under CERCLA section 103(a).
3. EPCRA section 304(a)(3) requires notification if a release of a substance not designated as an EPCRA EHS occurs from a facility at which a hazardous chemical is produced, used or stored, and such release requires a notification under CERCLA section 103(a).

C. Continuous Release Reporting (CRR) Regulations

There are situations where known or anticipated releases may be subject to significantly reduced reporting requirements, rather than the immediate

or occurrence-based reporting of CERCLA section 103(a) and EPCRA section 304(a) as outlined above. CERCLA section 103(f) and its attendant regulations at 40 CFR 302.8 provide such relief for a release of a hazardous substance that is continuous and stable in quantity and rate. Similarly, EPA relied on EPCRA section 304(a)(2) to promulgate analogous reduced reporting regulations for continuous releases under EPCRA at 40 CFR 355.32. Those EPCRA regulations instruct a facility to rely on and follow, in part, the related CERCLA regulations at 40 CFR 302.8. As discussed further in this document, the continuous release reporting option is meant to save facilities and response authorities from the unnecessary burden of notification each time a repeated release—that is continuous and stable—occurs.

Under CERCLA section 103(a), regulated entities are required to immediately report releases of CERCLA hazardous substances that meet or exceed the RQ threshold. In lieu of reporting for each release, however, certain continuous releases can qualify for reduced reporting (see 40 CFR 302.8), which allows the regulated entity to only provide the following:

- (1) Initial telephone notification made to the NRC;
- (2) Initial 30-day written notification to the EPA;
- (3) One-year follow-up written notification to the EPA;
- (4) Notification to the EPA of a change in the composition or source(s) of the release or in the other information submitted in the initial written notification; and
- (5) Notification to the NRC of any increase in the quantity of the hazardous substance being released during any 24-hour period, which represents a statistically significant increase (SSI).

Reduced release reporting provisions are also available under EPCRA, which requires reporting of CERCLA hazardous substances and EPCRA extremely hazardous substances. Under the EPCRA continuous release reporting regulations codified at 40 CFR 355.32, which cross-reference the CERCLA regulations at 40 CFR 302.8, facilities are required to report only items 1, 2, and 5 (from the list above) to their SERC or TERC and LEPC or TEPC. Any changes in source or composition (item 4) may be considered a new release, which is also required to be reported to the SERC or TERC and the LEPC or TEPC. A first anniversary report (item 3) is not required under EPCRA section 304.

² NRC is a part of the federally established National Response System and staffed 24 hours a day by the U.S. Coast Guard. It is the designated federal point of contact for reporting all oil, chemical, radiological, biological and etiological discharges into the environment, anywhere in the United States and its territories.

³ The EPCRA definition of facility at 40 CFR 355.16: means all buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous or adjacent sites and that are owned or operated by the same person (or by any person that controls, is controlled by, or under common control with, such person). Facility includes manmade structures, as well as all natural structures in which chemicals are purposefully placed or removed through human means such that it functions as a containment structure for human use. For purposes of emergency release notification, the term includes motor vehicles, rolling stock, and aircraft.

⁴ SERC is defined at 40 CFR 355.61 as: the State Emergency Response Commission for the state in which the facility is located except where the

facility is located in Indian Country, in which case, SERC means the Emergency Response Commission for the tribe under whose jurisdiction the facility is located. In the absence of a SERC for a state or Indian Tribe, the governor or the chief executive officer of the tribe, respectively, shall be the SERC. Where there is a cooperative agreement between a state and a tribe, the SERC shall be the entity identified in the agreement.

⁵ LEPC is defined at 40 CFR 355.61 as: the Local Emergency Planning Committee appointed by the State Emergency Response Commission. TEPCs are appointed by the TERCs.

CERCLA and the implementing regulations of both CERCLA and EPCRA⁶ and their implementing regulations define whether a release qualifies for continuous release reporting. The continuous release regulations in 40 CFR 302.8(d)(1) provide that a facility can establish a continuous release by “[u]sing release data, engineering estimates, knowledge of operating procedures, or best professional judgment to establish the continuity and stability of the release.” There is no specific requirement for release monitoring or collecting release data if a facility is relying on engineering estimates, best professional judgment, or knowledge of operations.

The definitions in the continuous release regulations in 40 CFR 302.8(b) provide further assistance to determine what qualifies as a continuous release. There, a continuous release is defined as a release “that occurs without interruption or abatement or that is routine, anticipated, and intermittent and incidental to normal operations or treatment processes.” A routine release is defined as a release “that occurs during normal operating procedures or processes.” And the phrase “stable in quantity and rate” is defined as a release “that is predictable and regular in amount and rate of emission.”

The continuous release regulations also include reporting the normal range of releases defined in 40 CFR 302.8 as “all releases (in pounds or kilograms) of a hazardous substance reported or occurring over any 24-hour period under normal operating conditions during the preceding year.” The upper and lower bounds of the normal range of the release are reported in the 30-day written report under EPCRA.

D. Regulatory and Legal Background

As previously noted, the history of release reporting for air emissions from animal waste at farms is long and complex. The following summary of events leading to this ANPRM is not meant to be exhaustive. Publicly available documents cited below and included in the docket provide further background information.

1. 2008 CERCLA/EPCRA Reporting Exemption Rule and Related Litigation

Prior to 2008, all farms were subject to release reporting for air emissions under both CERCLA and EPCRA but were eligible for reduced continuous release reporting. In December 2008, EPA published a final rule that

exempted all farms from reporting animal waste air emissions under CERCLA and exempted small and medium concentrated animal feeding operations (CAFOs)⁷ from reporting such emissions under EPCRA (73 FR 76948, December 18, 2008). Large CAFOs with emissions equal to or exceeding an RQ were still required to report under EPCRA with the continuous release reporting option, as applicable. EPA intended the 2008 rulemaking to reduce the reporting burden on farms and emergency response agencies.

In April 2017, the 2008 rule was vacated by the United States Court of Appeals for the District of Columbia Circuit as arbitrary and capricious. *See Waterkeeper Alliance, et al. v. EPA*, 853 F.3d 527 (D.C. Cir. 2017). In so holding, the court acknowledged the potential health risks of some animal waste air emissions and found that reporting could be useful to local and state authorities who may need to investigate or respond to these releases. The effect of the court’s vacatur was to reinstate reporting requirements for air emissions from animal waste at all farms under CERCLA and EPCRA. The court delayed the effective date of its ruling until May 2, 2018, to grant EPA time to develop guidance to assist farms with meeting their reporting obligations.

2. 2018 FARM Act and Related 2018 CERCLA Rule

On March 23, 2018, President Trump signed into law the Consolidated Appropriations Act, 2018 (“Omnibus Bill”). Title XI of the Omnibus Bill is entitled the “Fair Agricultural Reporting Method Act” or the “FARM Act.” *See* Fair Agricultural Reporting Method Act, Public Law 115–141, sections 1101–1103 (2018). The FARM Act amended CERCLA section 103 to expressly exempt the reporting of air emissions from animal waste (including decomposing animal waste) at a farm. As a result, in August 2018, the Agency published a final rule to amend the CERCLA regulations at 40 CFR part 302 by adding the reporting exemption for air emissions from animal waste at farms and adding definitions of “animal waste” and “farm” from the FARM Act (83 FR 37444, August 1, 2018).

The FARM Act expressly exempted all farms from reporting air emissions

from animal waste under CERCLA but did not amend EPCRA in any way.

3. 2019 EPCRA Rule and Related Litigation

EPA proposed a rule on November 14, 2018, to exempt all farms from reporting air emissions from animal waste under EPCRA (83 FR 56791, November 14, 2018). EPA received considerable comments from the public both supporting and opposing the proposed rule. Supporters largely agreed with EPA’s interpretation of the statutes and expressed concerns over the burden that would be placed on farms if animal waste emission reporting was not exempt under EPCRA. Opposing commenters expressed concerns over the environmental and health impacts of animal waste air emissions and the public’s right-to-know about these emissions. They argued that EPA’s interpretation of the statute in support of the proposed rule was unlawful.

After consideration of all these comments, EPA finalized the rule to promulgate the EPCRA exemption on June 13, 2019 (84 FR 27533) (the June 2019 EPCRA Rule).

On July 9, 2019, several environmental groups, including the Rural Empowerment Association for Community Help (REACH), the Center for Biological Diversity, the Environmental Integrity Project, and the Waterkeeper Alliance, amended an existing complaint to challenge the final rule in the U.S. District Court for the District of Columbia. *See REACH v. EPA*, No. 1:18–CV–02260 (Sept. 28, 2018) (the *REACH* case). A number of agricultural trade associations joined the action as intervenors, including the National Cattlemen’s Beef Association, the National Pork Producers Council, and the American Farm Bureau Federation.

4. Executive Order 13990, January 20, 2021

On January 20, 2021, shortly after the change in administration, President Biden issued Executive Order (E.O.) 13990, which states that it is the policy of the new administration: “to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental

⁶ The EPCRA continuous release reporting regulation at 40 CFR 355.32 cross-references the CERCLA definition of continuous releases at 40 CFR 302.8(b).

⁷ EPA defined different sizes of farms using the National Pollution Discharge Elimination System (NPDES) size definitions for concentrated animal feeding operations (CAFOs). A table of EPA’s NPDES regulatory definitions of large, medium, and small CAFOs can be viewed here: https://www3.epa.gov/npdes/pubs/sector_table.pdf.

justice and the creation of the well-paying union jobs necessary to deliver on these goals.” (86 FR 7037, January 25, 2021).

E.O. 13990 further directed federal agencies to “immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the 4 years prior to the E.O. that conflict with these important national objectives, and to immediately commence work to confront the climate crisis.” *See Id.* In keeping with E.O. 13990, EPA moved the court in the *REACH* case to remand the June 2019 EPCRA Rule back to the EPA on November 23, 2021. The district court granted the remand on February 14, 2022 “without vacatur,” meaning the EPCRA exemption for farms remains in place while EPA reconsiders the rule.

IV. What information is EPA seeking?

EPA is seeking comments and data that will better inform the Agency on whether to pursue a proposed rule, as well as assist the Agency on how best to implement the reinstating of EPCRA reporting from farms, if such a rule is finalized. The Agency is specifically soliciting information on the following five topics: (1) health impacts; (2) implementation challenges; (3) costs and benefits; (4) small farm definition and potential reporting exemption, and (5) a national report on animal waste air emissions.

A. Health Impacts From Animal Waste Air Emissions

EPA reviewed literature about health impacts to communities in the vicinity of farms with animal waste. A summary of the health impact studies can be found in the Technical Background Document (TBD) in the docket for this action. The literature review of 21 studies reporting on health effects associated with air releases from Animal Feeding Operations (AFOs) add to a body of evidence that exposure to AFOs is associated with respiratory health effects, mortality, odor annoyance, gastrointestinal illness, and other health effects. They also reveal that populations located in close proximity to animal operations are at a greater risk for adverse health effects compared to populations located farther away or residing in areas without AFOs. The literature search identified several studies showing a correlation between proximity and exposure to animal waste and respiratory health effects, including increased likelihood of asthma in both adults and children and reduced lung function. Some of the studies also identified exposure to animal waste as

being correlated with mortality rates, gastrointestinal illness, and other human health effects. The size and type of operation, number of animals, and species may affect the intensity of animal waste exposure. The studies also concluded that populations located in closer proximity to animal farm operations are at an increased risk for adverse health effects when compared to populations located farther away or residing in areas without animal farm operations. The studies also provided specific cases where communities with environmental justice concerns, including those comprising people of color, low-income individuals, and children in specific geographic locations of the country are disproportionately located near animal feeding operations. The location of these populations has the potential to result in significant health impacts on the members of these communities.

Request for Information

EPA requests the following information relating to health impacts:

#1—Health Impacts: The Agency is soliciting comment on the literature search provided in the TBD and requesting any additional relevant literature or other information on health impacts from animal waste air emissions, including any indirect health impacts. The Agency is also requesting any information on health impacts to communities with environmental justice concerns.

B. Implementation Challenges

If the Agency reinstates EPCRA reporting, EPA anticipates a certain level of uncertainty with determining or calculating the amount of animal waste air emissions of ammonia and hydrogen sulfide to trigger reporting. In the subsequent sections, the Agency is soliciting information on estimating amounts of air emissions, as well as other implementation challenges such as whether the continuous release reporting requirements are applicable to farm operations and how the influx of release reporting data could be managed.

1. National Air Emissions Monitoring Study (NAEMS)

EPA’s Office of Air and Radiation (OAR) is developing methodologies, based on data collected under the National Air Emissions Monitoring Study (NAEMS), to estimate air emissions of ammonia, hydrogen sulfide, particulate matter (PM), and volatile organic compounds (VOCs) from animal waste from poultry (egg-layers and chicken broilers), swine, and

dairy livestock. The NAEMS originated in 2005 from the EPA and agriculture industry’s understanding of the difficulty in estimating air emissions from animal feeding operations. To address the issue, the Agency entered into the Air Consent Agreement with the animal production industry, which included approximately 2,600 entities covering about 14,000 farms. As part of the agreement, EPA agreed not to pursue enforcement actions for certain past violations of the Clean Air Act, CERCLA, and EPCRA during development of the methodologies. The methodologies, based on the NAEMS data, are being developed for poultry (egg-layers and chicken broilers), swine, and dairy operations utilizing air monitoring data from animal operations and statistical analyses. The initial methodologies were released to the public starting in 2020. EPA anticipates holding a formal public comment period starting in late 2023 and finalizing the methods by spring 2024. In the existing draft form, the methods use a set of variables easily accessible to estimate emissions. These variables include type and number of animals at the farm; beginning and ending animal weight; waste management method(s) and if applicable; the housing type and number of days without animals in the barn or house; and ambient relative humidity, ambient temperature, and wind speed. Additional information can be found at <https://www.epa.gov/afos-air/national-air-emissions-monitoring-study> or in docket EPA–HQ–OAR–2004–0237.

The Agency acknowledges there are livestock types, such as turkey and beef, and operational configurations that are not covered under the NAEMS methodologies. The subsequent section, IV.B.2, solicits comment and information on these gaps and how to address them, if EPCRA reporting is reinstated.

Request for Information

EPA requests the following information relating to EPA’s emissions estimating methodologies developed using data collected as part of the NAEMS:

#2—Emissions Estimating Methodologies: EPA requests comments on the applicability of the NAEMS methodologies for estimating air emissions from animal waste for farm types not included as part of NAEMS for a potential future reporting under EPCRA. For instance, data were not collected from cage-free layer facilities and recent trends in the industry have been toward more eggs being produced from cage-free facilities. As part of the

NAEMS program, emissions data were collected from high-rise and belt-battery layer facilities which may have different emissions than a cage-free facility.

#3—2005 Compliance Agreement Reporting: If EPA requires reporting under EPCRA, would there be confusion around the timing of reporting for participants of the 2005 compliance agreement? If the Agency were to pursue and finalize a rulemaking to reinstate EPCRA reporting for animal waste air emissions prior to the NAEMS methods being finalized, then NAEMS Agreement participants would not have to report until the timeframes triggered by publication of the final NAEMS methodologies. This point may be moot since the NAEMS methods are scheduled to be finalized well in advance of the time needed for a possible rulemaking to reinstate EPCRA reporting. The Agency is soliciting comment on any outreach that EPA should conduct to avoid potential confusion.

2. Emissions Calculator and Guidance on Estimating Amounts of Air Releases

If EPA moves forward with reinstating the EPCRA reporting requirement for farms, the Agency may need to develop tools and guidance to minimize the reporting burden.

EPA could develop a calculator for farms to estimate their animal waste air emissions. The web-based emissions calculator would use the estimation methods developed with the NAEMS data, enabling farms to input a limited number of variables to estimate the amount of ammonia and hydrogen sulfide air releases from animal waste. The input variables would be information that farmers are assumed to already know, such as location of the farm, species of animals at the farm, species population size, waste management method(s) and if applicable, the housing type, number of days without animals in the barn or house and beginning and ending animal weight. The emissions calculator could use the farm location (*e.g.*, county or ZIP code) to obtain meteorological data (*e.g.*, ambient relative humidity, ambient temperature, wind speed). The emissions calculator would perform the calculations using the formulas derived from the NAEMS data, which provide an estimate of release amount per day in pounds. This screening step would identify whether a farm meets or exceeds the reportable quantity and therefore, be subject to reporting under EPCRA. If the emissions calculator shows that the reportable quantity is exceeded, the farm may be able to meet the reporting requirements with

continuous release reporting. The applicable information in the emissions calculator could then auto-populate an EPA webform for the continuous release report form. Finally, instructions with the webform could instruct the farmer on how to submit the continuous release report to their appropriate state, tribal and local agencies responsible for collecting EPCRA release reports. The Agency recognizes that the NAEMS data does not cover all livestock species or operational configurations. For example, common species such as turkey and beef are not included in the Air Consent Agreement, nor are less common livestock species, such as goat, llama, and aquaculture. If the Agency pursues a rule to require EPCRA reporting, the Agency does not want farmers to struggle with estimating air emissions, thus the Agency is soliciting input and recommendations for tools and/or guidance the Agency could develop to assist farms in estimating air emissions for livestock and operational configurations not covered under the NAEMS methods.

Finally, if farms are required to report under EPCRA, ideally, EPA would provide a mechanism or threshold upfront to farms as to whether an estimate of their emissions is even necessary (*i.e.*, does a farm have enough livestock to even come close to the reportable quantity?). EPA has considered developing guidance on a minimum number of animals, where under typical farm operations, any number of livestock below the cutoff could not exceed the 100 pounds of air emissions for either hydrogen sulfide or ammonia. If possible, these types of cutoffs could be provided on EPA's website and on the front end of the emissions calculator, so that farms with numbers of animals below the cutoff, can quickly determine they would not need to report. EPA understands this may not provide the level of regulatory certainty to assure farmers that they are complying with the regulations. The Agency seeks input on whether this type of cutoff would be helpful and what unforeseen issues with providing such cutoffs through guidance and outreach materials could arise. Of note, the Agency contemplated including such a cutoff in regulatory text for a potential future rule. Under the prior 2008 rulemaking (73 FR 76948), only large CAFOs were required to report under EPCRA, where the definition of a large CAFO (by number of livestock) provided regulatory certainty.

Request for Information

EPA requests the following information relating to a potential emissions calculator:

#4—Emissions Calculator—General: EPA requests comments on the utility and function of an emissions calculator. Should EPA create a webform tool that can calculate an estimate of air emissions from animal wastes on farms? The Agency has a draft design of an emissions calculator included in an appendix of the TBD to provide readers with the look and feel of the tool. Separately, is there a need for EPA to create a paper form or phone hotline to assist users that do not have access to the internet? Are there other, more efficient, ways to provide air emission estimates to farms other than through a webform calculator?

#5—Emissions Calculator—Continuous Release Reporting: If the emissions calculator provides an estimate that exceeds the reportable quantity, should farmers (users) be routed from the emissions calculator to the continuous release reporting form and the instructions for submission to the specific state, tribal and local agencies? The Agency is soliciting comment on this approach in general, and on whether this is the most efficient process EPA can establish for reporting animal waste air emissions under EPCRA (*i.e.*, Would farms find this helpful? Are there any other steps in the process which could be streamlined by EPA and/or state, tribal and local agencies? Are there alternatives that may be more efficient?).

#6—Accuracy of Reported Release Quantity: Should the calculator include a disclaimer that the emissions are estimates of uncontrolled emissions, and may not reflect actual emissions due to differences in each farm operation and applications of controls? The Agency solicits comment on adding a disclaimer and any other guidance that may be needed.

#7—Turkey and Beef Contribution Factors: Turkey and beef are two of the most prevalent livestock species not included in the Air Consent Agreement. If EPCRA reporting is reinstated, the Agency would consider publishing contribution factors for turkey and beef livestock. The contribution factor would be a quantity of ammonia and hydrogen sulfide emitted per animal. The farmer would only need to conduct a "bookkeeping exercise," of multiplying the number of livestock by the contribution factor, which would provide the air emission estimate. Potential contribution factors for turkey and beef are in an appendix in the TBD.

The Agency is soliciting comment and information on whether developing contribution factors would be useful and appropriate for turkey and beef. The Agency is also soliciting any information that could be used to develop contribution factors for turkey and beef. See the TBD for the Agency's preliminary review into turkey and beef emissions studies. The contribution factors and literature search in the TBD are only drafts to give the reader an estimate of what a turkey and beef contribution factor may be, as well as show the relevant literature EPA would review to develop contribution factors.

#8—Estimating Emissions from Less Common Species: The Agency is requesting information that could be used in development of contribution factors for less common livestock which are not included in the NAEMS. Additionally, if the Agency reinstates EPCRA reporting, would it be appropriate for the Agency to devote time and resources to develop contribution factors for all conceivable farming operations? The Agency has included some preliminary draft cutoffs in the TBD for estimating the initial burden to all farms when determining if they will exceed the RQs.

#9—Estimating Emissions from Atypical Farming Operations: There may be farms unable to use the NAEMS methods because they do not apply to their specific operation configuration. For example, cage-free egg laying houses were not prevalent in the industry when the NAEMS was conducted, and no data were collected to support method development. In those cases, farms would need to use other information to estimate the air emissions, if EPCRA reporting is reinstated. For examples of operations that are included in the emissions calculator, see the screenshots of a mock-up of the calculator in the appendices of the TBD. EPA requests comment on operational configuration scenarios not covered by the NAEMS methodologies, and subsequently not covered by the emissions calculator, that should be included in guidance to assist the regulated community. EPA requests comment on operational configurations not covered by the methodologies developed from NAEMS data and requests any information that could be used to develop tools or guidance on how to calculate emissions from atypical farming operations.

#10—Cutoffs for Estimating: Should EPA develop guidance with de minimis thresholds which would make clear that a farm with livestock inventory below the threshold could not conceivably produce over 100 pounds of ammonia or

hydrogen sulfide in a 24-hour period, and thus would not have to estimate air emissions or have to report under EPCRA? The Agency is requesting any information that could be used to develop thresholds. Are there farming operations that could be exceptions to such a threshold where very few animals are on the farm, but the farming operation would have enough manure on site to emit over 100 pounds of ammonia or hydrogen sulfide in a 24-hour period?

#11—Other Guidance: EPA solicits comment on additional implementation information EPA should consider in development of guidance, and other implementation tools EPA could provide to farms to reduce reporting burden and costs.

3. Grazing Operations

EPA is also seeking comment on having emissions from animals living and being raised in grazing or pasture situations covered by a potential future rule. A common example is beef cattle that are raised grazing or pastured over large areas of land for a period of time in their growth cycle. The animal waste generated while grazing or pastured is generally widely dispersed across the landscape and is not in a concentrated area. The beef cattle can then be transferred from the grazing or pastured areas to feedlots or other concentrated feeding operations to complete their life cycle. Other species similarly are raised grazing or pastured for a period of their life cycle.

If reporting is reinstated under a potential future rule, only farming operations that are defined as a "facility" would need to report. Under EPCRA section 329 (Definitions), the term "facility" means "all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites . . ." The term "facility" is further defined in the EPCRA regulations at 40 CFR 355.61 to include "manmade structures, as well as all natural structures in which chemicals are purposefully placed or removed through human means such that it functions as a containment structure for human use." In general, the Agency does not currently believe grazing operations fall under the definition of "facility," unless the manure is collected and managed.

Request for Information

EPA requests the following information relating to grazing operations:

#12—Grazing Operations: EPA seeks comment on whether the Agency's interpretation of "facility" relating to

grazing operations is correct and appropriate. The Agency also seeks information on whether clarifications of the applicability of the regulations to other farming operations is needed.

4. Use of Continuous Release Reporting by Farms

The animal waste that farms handle or manage as part of their normal operations of raising animals may have regular air emissions which could fall within the scope of continuous release reporting (see section III.C. for an overview of continuous release reporting). As mentioned previously, continuous release reporting under EPCRA encompasses the following three requirements, found at 40 CFR 355.32: (1) Initial telephone notification made to the LEPC and SERC; (2) Initial 30-day written notification to the LEPC and SERC; and (3) notification to the LEPC and SERC of any increase in the quantity of the hazardous substance being released during any 24-hour period, which represents a statistically significant increase (SSI). The 30-day written notification is submitted using a range for the quantity released, and an SSI is anything that exceeds the upper bound of the range identified in the initial 30-day notification. Of note, there are no requirements for updating a continuous release report if the release decreases below the lower bound provided in the report, and there are no federal requirements for reporting when a continuous release has ceased.⁸ Furthermore, the initial notification does not require monitoring data to support the upper and lower bounds of the quantity released; instead, the regulations allow for "using release data, engineering estimates, knowledge of operating procedures, or best professional judgment" (see 40 CFR 355.32(a) via 40 CFR 302.8(d)(1)). Finally, a continuous release is defined as "a release that occurs without interruption or abatement or *that is routine, anticipated, and intermittent and incidental to normal operations or treatment processes*," (see 40 CFR 302.8(b); emphasis added).

Request for Information

EPA requests the following information relating to continuous release reporting:

#13—Application of Continuous Release Reporting: The Agency is soliciting comment on the appropriateness of defining all air releases from animal waste on farms as

⁸Note: State, tribal, and local EPCRA implementing agencies may have additional reporting requirements.

continuous releases, because they are routine, anticipated, and intermittent and incidental to normal operations.

#14—Application of Upper and Lower Bounds: The Agency is soliciting comment on allowing farms to apply upper and lower bounds on their continuous release reports to estimate the highest or lowest quantity released at any point during the year, regardless of seasonal fluctuations in farming operations.

#15—Exceptions to Continuous Release Reporting: Given the flexibility of the EPCRA continuous release reporting requirements, the Agency is soliciting comment on whether there are scenarios for which releases from animal waste at farms could not be covered under continuous release reporting. If that is the case, the Agency requests any information on such farming operations, so the Agency can account for the burden these operations would incur from episodic release reporting, instead of continuous release reporting.

#16—Benefits and Costs of Continuous Release Reporting Data: The Agency is soliciting comment and supporting data on the usefulness of continuous release reporting data to the surrounding communities and SERCs and LEPCs (*i.e.*, If the report is submitted with a large range for the quantity released, would that help the public understand what's in their community?).

#17—Continuous Release Reporting—Other: The Agency is soliciting information and comment on any other issue relating to the application of continuous release reporting by farms subject to a potential future rule.

5. Citizen Suits

Reinstating animal waste air emissions reporting requirements would create potential liability for farms that meet or exceed the RQ, but fail to report, under the citizen suit provisions of EPCRA. Under EPCRA section 326(a)(1)(A)(i), a citizen may file suit against an owner or operator of a facility, including a farm, for failing to submit the follow-up emergency notice of release required by EPCRA section 304(c).⁹ Before filing a citizen suit, the citizen must provide 60 days' notice of the alleged violation to the facility, the state, and EPA, as required by EPCRA section 326(d)(1). If the alleged violator files the missing report in that time (*i.e.*, the violation is "wholly past"), EPA

believes an actual lawsuit would be unlikely. Pursuant to the Supreme Court decision in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), citizens may not be able to demonstrate that they have standing to bring a suit for wholly past violations. In practice, if a facility files a release report within 60 days of receiving notice of a citizen suit, the suit may be dismissed with no award of attorney's fees or investigative costs. A suit also may not be brought if EPA has "commenced and is diligently pursuing" an action to enforce a requirement or impose a civil penalty under EPCRA.

The Agency does not have a list of past citizen suits, but believes they are infrequent and not focused on small farms. EPA requests comment on potential citizen suit issues and concerns that are related to non-reporting farms. If there are other citizen suit considerations, EPA requests comment on these issues and concerns, including benefits of this potential remedy. These comments may assist in the development of guidance and outreach information to be shared with the regulated community as part of future compliance assistance if reporting is reinstated.

Comments received on the 2018 proposed rule included a concern of liabilities that reporting requirements could create for farmers because the information is "inherently imprecise and therefore subject to dispute."¹⁰ The Agency notes that under EPCRA section 326(a)(1)(A)(i), a citizen suit can be brought against an owner or operator for failing to submit the follow-up emergency notice of release required by EPCRA section 304(c). That notice includes an "estimate of the quantity of any such substance that was released . . ." (see EPCRA section 304(b)(2)(C)).

Request for Information

EPA requests the following information relating to potential impacts on farms from citizen suits:

#18—Citizen Suits—Wholly Past Violations: Given that EPCRA requires 60 days' notice before filing a citizen suit, and the decision in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), could citizen suits create more than a minimal burden on farms? Given that only an estimate needs to be provided to fulfill the requirements, the Agency is also soliciting comment and information on the potential for additional citizen suits based on the accuracy of the reporting estimate.

¹⁰ See comment with docket ID EPA-HQ-OLEM-2018-0318-0224.

#19—Citizen Suit Benefits and Costs: What are the potential costs and liabilities of EPCRA citizen suits for non-reporting farms if reporting is reinstated? The Agency is also soliciting any information on realized benefits of a citizen suit being filed against a farm. Finally, the Agency is soliciting information on the frequency and number of previous citizen suits for failing to submit the follow-up emergency notice of release required by EPCRA section 304(c), as well as the frequency and number of 60-day notices provided to farms in advance of the citizen suit. We realize that EPCRA reporting for animal waste air emissions at farms is not currently required, however, reporting was required by large CAFOs prior to 2019, which is the time period for which EPA is seeking information.

#20—Citizen Suit—Guidance: If the Agency develops guidance on citizen suits, what information should the guidance include?

#21—Citizen Suit—Other: The Agency is soliciting information and comment on any other issues related to citizen suits in the context of a potential future rulemaking to reinstate EPCRA reporting for farms.

6. Privacy Concerns

If reporting is reinstated in a future rulemaking for farms, the public may seek access to the report under the right-to-know provision in EPCRA section 324(a). EPA understands there may be privacy concerns by the farmers when their personal residence is the same as the address for the farm, in which case the submitted reports may contain personal information that was previously unavailable from any other source to the public. The Agency expects that most small farms will not meet the applicable release reporting thresholds and will therefore fall outside the scope of any EPCRA reporting requirement entirely; however, the Agency still appreciates the concern for the small farms that would need to report.

Request for Information

#22—Privacy Concerns: EPA seeks comment, generally, on the privacy concerns of farmers who would be required to report animal waste air emissions. The Agency is also seeking creative solutions that could provide communities with information on air emissions from a farm without disclosing the location (*i.e.*, personal address) of a "small" farm.

#23—Privacy Concerns—Other: The Agency is soliciting information and comment on any other issues related to

⁹ When using continuous release reporting, the 30-day initial written notification under 40 CFR 355.32(a), further specified under 40 CFR 302.8(e), is considered the follow-up emergency notice under EPCRA section 304(c).

privacy concerns in the context of a potential future rulemaking to reinstate EPCRA reporting for farms.

7. EPCRA National Database

Under EPCRA's statutory authority (42 U.S.C.11004), EPCRA emergency release notifications (Section 304; 40 CFR 355.30) are submitted to the SERCs or TERCs and LEPCs or TEPCs, but not to the EPA or another federal agency. EPA recognizes that reinstatement of EPCRA animal waste air emissions reporting will increase the number of release reports submitted to state, tribal, and local agencies (the implementing agencies). Under the existing authorities, the implementing agencies will have the responsibility of receiving and managing the reports and making the information publicly available as part of the EPCRA right-to-know provisions.

The EPA requests comment and information on creating an EPCRA database for animal waste air emissions information at the national level, that would be housed at EPA. The Agency believes a centralized EPCRA submission portal and management system can improve the reporting program by centralizing and standardizing reporting and reducing burden on both the implementing agencies and the regulated community. Recognizing that existing statutory reporting requirements under EPCRA may need to be amended to allow it, EPA also seeks comment from the implementing agencies and the regulated community on the benefits and challenges of creating an EPCRA national database. EPA requests comment not only for animal air emissions, but for reporting under all sections of EPCRA, except section 313, which is the Toxics Release Inventory (TRI) program. Following is a list of applicable EPCRA reporting requirements that could be built into a national system:

- Facility emergency planning notifications (40 CFR part 355, subpart B; EPCRA section 302).
- Emergency release notifications (40 CFR part 355, subpart C; EPCRA section 304)
- Hazardous chemical inventory reports (40 CFR part 370; EPCRA sections 311 and 312).

Currently, reporting methods are determined by the state or tribe. These SERCs and TERCs are using a variety of submission and data management platforms to meet their statutory obligations. Over half of the states are using three existing submission platforms for annual Section 312 Tier II

submissions: Tier2 Submit, E-Plan, and TIER II MANAGER. The other states use other commercial software or have state-specific programs. Through a centralized database, EPA could collect EPCRA reports and make those reports immediately available to state, tribal, and local agencies, thus improving the efficiency, efficacy, and transparency of EPCRA reporting compliance and removing the burden to state, tribal, and local agencies receiving and managing the submittals. The database can also reduce the burden on these implementing agencies by providing a public right-to-know information center. The clearinghouse would be a “one-stop shop” for industry, the EPCRA implementing agencies, and the public. A national database would provide industry the opportunity to report to multiple states and local entities in one platform. The implementing agencies would have access to all of the submitted information for their covered area, reducing their administrative burden and allowing them to focus on implementation, community safety, and compliance. The database would handle all reporting requirements, as well as requests from the public for information, allowing entities to use their limited resources to improve compliance efficacy.

The EPCRA emergency planning provisions, codified under 40 CFR part 355, subpart B, include several required communications with the SERC or TERC and/or LEPC or TEPC, such as the initial notification that a facility is subject to EPCRA emergency planning requirements; notification of the facility emergency coordinator; notification of any relevant changes to emergency planning; and providing information to the LEPC or TEPC upon request. A national database could manage, track, and store all these required communications. Furthermore, with the planning data, the EPA could facilitate coordination between LEPCs or TEPCs with similar types of facilities to share best practices and lessons learned on how to plan for specific risks.

The emergency release notification requirements, under 40 CFR part 355, subpart C, include immediate notification via phone and follow-up written reports to the SERC or TERC and LEPC or TEPC, as well as specific requirements for continuous release reporting requirements. A national EPCRA database could handle these notifications, although initial release notification may not be ideal, because initial notifications are time-sensitive and are typically phone calls to the LEPC or TEPC and SERC or TERC. However, the 30-day follow-up written

reports and continuous release reports could be well-suited for a national database. LEPCs, TEPCs, TERCs and SERCs would have the benefit of having the data standardized and stored. Additionally, EPA could coordinate discussions on clean-up and response activities among LEPCs and TEPCs with similar releases.

Request for Information

EPA requests the following information relating to a National EPCRA Database:

#24—National EPCRA Database—General: The Agency is soliciting information and comment in general about a national EPCRA database, as well as any input on how such a system should be designed, developed, and implemented. EPA seeks quantitative information characterizing how a centralized reporting clearinghouse could reduce burden to stakeholders. The Agency also solicits information on conducting a pilot of a national database with a small number of states and local implementing agencies.

#25—National Database—Managing Right-to-Know Data: EPA requests comment and information from LEPCs, TEPCs, SERCs, and TERCs on whether a national EPCRA database would be beneficial to receive and manage reports and, pursuant to the right-to-know requirements, make those reports available to the public.

#26—National Database—Managing Reports from Facilities: EPA seeks input on both the potential benefits and any disadvantages for LEPCs, TEPCs, SERCs, and TERCs of creating a national database for receiving and managing EPCRA sections 302, 304, 311, and 312 reports.

#27—National Database—Animal Waste Air Emissions Reporting: EPA seeks input on the potential efficiencies or inefficiencies to the regulated community of submitting EPCRA animal waste air emissions reports to one centralized portal. EPA also seeks input on both the potential benefits and disadvantages to the communities near animal farming operations and the general public of a national database to receive and manage reports and, pursuant to right-to-know requirements, make reports available to the public.

#28—National Database—Facility Benefits and Disadvantages: EPA seeks input on potential benefits and disadvantages for the regulated community of a national database for complying with EPCRA sections 302, 304, 311, and 312 reporting requirements.

#29—National Database—Managing FOIA Requests: EPA seeks input from

LEPCs, TEPCs, SERCs, and TERCs about EPA managing Freedom of Information Act (FOIA) requests and releasing EPCRA data from a national system. The Freedom of Information Act generally provides the public with access to federal agency records, however FOIA does not apply to state and local agencies. Each state has their own laws and procedures for releasing records to the public. The EPA is soliciting comment and information on what issues may need to be addressed if EPA were to manage FOIA requests on what would be considered state and local data under EPCRA.

#30—*National Database—Other*: The Agency is soliciting information and comment on any other issues related to a national EPCRA database.

C. Costs and Benefits

1. Estimated Regulated Universe

EPA estimates the total number of farms with livestock to be approximately 1.25 million based on data from the United States Department of Agriculture's (USDA) 2017 Census of Agriculture. However, only a fraction of these farms is expected to exceed the reportable quantity for either ammonia and/or hydrogen sulfide, and thus be regulated under a potential future rule that would reinstate reporting. The Agency used data from NAEMS and literature reviews to estimate contribution factors (*i.e.*, estimate of quantity of air emissions per animal per day), which were applied to the livestock numbers from the USDA Census, to generate an estimate of 37,891 farms that would be expected to exceed the reportable quantity. All of the estimates, calculations and assumptions are in the TBD in the docket.

The reporting burden is expected to be relatively minimal because the Agency anticipates that continuous release reporting would be used in a majority of instances (see Section D.2 for burden estimates). Even though the reporting burden is expected to be low and only encompass approximately 38,000 farms, other farms may not know whether their operations will exceed the reportable quantity. The following section (Section D.2) solicits comment on estimating the burden to all 1.25 million farms with livestock.

Request for Information

EPA requests the following information relating to estimating the regulated universe:

#31—*Regulated Universe—Number of Farms Reporting*: The Agency is soliciting information and comments on the estimate of farms expected to exceed the reportable quantity. The Agency is specifically soliciting information and comment on the methods for estimating the number of regulated farms, the data sources used, and the estimated contribution factors, which are all detailed in the TBD. Regarding the contribution factors, the Agency realizes that the contribution factors EPA used, for estimating the regulated universe, may not take into account all the variables that impact any given farm's animal waste air emissions, and is soliciting information and comment on the accuracy of the contribution factors used to estimate the regulated universe; any additional information that may provide a more accurate estimate of the regulated universe; and the utility of refining the contribution factors or the method used.

2. Burden Estimates

In analyzing whether to pursue a rulemaking to rescind the reporting

exemption, EPA considered the costs associated with reinstating reporting requirements. EPA estimated the total costs by combining unit costs of compliance per farm with the estimate of the affected farm universe. The Agency used animal inventory data from USDA's 2017 Census of Agriculture in the affected NAICS codes to identify the regulated universe of 37,891 farms. Farm operations with continuous air releases of ammonia or hydrogen sulfide from animal waste that meet or exceed the RQ would qualify for reduced reporting requirements, including:

- Providing initial continuous release telephone notification to the SERC (or TERC) and LEPC (or TEPC);
- Submitting initial written report to the appropriate SERC (or TERC) and LEPC (or TEPC);
- Providing notification of a statistically significant increase (SSI) in a release to the SERC (or TERC) and LEPC (or TEPC); and,
- Providing notification of a new release resulting from a change in source or composition.

EPA estimated the annualized cost of a potential future rule over a 10-year analysis period. The total annualized cost of reinstating EPCRA reporting would be approximately \$2.9 or \$2.8 million using three and seven percent discount rates, respectively, as detailed in the TBD.

Table 2 summarizes the total undiscounted cost of a future rule, by year. For reporting farms, first-year costs are \$16.8 million, and total first-year costs for SERCs (or TERCs) and LEPCs (or TEPCs) is \$6.5 million. Costs in years 2 through 10 of the analysis are significantly less, at approximately \$0.1 million per year for both sets of affected entities.

TABLE 2—TOTAL COST BY YEAR (UNDISCOUNTED) (2022\$)

Compliance requirement	Animal operations		State, local, tribal gov't	
	First year	Years 2–10	First year	Years 2–10
Rule Familiarization and Applicability Determination	\$3,710,295	\$0	\$0	\$0
CRRR Reporting:				
<i>Labor Costs</i>	11,782,802	164,451	6,481,555	108,026
Initial Notification	1,073,190	0	2,160,518	0
Initial Written Report	10,709,612	0	4,321,037	0
Reporting an SSI	0	164,451	0	108,026
<i>O&M Costs</i>	1,307,223	0	0	0
Initial Notification	0	0	0	0
Initial Written Report	1,307,223	0	0	0
Reporting an SSI or New Release	0	0	0	0
Total Cost	16,800,321	164,451	6,481,555	108,026

The Agency has also prepared a screening analysis to assess small entity impacts, documented in the TBD. The Agency used sales data from the USDA's 2017 Census of Agriculture in the affected NAICS codes, along with Small Business Administration (SBA)-specified small business thresholds, to identify the potential set of affected small operations. EPA combined these data with the affected universe data to estimate the subset of reporting farms that meet SBA size standards for small entities. EPA estimates that 31,921 out of the 37,891 farms in the regulated universe (84 percent) are small operations under SBA size standards. EPA performed a cost-to-sales test for these entities and found that none of the affected operations would experience costs greater than one percent of annual sales. Based on the results of the cost-to-sales test, EPA concludes that a future rulemaking would not have a significant economic impact on a substantial number of small entities.

Request for Information

EPA requests the following information relating to the costs of a potential future rule:

#32—Burden—Reporting Farms: The Agency is soliciting information and comments on the cost estimates for farms and state and local agencies. See the TBD for a detailed analysis. The Agency made assumptions for hours for specific tasks; labor rates; how many SSIs would be submitted; how many new farms would report in the out years; and other variables. EPA is requesting information and comment on these assumptions and variables that could result in more accurate burden estimates.

#33—Burden—Non-Reporting Farms: The Agency is soliciting information and comments on the cost estimates for all farms to understand and potentially estimate their air emissions. The Agency estimates that all 1.25 million farms with livestock (both reporting and non-reporting farms) would incur between 1 and 2.5 hours of burden per farm for rule familiarization, which totals to \$97.6 million burden for all farms. See section 3.2 in the TBD for a detailed analysis.

#34—Burden—Small Farms: The Agency is soliciting information and comments on the analysis of impacts to small farms. See the TBD for a detailed analysis.

#35—Burden—Qualitative Costs: The Agency is soliciting information and comments on any qualitative costs of a reinstating reporting. In the TBD, the Agency attempted to quantify as many

costs of a potential future rule as it was able to.

3. Environmental Justice and Community Right-To-Know

Any rulemaking resulting from this ANPRM would impact only the reporting requirements for animal waste air emissions; a new rule would not directly lessen air emissions from animal waste on farms, nor directly change disproportionate and adverse effects experienced by communities with environmental justice concerns. However, one of the benefits of requiring reporting is the availability and accessibility of this information to surrounding communities. This reporting is critical to advancing the Agency's environmental justice goals by increasing the understanding of potential impacts of air emissions from animal waste on communities with environmental justice concerns. As a result, fence-line communities may benefit from the reporting of animal waste air emissions at farms.

Although a potential future rule would not directly address human health or environmental conditions, the EPA investigated potential environmental justice concerns by conducting geospatial analyses. To conduct a thorough, national-level environmental screening analysis, publicly available data of source locations of air emissions are required. These data do not exist at the national level. While the 2017 USDA Census is a complete count of U.S. farms and ranches and the individuals who operate them, publicly available data are aggregated to the county level to protect the confidentiality of the information provided by individual respondents. The EPA conducted three levels of analysis to identify communities that may be affected by the reporting rule based on the level of animal operations' ammonia emissions for 5 animal sectors (Beef, Broilers, Dairy, Layers, and Swine) at the county-level, tribal-level, and available state-level data.

As shown with the 2017 USDA Census data in the environmental justice analysis provided in TBD, that while the upper quintile of counties emitting ammonia from animal waste on average does not exceed the national average for minority populations or low-income populations, four of the top ten counties in ammonia emissions from animal waste comprise populations exceeding the national average for minority populations and low-income populations. The EPA believes that in some localities, minority and low-income populations may be disproportionately impacted by air

emissions from animal wastes, which is shown in the TBD at the county level and census block level using the USDA Census data and the state-specific farm data.

Request for Information

EPA requests the following information relating to the benefits of a potential future rule:

#36—Benefits—Environmental Justice: The Agency is soliciting information and comments on the environmental justice analysis. See the TBD for details.

#37—Indirect Benefits: The Agency is soliciting information and comments on the indirect benefits of a potential future rule to reinstate EPCRA reporting by farms. A future rule would only be a reporting rule to provide state, tribal and local implementing agencies and communities information on releases of ammonia and hydrogen sulfide from animal wastes on farms. However, after air emission information is shared with states, locals, and communities, there are potential indirect benefits, such as communities experiencing greater capacity for meaningful involvement in the development and implementation of local pollution management policies or the information leading to voluntary initiatives by farms to review farming and waste management practices and set goals for reductions in emissions, and institute "good neighbor" policies. Potential changes in farm operations—including reductions in the releases and changes in the waste management practices—could yield health and environmental benefits. Indirect benefits of a potential future rule have not been quantified.

D. Small Farms

Based on the existing EPCRA RQs of 100 pounds per day for both ammonia and hydrogen sulfide, EPA estimates the regulated universe of the proposed rule to be 37,891 farms. The regulated universe is 3 percent of approximately 1.25 million farms nationwide in the 2017 USDA Agriculture census. Of the 37,891 reporting farms, 31,921 farms are estimated to be small businesses as defined by the Small Business Administration (SBA), see the TBD in the docket. Separately, using the National Pollution Discharge Elimination System (NPDES) farm size CAFO categories, only approximately 3,000 of the 37,891 farms would be considered small CAFOs and limited to swine and dairy operations, also see the TBD in the docket. Even though there are relatively few "small farms" that would be required to report releases from animal waste, EPA recognizes that

most farms would not know whether they exceed the reporting threshold (*i.e.*, be in the regulated universe). This section is designed to gather information relating to a reporting exemption for small farms, which could create regulatory certainty for farmers.

1. Potential Reporting Exemption for “Small Farms”

If the Agency reinstates reporting for farms, EPA seeks information on whether “small farms,” which would need to be defined in a potential future rule, should be exempted from reporting animal waste air emissions.

EPA considered relevant comments received during the previous 2008¹¹ and 2019¹² rulemakings, as discussed in the response to comment documents in those dockets. For both the 2008 and the 2019 rules, commenters acknowledged that “small farms,” as described but not defined by the commenters, would not be expected to report because they are likely to fall below the RQ-based reporting threshold. In 2008, commenters stated that they did not think “small farms” would reach the established 100-pound RQs even without a reporting exemption. One commenter stated that EPA should establish an exemption for farms under an income level threshold which was not specified but would differentiate between “true” family farms and larger industrial-type operations. The 2019 rule received a comment from an environmental group that smaller animal feeding operations are unlikely to be subject to EPCRA reporting.

Request for Information

EPA requests the following information:

#38—Small Farm Exemption—General: EPA requests comment on whether “small farms” should be exempted from reporting animal waste air emissions. If so, how should they be exempted? EPA requests any information that the Agency can use to develop a justification to exempt “small farms” from reporting air emissions under EPCRA. Similarly, the Agency is requesting any information that supports not exempting “small farms.”

#39—Small Farm Exemption—Criteria: EPA requests comment on the criteria that should be considered in establishing a potential exemption for small farms. For example, should an exemption be based on animal number thresholds at the operation; animal

waste management methods; single species-focused operations; or other criteria? The Agency requests information that could be used to differentiate small farms from medium and large operations that would support exempting small farms from EPCRA reporting.

2. Defining “Small Farms”

Any potential action for small farms requires defining “small farm.” The term “farm” is already defined in 40 CFR 355.61. If the Agency pursues reinstatement of EPCRA reporting, and further pursues an exemption from that reporting for small farms, the Agency would not be seeking to change the definition of “farm,” but rather to expand on the existing definition to categorize “small farms.”

In the 2008 rule exempting farms from reporting animal waste air emissions (73 FR 76948), EPA defined different sizes of farms using the NPDES size definitions for CAFOs, due to familiarity with these size categorization terms within the agriculture industry.¹³ The NPDES farm size categories of small, medium, and large are based on animal threshold numbers for each species. For example, mature dairy cattle have species-specific threshold ranges as follows: less than 200 defined as a small CAFO, 200 to 699 defined as a medium CAFO, and 700 or above defined as a large CAFO.

EPA seeks input on whether using the NPDES CAFO farm size categories for defining small farms is the best choice, and if not, EPA is seeking input on an alternative definition for “small farm.” EPA is aware of and has considered other ways to define “small farms.” For example, an alternate definition for small farm could come from the Economic Research Service at USDA,¹⁴ which classifies sizes based on revenue. The USDA defines small farms to have annual gross cash farm income (GCFI) of less than \$350,000. If revenue is used to define “small farms”, the farms would make the determination as to whether they were subject to the exemption, unless they voluntarily provide the applicable information. Any revenue-based definition would make it challenging for EPA, or other agencies, to conduct reporting compliance and independently determine whether a

farm meets the exemption threshold. For example, EPA, or other another agency, would have to determine if revenue information is available, and whether the source of revenue (*e.g.*, from the livestock at the farm or from another source such as crop production) is significant in defining farm size for EPCRA reporting purposes.

No direct comments were received to assist the Agency in defining “small farms” in the 2008 nor 2019 rulemakings.

Request for Information

EPA requests the following information:

#40—Small Farm Definition: The Agency is soliciting comment and information on how to define “small farm” in the context of creating a potential reporting exemption. Specifically, EPA is soliciting input on applying the definition of small farms from NPDES or USDA to EPCRA reporting. Are there other small farm definitions that may be more appropriate for EPCRA reporting? Are there certain attributes from “small farms” that correlate with quantity of air emissions (*e.g.*, is there a certain level of farm revenue that correlates to farms with smaller manure management operations)?

3. Animal Waste Management Methods for “Small Farms”

EPA seeks information on animal waste management methods that could be used to differentiate farm size and how such methods would affect air emissions of ammonia and hydrogen sulfide.

In examining this issue, the Agency reviewed comments received on the 2008 and 2019 rules, though no comments explicitly addressed how to differentiate farms by size.

Request for Information

EPA requests the following information:

#41—Small Farm—Waste Handling: EPA is soliciting information and comment on certain waste management practices that could be used to support an exemption for small farms, if EPCRA reporting is reinstated. Specifically, the Agency seeks information on various animal waste handling methods based on size of operation (number of animals) and species of animals that would be different at small farms versus medium and large farms and may affect air emissions of ammonia and hydrogen sulfide.

¹¹ <https://www.regulations.gov/document/EPA-HQ-SFUND-2007-0469-1359>.

¹² <https://www.regulations.gov/document/EPA-HQ-OLEM-2018-0318-0405>.

¹³ A table of EPA’s NPDES regulatory definitions of large, medium, and small CAFOs can be viewed here: https://www3.epa.gov/npdes/pubs/sector_table.pdf.

¹⁴ USDA. 2022. Economic Research Service. Farm Structure and Contracting. Available at: <https://www.ers.usda.gov/topics/farm-economy/farm-structure-and-organization/farm-structure-and-contracting/>.

4. Health Impacts From “Small Farms”

Section IV.A in this document outlines the health impacts from animal waste air emissions, which are further detailed in the TBD. This section is intended to solicit comment and information regarding any distinction that could be made between adverse health impacts from air emissions from small farms versus medium and large farms.

Request for Information

EPA requests the following information:

#42—Small Farm—Health Impacts: The Agency is soliciting information on health impacts from different size farms to determine if lack of adverse health impacts would support a reporting exemption for small farms, if EPCRA reporting is reinstated through a potential future rule. Conversely, the Agency is also soliciting information that demonstrates adverse health impacts from animal waste air emissions from “small farms.” When submitting information, the Agency requests the commenters to provide any information on how the requester or information is defining “small farm.”

5. State, Tribal, and Local Emergency Planners and Responders Use of “Small Farm” Animal Waste Air Emissions Information

Reinstating animal waste air emissions reporting requirements would require owners or operators of covered farms to provide initial notification to either the SERC or TERC, and the LEPC or TEPC in the event of a release of an EPCRA EHS, as required by EPCRA section 304, or of a CERCLA hazardous substance in an amount equal to or greater than the RQ for that substance within a 24-hour period. Within 30 days of the initial notification, farms must submit a written follow-up report to these agencies. EPA recognizes that reinstating EPCRA animal waste air emissions reporting will increase the number of notifications (ex: telephone, email, etc.) and written release reports submitted to SERCs or TERCs and LEPCs or TEPCs. These agencies will have the responsibility of receiving initial notifications and managing the reports as well as making the information publicly available as part of the EPCRA right-to-know provisions.

Previous comments submitted to EPA on the 2008 rulemaking include comments from LEPCs stating their support for a reporting exemption because there would likely be no federal, state or local emergency

response to such release reports.¹⁵ EPA also received comments from the National Association of SARA Title III Program Officials (NASTTPO), an EPCRA-related association for state, tribal, and local EPCRA implementing agencies, supporting the 2019 EPCRA reporting exemption (84 FR 27533).¹⁶ NASTTPO stated that these reports are of no particular value to LEPCs and first responders and instead are generally ignored because they do not relate to any specific event. The NASTTPO noted that open dialogue and coordination between local emergency authorities and animal farming operations can be more effective than EPCRA-required release reporting for farms that do not handle quantities of chemicals designated under EPCRA as EHSs.¹⁷ While some state and local agencies have stated they support not receiving release reports of animal waste air emissions from farms, the EPA believes there may be value in providing these reports for fence-line communities.

Request for Information

EPA requests information from SERCs, TERCs, LEPCs, and TEPCs on the usefulness of information pertaining to “small farm” animal waste air emissions for the purposes of emergency planning and response.

#43—State, Local, and Tribal Impacts: Through prior public comment periods from previous rulemakings, as well as the ongoing coordination between EPA and SERCs, TERCs, and LEPCs, the Agency has heard that state, tribal, and local emergency planners and responders would not use EPCRA release reports of animal waste air emissions from farms, and so, the Agency is inferring that if EPCRA reporting is reinstated, an exemption for small farms would be well received by state, tribal, and local emergency planners and responders. The Agency is requesting any new comments and information that would support or contradict this position. Regarding small farms, if EPCRA reporting is reinstated without a small farm exemption, EPA is requesting comment on whether state, tribal, and local implementing agencies would process and utilize release reports for animal waste air emissions from small farms differently from reports from larger farms.

¹⁵ See comments submitted with docket IDs: EPA-HQ-SFUND-2007-0469-0498; EPA-HQ-SFUND-2007-0469-0215.

¹⁶ See comment submitted with docket ID: EPA-HQ-OLEM-2018-0318-0238.

¹⁷ See NASTTPO letter as part of comment submitted with docket ID: EPA-HQ-OLEM-2018-0318-0236.

6. Adjusting the RQs of Ammonia and Hydrogen Sulfide for Animal Waste Air Emissions

One way EPA could potentially reduce reporting of air emissions from animal waste for small farms is by adjusting the RQs or creating industry and media-specific RQs. The existing RQs for ammonia and hydrogen sulfide are both set at 100 pounds. Any release of either of these substances at or above the RQ in a 24-hour period would require reporting under EPCRA.

Establishing Category-Specific Animal Waste Air Emissions RQs

CERCLA section 103 requires immediate notification to the National Response Center whenever an RQ or more of a CERCLA hazardous substance is released in a 24-hour period. Similarly, EPCRA section 304 requires notification to the SERC or TERC and the LEPC or TEPC when there is a release of an RQ or more of either a CERCLA hazardous substance or an EPCRA EHS in any 24-hour period. For substances listed under both CERCLA (40 CFR 302.4) and EPCRA (40 CFR part 355, Appendices A and B), the applicable RQ is established under CERCLA and adopted under EPCRA (April 22, 1987, 52 FR 13378). For EHSs not listed under CERCLA, EPA used the EPCRA threshold planning quantities (TPQs) to assign RQs, by raising the statutory RQ (one lb) to be the same as their TPQs.

EPA adopted a five-level system for RQs of 1, 10, 100, 1,000, and 5,000 pounds for CERCLA reporting. These levels were originally established pursuant to CWA section 311 (40 CFR part 117). EPA has authority to establish and adjust RQs for hazardous substances under CERCLA and for EPCRA EHSs.

EPCRA additionally requires EPA to consider and establish TPQs for EHSs, which is the quantity of the substance present at a facility for which emergency planning notification is required under EPCRA section 302. Currently, the TPQ for ammonia and hydrogen sulfide is 500 lb for all industry sectors. The TPQ methodology is separate from the RQ methodology and was developed specifically to reflect a quantity that could cause serious health consequences if accidentally released. Generally, the TPQ for a substance should be higher than the RQ, which is the case for most EHSs. For other EHSs, the TPQ is the same quantity as the RQ, which is dependent on the criteria and the ranking factor established for TPQ and RQ. In a future rulemaking, if EPA were

to raise the RQs for hydrogen sulfide and ammonia from animal waste air emissions at farms above the existing 500-pound TPQ (*i.e.*, to either 1,000 or 5,000 lb), the Agency may need to address the TPQs for ammonia and hydrogen sulfide emitted from animal waste from farms, since those situations may not be appropriate for emergency planning purposes.

Based on publicly available information, EPA developed preliminary estimates of the reporting universe and the numbers of small farms under several possible RQs. Under the existing RQ of 100 pounds, approximately 37,891 of the 1.25 million farms, based on USDA's 2017 Census of Agriculture, would be required to report releases of air emissions from animal waste, which comprises approximately 3% of farms. Using the NPDES CAFO size categories, this estimate of 37,891 farms includes approximately 3,000 small farms. If the RQ for both ammonia and hydrogen were raised to 500 pounds, the preliminary estimated regulated universe would decrease from 37,891 to approximately 15,000 farms; at 1,000 pounds RQ, the estimated regulated universe would decrease even further to approximately 5,000 reporting farms. Additionally, at an RQ of 1,000 pounds, EPA estimates that no small farms, under the NPDES definition, would exceed the reportable quantity. See the TBD for the analysis of number of regulated farms at different RQs.

Request for Information

EPA requests the following information relating to adjusting the RQs of ammonia and hydrogen sulfide for animal waste air emissions:

#44—RQ Adjustment—General: EPA requests comments and supporting information, if available, on the potential of adjusting the RQs for ammonia and hydrogen sulfide to reduce the reporting burden for small farms, based on the existing RQ methodology.

#45—Industry-Specific RQ Adjustment: The Agency is soliciting comment and information on creating industry and/or media-specific animal waste air emissions RQs for farms only, where all non-farming industries would retain the existing 100-pound RQs for ammonia and hydrogen sulfide, but animal waste at farming operations would have separate, higher RQs for ammonia and hydrogen sulfide. Additionally, the Agency is requesting comment and information on what the "farm-specific" RQs should be. The Agency is seeking information that supports or refutes the concept of

separate RQs for the same hazardous substance.

E. National Report on Animal Waste Emissions

The issue of whether farms should report under EPCRA has been through various rulemakings and litigation since 2008. The decision seems to be binary (*i.e.*, farms report or they do not). The Agency is including this section of the ANPRM to solicit comment and information on potential creative solutions to provide information to fenceline communities on air emissions from animal wastes without requiring farms with having to estimate and report to their state, tribal and local agencies.

Request for Information

EPA requests the following information on finding a creative solution to reporting animal waste air emissions:

#46—National Report based on USDA or State Data: EPA contemplated developing a national report using USDA Census data to gather locations of farms and applying the contribution factors developed under NAEMS. However, the USDA Census dataset only supplies farm locations at the county-level, and there are additional restrictions on sharing farm data when an individual farm can be identified. The EPA conducted the county-level analysis with the USDA data, which can be found in the TBD. However, EPA does not believe that county-level data will be granular enough for fenceline communities to understand the amounts and impacts of animal waste air releases. The EPA also evaluated all the state datasets we found that included farm locations (see the TBD). However, the handful of state datasets are well short of building a national report on animal waste air emissions. The Agency is soliciting comment and information on our assessment of using USDA Census data and datasets from state agencies. We are also soliciting comment and information on any other datasets that may be used to develop a national report of air emissions. Finally, the Agency is soliciting comment on whether this type of national report would/should be a compromise for this long-standing issue.

#47—Other Technology for Estimating Air Releases: The Agency is soliciting comment and information on newer technologies that could be applied to understanding animal waste air emissions and then distributing that information to fenceline communities. For example, are there existing technologies, such as satellite-based instruments, to measure ammonia and/

or hydrogen sulfide that can be applied at a granular enough level to show quantities released from individual farms?

#48—Other Solutions: The Agency is soliciting comment and information on other possible solutions to providing animal waste air emissions to fenceline communities without requiring farms with reporting.

V. Request for Comment and Additional Information

EPA is seeking comment on all questions and topics described in this ANPRM. In addition, EPA encourages all interested persons to identify and submit comments on other issues relevant to EPA's consideration of the potential development of future regulations pertaining to animal waste air emission reporting under EPCRA. EPA requests that commenters making specific recommendations include supporting documentation, where appropriate.

Instructions for providing written comments are provided under **ADDRESSES**, including how to submit any comments that contain CBI or PBI.

VI. What are the Next Steps EPA will take?

EPA intends to carefully review all comments and information received in response to this ANPRM. Once that review is completed, EPA will determine whether to pursue a proposed rule to reinstate air emission reporting from animal waste at farms under EPCRA.

VII. Statutory and Executive Order Reviews

Under Executive Order 12866, entitled *Regulatory Planning and Review* as amended by *Executive Order 14094: Modernizing Regulatory Review*, EPA submitted this action to the Office of Management and Budget (OMB). Any changes made in response to recommendations received as part of Executive Order 12866 review have been documented in the docket for this action. Because this action does not propose or impose any requirements, other statutory and executive order reviews that apply to rulemaking do not apply. Should EPA subsequently determine to pursue a rulemaking, EPA will address the statutes and executive orders as applicable to that rulemaking.

Nevertheless, the Agency welcomes comments and/or information that would help the Agency to assess any of the following: the potential impact of a rule on small entities pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*); potential impacts on

state, local, or tribal governments pursuant to the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1531–1538); federalism implications pursuant to Executive Order 13132, entitled *Federalism* (64 FR 43255, November 2, 1999); availability of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113; tribal implications pursuant to Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000); environmental health or safety effects on children pursuant to Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997); energy effects pursuant to Executive Order 13211, entitled *Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001); paperwork burdens pursuant to the Paperwork Reduction Act (PRA) (44 U.S.C. 3501); or human health or environmental effects on minority or low-income populations pursuant to Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994) and Executive Order 14096, entitled *Revitalizing Our Nation's Commitment to Environmental Justice for All* (88 FR 25251, April 21, 2023). The Agency will consider such comments during the development of any subsequent rulemaking.

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

List of Subjects in 40 CFR Part 355

Environmental protection, Air pollution control, Chemicals, Disaster assistance, Hazardous substances, Hazardous waste, Natural resources, Penalties, Reporting and recordkeeping requirements, Superfund.

Michael S. Regan,

Administrator, Environmental Protection Agency.

[FR Doc. 2023–25270 Filed 11–16–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 2360

[BLM_HQ_FRN_MO4500175868]

RIN 1004–AE95

Management and Protection of the National Petroleum Reserve in Alaska; Extension of Comment Period

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed rule; extension of comment period.

SUMMARY: On September 8, 2023, the Bureau of Land Management (BLM) published in the **Federal Register** a proposed rule that would revise the framework for designating and assuring maximum protection of Special Areas' significant resource values and protect and enhance access for subsistence activities throughout the National Petroleum Reserve in Alaska (NPR–A). The proposed rule would also incorporate aspects of the NPR–A Integrated Activity Plan approved in April 2022. On October 24, 2023, the BLM extended the comment period to November 17, 2023. The BLM has determined that it is appropriate to further extend the comment period for the proposed rule by 20 days, until December 7, 2023, to allow for additional public comment.

DATES: The comment period for the proposed rule that originally published on September 8, 2023, at 88 FR 62025, and was extended on October 24, 2023, at 88 FR 72985, ends on November 17, 2023. Under this further extension, comments must now be submitted on or before December 7, 2023. The BLM need not consider or include in the administrative record for the final rule comments that the BLM receives after the close of the comment period or comments delivered to an address other than those listed in the **ADDRESSES** section.

ADDRESSES: *Mail, personal, or messenger delivery:* U.S. Department of the Interior, Director (HQ–630), Bureau of Land Management, 1849 C St. NW, Room 5646, Washington, DC 20240, Attention: 1004–AE80. *Federal eRulemaking Portal:* <https://www.regulations.gov>. In the Search-box, enter “RIN 1004–AE95” and click the “Search” button. Follow the instructions at this website.

FOR FURTHER INFORMATION CONTACT:

James Tichenor, Advisor—Office of the Director, at 202–573–0536 or [\[blm.gov\]\(mailto:blm.gov\) with a subject line of “RIN 1004–AE95.” For questions relating to regulatory process issues, contact Faith Bremner at \[fbremner@blm.gov\]\(mailto:fbremner@blm.gov\). Individuals in the United States who are deaf, blind, hard of hearing, or have a speech disability may dial 711 \(TTY, TDD, or TeleBraille\) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.](mailto:jtichenor@</p>
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SUPPLEMENTARY INFORMATION:

Public Comment Procedures

If you wish to comment on this proposed rule, you may submit your comments to the BLM, marked with the number RIN 1004–AE95, by mail, personal or messenger delivery, or through <https://www.regulations.gov> (see the **ADDRESSES** section). Please note that comments on this proposed rule's information collection burdens should be submitted to the OMB as described in the **ADDRESSES** section. Please make your comments on the proposed rule as specific as possible, confine them to issues pertinent to the proposed rule, and explain the reason for any changes you recommend. Where possible, your comments should reference the specific section or paragraph of the proposal that you are addressing. The comments and recommendations that will be most useful and likely to influence agency decisions are:

1. Those supported by quantitative information or studies; and
2. Those that include citations to, and analyses of, the applicable laws and regulations.

The BLM is not obligated to consider or include in the Administrative Record for the final rule comments that we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**). Comments, including names and street addresses of respondents, will be available for public review at the physical location listed under **ADDRESSES** during regular business hours (7:45 a.m. to 4:15 p.m. EST), Monday through Friday, except holidays. Before including your address, telephone number, email address, or other personal identifying information in your comment, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold from public review your personal identifying information, we

cannot guarantee that we will be able to do so.

Background

The proposed rule was published on September 8, 2023 (88 FR 62025), with a 60-day comment period closing on November 7, 2023. Since publication, the BLM has received requests for extension of the comment period on the proposed rule. The BLM previously extended the comment period to November 17, 2023 (88 FR 72985). The BLM has determined that it is appropriate to further extend the comment period for the docket until December 7, 2023, to allow for additional public comment.

Steven H. Feldgus,

Deputy Assistant Secretary, Land and Minerals Management.

[FR Doc. 2023-25486 Filed 11-16-23; 8:45 am]

BILLING CODE 4331-27-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket Nos. 10–90, 23–328, 14–58, 09–197; WT Docket No. 10–208; FCC 23–87; FR ID 184414]

Connect America Fund, Alaska Connect Fund, ETC Annual Reports and Certifications, Telecommunications Carriers Eligible To Receive Universal Service Support, Universal Service Reform—Mobility Fund

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (FCC or Commission) adopted a Notice of Proposed Rulemaking (NPRM) that seeks comment on the next phase of high-cost fixed and mobile support in Alaska. The Commission initiates this rulemaking to seek comment on innovative solutions and unique accommodations necessary to continue supporting broadband service to Alaska.

DATES: Comments are due on or before January 16, 2024, and reply comments are due on or before February 15, 2024.

ADDRESSES: You may submit comments, identified by WC Docket Nos. 10–90, 23–328, 14–58, 09–197 or WT Docket No. 10–208 by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: www.fcc.gov/ecfs.

- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.

Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.

- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, 35 FCC Rcd 2788, 2788–89 (OS 2020).

People with Disabilities. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

FOR FURTHER INFORMATION CONTACT: For further information, please contact, Rebekah Douglas, Telecommunications Access Policy Division, Wireline Competition Bureau, at Rebekah.Douglas@fcc.gov or (202) 418–7931 or Matt Warner, Competition and Infrastructure Policy Division, Wireless Telecommunications Bureau, at Matthew.Warner@fcc.gov or (202) 418–2419.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's NPRM in WC Docket Nos. 10–90, 23–328, 14–58, 09–197 and WT Docket No. 10–208; FCC 23–87, adopted on October 19, 2023 and released on October 20, 2023. The full text of this document is available at the following internet address: <https://docs.fcc.gov/public/attachments/FCC-23-87A1.pdf>.

Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 45 L Street NE, Washington, DC 20554. These

documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

Filing Requirements. Comments and reply comments exceeding ten pages must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with § 1.49 and all other applicable sections of the Commission's rules. The Commission directs all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. The Commission also strongly encourages parties to follow the same order and organization set forth in the NPRM in order to facilitate the Commission's internal review process.

Ex Parte Rules—Permit-But-Disclose. These proceedings shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies).

In light of the Commission's trust relationship with Tribal Nations and its commitment to engage in government-to-government consultation with them, it finds the public interest requires a limited modification of the *ex parte* rules in these proceedings. Tribal Nations, like other interested parties, should file comments, reply comments, and *ex parte* presentations in the record to put facts and arguments before the Commission in a manner such that they may be relied upon in the decision-making process consistent with the requirements of the Administrative Procedure Act. However, at the option of the Tribe, *ex parte* presentations made during consultations by elected and appointed leaders and duly appointed representatives of federally recognized Indian Tribes and Alaska Native Villages to Commission decision makers shall be exempt from disclosure in permit-but-disclose proceedings and exempt from the prohibitions during the Sunshine Agenda period. To be clear, while the Commission recognizes consultation is critically important, it emphasizes that it will rely in its decision-making only on those presentations that are placed in the public record for these proceedings.

Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Synopsis

I. Notice of Proposed Rulemaking

1. In the NPRM, the Commission seeks comment on the next phase of high-cost fixed and mobile support in Alaska (the "Alaska Connect Fund" or "Alaska Connect"). The Commission asks how it can best support the rural and remote areas of Alaska once the support terms for the current incumbent Local Exchange Carriers (LECs) and competitive eligible telecommunications carriers (ETCs) have ended. The Commission has recognized that these areas of Alaska are some of the hardest to serve in the country, where many residents lack access to high-quality affordable broadband and the opportunity to keep up with the advances in technology that Americans living elsewhere enjoy. The Commission initiates this rulemaking to seek comment on innovative solutions and unique accommodations necessary to continue supporting broadband service to Alaska.

2. Currently, the Commission provides high-cost support to Alaska Plan carriers, Alaska Communications Systems (ACS) and Alternative Connect America Cost Model (A-CAM) carriers operating in Alaska to fund the deployment of voice and broadband networks. In the *2016 Alaska Plan Order*, 81 FR 69696, October 7, 2016, the Commission stated that it expected to conduct a rulemaking prior to the close of the 10-year support term to determine how support would be determined after the end of the 10-year support term for rate-of-return carrier participants in the Alaska Plan, and that the Commission would consider adjustments for marketplace changes and the realities of the current time. In the *ACS Order*, 81 FR 83706, November 22, 2016, the Commission stated that it expected to begin a rulemaking in year eight of the program to determine how support might be awarded for the ACS locations at the end of the ten-year period.

3. In this document, the Commission initiates a rulemaking to better understand all the changes, both in technology and in the broadband availability and funding landscape, that have occurred in Alaska since the inception of the Alaska Plan and *ACS Order* in 2016. The Commission undertakes a fresh look at the most efficient use of Universal Service Fund (USF) high-cost support in Alaska going forward not only to help connect unserved Alaskan communities, but also to support existing service and service funded through other Federal and state programs. The Commission relies on its experiences from the existing Alaska Plan and the record stemming from proposals in recent petitions to develop a framework on how best to structure and target Alaska Connect Fund support.

4. The Commission also concurrently adopted a Report and Order (Order) amending existing rules and requirements governing the management and administration of the USF high-cost program. The modifications adopted in the concurrently adopted Order streamline processes, align timelines, and refine certain rules to more precisely address specific situations experienced by carriers.

5. *Alaska Connect Fund for Fixed Carriers*. In the NPRM, the Commission seeks comment on a number of issues to ensure Alaskans continue to have access to reliable, affordable high-speed broadband as the Commission approaches the end of the Alaska Plan and the *ACS Order* obligations and support terms. The Commission

appreciates that Alaskan carriers still face unique circumstances and conditions that make it challenging both to deploy and maintain voice and broadband-capable networks in much of Alaska, including varied terrain, harsh climate, isolated populations, shortened construction season, and lack of access to infrastructure. However, the Commission also recognizes that much progress has been made to date, due to the several years of USF high-cost support as well as the advancements in technology and the availability of additional Federal funding programs for broadband services.

6. Carriers and commenters alike applaud the progress that has been made in extending fiber networks to rural and remote areas of Alaska, which has brought thousands of residents and small businesses online. However, while progress has been made, other commenters and carriers point out that much work remains in Alaska to reach unserved and underserved residents with the necessary infrastructure. Indeed, based on Broadband Data Collection (BDC) data as of December 2022, Alaska ranks 55th of 56 states and territories for availability coverage for fixed and mobile service. Thus, there continues to be a significant need for funding to support broadband service in Alaska. The Commission seeks comment on the solutions that will result in the greatest improvements in access. How can the Commission ensure the Alaska Connect Fund will result in Alaska residents having access to affordable service plans? How can the Commission ensure that USF high-cost support best complements other programs focused on improving affordability? Alaska receives support from all the USF programs, including Lifeline, E-Rate and Rural Healthcare Program. The Commission seeks comment on ways that the Alaska Connect Fund support can be utilized to work in cooperation with other USF disbursements to optimize the provision of advanced voice and broadband services.

7. As current funding programs for Alaskan carriers near their end dates, the Commission seeks guidance on how USF high-cost support can best serve the public interest in Alaska. In so doing, the Commission must take into account legislative requirements, improved mapping of broadband availability, and broadband support provided by other Federal agencies. The Commission seeks comment on the broader picture for universal service support in Alaska and urge commenters to address specifically the changes in technology, mapping, and other Federal

funding programs and how they might affect the future of the Alaska high-cost support program. In the following the Commission seeks comment on targeted issues related to the next phase of the Alaska high-cost support mechanism, including eligible areas and location, support amounts or mechanisms, budget, term of support, public interest obligations, support term, eligible carriers, accountability and oversight. The Commission also seeks comment on transitional and phase-down support, digital equity, broadband affordability, cybersecurity and supply chain risk management, and Tribal matters.

8. While significant progress has been made in Alaska since the original Alaska Plan was established, many areas in the state could still be considered unserved or underserved; and now, the Commission has the required data and the resulting maps to efficiently inform its decision making going forward. The Commission can determine statewide, using the National Broadband Map, that about 21% of broadband-serviceable units lack at least 25/3 Mbps and about 27% of broadband-serviceable units lack at least 100/20 Mbps fixed terrestrial service. The Commission can granularly see exactly where those broadband-serviceable units are located. Furthermore, the National Broadband Map allows the Commission to conveniently assess coverage based on technology type, which may be valuable to tackle the distinct challenges in Alaska. In recognition of the unique challenges of Alaska, in the following, the Commission seeks comment on how to define unserved and, if needed, underserved for the purposes of this next phase for support in Alaska.

9. The Commission seeks comment on how to determine areas and services that would be eligible for the Alaska Connect Fund. Particularly in light of the evolving competitive landscape, should the Alaska Connect Fund include the same or different eligible areas as the Alaska Plan? How does the National Broadband Map data generally inform the Commission regarding where to focus Alaska Connect Fund support? The Broadband DATA Act requires that the Commission use the BDC and the Broadband Serviceable Location Fabric (Fabric) “to determine the areas in which terrestrial fixed, fixed wireless, mobile, and satellite broadband internet access service is and is not available, . . . when making any new award of funding with respect to the deployment of broadband internet access intended for use by residential and mobile customers.” This new data allows the Commission to better assess where fixed broadband service is—and is not—

available in Alaska. Consistent with the Broadband DATA Act, this data will inform the Commission’s determination of the eligible areas for the Alaska Connect Fund.

10. Additionally, the Broadband Interagency Coordination Agreement requires the FCC, United States Department of Agriculture, and the National Telecommunications and Information Administration (NTIA) to “consider basing the distribution of funds for broadband deployment . . . on standardized data regarding broadband coverage,” and the agencies meet regularly to ensure the most efficient allocation of Federal broadband funding. As noted in this document, the state was recently allocated more than \$1 billion in Broadband Equity Access and Deployment (BEAD) funding and has begun planning for its use. The State of Alaska Broadband Office (ABO) was established to strategically consider how best to use this Federal funding to connect residents of Alaska with advanced technology. The ABO has published on its website maps and data related to the estimated costs to serve the remaining unserved and underserved areas of Alaska. Additionally, several projects have already been established and are underway to build out broadband to Tribal and other areas of the state.

11. The Commission seeks comment on how the funding received by and the decisions of the State of Alaska should inform its determination of the eligible areas for the Alaska Connect Fund. To the extent there are discrepancies between the National Broadband Map and ABO maps, the Commission’s robust challenge process for the National Broadband map can be used to address these discrepancies, and the Commission encourages the ABO and other state, local governments and communities in Alaska to use that existing process.

12. Broadband serviceable locations on the National Broadband Map can generally be broken down into four categories: (1) those served by the ILEC only; (2) those served by both the ILEC and an unsubsidized provider; (3) those served by an unsubsidized provider only; and (4) those that are unserved. The Commission seeks comment on how the Alaska Connect Fund should treat eligibility for each of these types of locations? How should the Commission define unserved? The Commission seeks comment on whether to establish a definition for underserved? Should the Commission define those terms consistent with Enhanced A-CAM (E-ACAM), or the BEAD program, or should it adopt another definition? Does

the Alaska Broadband Office or other broadband support programs in Alaska use different definitions, and if so, what are the differences?

13. Additionally, one of the ways in which Alaska is unique is that while villages or communities may be far from urban areas, individuals or individual locations within those villages or communities may be relatively close together. Accordingly, the Commission seeks comment on determining eligibility at a village or community level instead of by individual location. How should the Commission define village and community for this purpose? Would this approach better help address lack of service in unserved areas? If the Commission adopts such an approach, how should it address geographically isolated individual locations? What is the most appropriate metric for identifying eligible locations and how should the Commission define eligible locations for this purpose? Is defining eligibility based on village or community level instead of location consistent with the BDC?

14. *Middle Mile*. Carriers have argued to the Commission that both lack of availability and the cost of middle mile is what prevents deployment of high-quality, affordable services to the most rural and remote Alaskan villages and populations. Satellite networks made available after the start of the Alaska Plan are providing higher capacity and lower latency middle mile transport. What is the typical cost, or range of costs, for middle mile transport in Alaska today? USF high-cost Alaska Plan support, like model-based support, may be used anywhere in the network, including middle-mile, as long as carriers are improving service. In the *2016 Alaska Plan Order*, the Commission required recipients to report data on their use of middle-mile facilities. The Commission seeks comment on how this data should inform the distribution of support in the Alaska Connect Fund.

15. The Commission seeks comment on whether and how it might provide direct support for middle mile facilities and transport services under the Alaska Connect Fund, particularly in light of other Federal programs directed at supporting middle mile. What types of middle-mile expenses should be eligible for support? Should the Alaska Connect Fund support construction of new middle mile facilities, the cost of leased middle mile facilities, or both? Should support for middle-mile facilities or services be limited to a certain percentage of overall support received? Under Alaska Plan obligations, carriers are required to report to the Commission

on whether new middle mile transport is commercially available in their service area and increase obligations accordingly. Are there middle-mile services that are ubiquitous, reliable and affordable such that the Commission should condition support on their use prior to authorizing support? Does funding middle mile directly result in more affordable retail broadband prices? Should the Commission allow support for redundant networks to enhance network resiliency? The Alaska Remote Carrier Coalition (ARCC) filed a petition arguing for the adoption of its Alaska Middle Mile Expense Support (AMMES) calculator to determine funding support amounts. The method, as proposed, would have the Commission review carriers' accounting, which is more akin to a cost-based mechanism. The Commission seeks comment on using the AMMES plan calculator for determining middle mile funding support amounts or other methods that align with modernizing support.

16. *Direct-to-Home Satellite Services.* The Commission seeks comment on whether the Alaska Connect Fund should provide support to carriers that provide direct-to-home satellite service. Parties have commented that the remote and insular nature of some areas within Alaska make serving all areas of Alaska difficult with terrestrial-only solutions. Indeed, customers are subscribing to direct-to-home satellite service available after the start of the Alaska Plan. Although carriers are permitted to use satellite technology in their networks, the Alaska Plan does not provide support for carriers that provide direct-to-home satellite service. These satellite providers argue their service is no longer "expensive" or "performance-limiting," and just as reliable, if not more reliable than traditional fiber-based networks while also being ubiquitous.

17. How should new satellite services factor into the Commission's subsidy determinations? In certain communities, will satellite service be a necessary component to providing internet for the foreseeable future? Should the Commission focus on limiting subsidies for satellite services to certain areas of Alaska, e.g., "extremely remote areas" or "areas with ultra-high costs"? How would the Commission define those terms? What are the physical barriers to receiving satellite service or reliable service in Alaska? Are consumer services using satellite affordable for Alaskans? How do the costs of satellite services compare to services that use terrestrial solutions? Do direct-to-home satellite providers offer voice service? The Commission seeks comment on the

need to provide support for voice-only providers in communities, even if there is an unsubsidized internet provider.

18. The BEAD program requires states to establish an "Extremely High Cost Per Location Threshold" and allows states to fund alternative technologies, including technologies that do not meet the BEAD definition of "Reliable Broadband Service but otherwise satisfy the Program's technical requirements," in order to not exceed that threshold. The Commission seeks comment on whether it should take into account Alaska's Extremely High Cost Per Location Threshold determination in assessing an area's eligibility for the Alaska Connect Fund. How can the Commission use Alaska's determination most appropriately in its process?

19. Next, the Commission seeks comment on carriers eligible to participate in the Alaska Connect Fund support program. The Alaska Plan includes 13 rate-of-return carriers, while ACS, as a price cap carrier, receives frozen support. The high-cost program also supports a small number of A-CAM carriers operating in Alaska. Carriers and commenters have argued that the Commission should fold all high-cost Alaskan carriers into one support mechanism going forward. The Alaska Telephone Association (ATA) suggests that the Commission allow ACS and A-CAM carriers an opportunity to join that mechanism. ATA and ARCC advocate that high-cost support for fixed services in Alaska continue to be limited to ILECs. However, the record supports, and the Commission agrees, that it should explore whether non-ILECs should be eligible. While the ILECs do continue to serve the communities, others may be in a position to efficiently and effectively serve those same communities. Further, the Commission seeks comment on whether in some areas the ILEC is no longer the predominant broadband provider, which would make ILEC-only support inconsistent with broad service availability for consumers. The Commission seeks comment on whether any broadband carrier serving Alaska (or even those not currently serving Alaska) should be eligible to participate in the Alaska Connect Fund. Should there be existing minimum requirements for eligibility in the Alaska Connect Fund? Should both terrestrial and non-terrestrial providers be allowed to participate in the Alaska Connect Fund? Should the Commission allow partnerships or consortia to participate? Should Alaska A-CAM carriers that did not elect E-ACAM support be able to participate in the Alaska Connect Fund? Should carriers that have not met public

interest obligations under the original Alaska Plan be precluded from participating in the Alaska Connect Fund or subject to enhanced compliance requirements?

20. *Eligible Telecommunications Carrier Status.* The Communications Act of 1934 (the Act) requires that all recipients of USF high-cost support obtain ETC status. It limits the Commission's authority to designate ETCs to situations when a carrier demonstrates that a state commission lacks jurisdiction over that carrier. In Alaska, the Regulatory Commission of Alaska is the governing body that adjudicates that process and designates carriers as ETCs in their service territories. As such, the Commission has limited authority to designate ETC status to a carrier operating in Alaska. The Commission seeks comment on the barriers to obtaining ETC status in Alaska. Are there specific barriers for satellite technology in obtaining ETC status in Alaska? Should ILECs be eligible to receive support outside of their current ETC areas? If the Commission does so, what considerations does it need to make regarding the reliability of voice services in those areas?

21. The Commission seeks comment on how to determine the Alaska Connect Fund support amounts to best support service in Alaska. The Commission has used various mechanisms for determining support amounts in the past, including frozen support, adjusted frozen support, model-based support, and competitive processes. The Alaska Plan and ACS support are based on frozen support—meaning that current support amounts, which were originally determined through a cost-based mechanism, are the same as they were on a specific date. However, as the Commission has reformed the high-cost program, it has aimed to base support amounts on a forward-looking cost model or a competitive process. Additionally, Congress required states, including Alaska, to conduct competitive processes to distribute BEAD funding. The Commission seeks comment on which of these mechanisms makes the most sense for the Alaska Connect Fund. Should the type of support mechanism be informed by whether an area is served by the ILEC only, ILEC and unsubsidized competitor, only unsubsidized competitor or is unserved? If so, which would be the most efficient mechanism for reaching the Commission's universal service goals through the Alaska Connect Fund? For example, if there are one or more unsubsidized competitors in an area,

does that mean a competitive process would be best? Should the Commission endeavor to award funding in a similar or different way than the BEAD program? In the recent *Enhanced A-CAM Order*, 88 FR 55918, August 17, 2023, the Commission sought comment on issues related to providing support for served locations. The Commission incorporates those questions here and seeks comment on their specific applicability to the Alaska Connect Fund.

22. *Alaska Cost Model.* The Commission has recognized the limitations of the Connect America Cost Model (CAM) for Alaska, which led to it establishing the Alaska Plan. The Commission seeks comment on whether it should develop a cost model to help determine support amounts for the Alaska Connect Fund carriers. Would this be an efficient way to determine support amounts going forward? What inputs are required for a cost model? The ABO introduced a model that evaluates, at a high level, the math associated with the cost of operating in remote communities in Alaska, but it acknowledges that it does not claim the numbers in the model “match any real-world applications.” The ABO also introduced a technology neutral cost model that estimates the capital costs of new broadband projects in Alaska, along with supporting maps identifying unserved and underserved communities. The Commission seeks comment on these models. Should the Commission consider using or leveraging these models for determining support amounts? Are there other already developed cost models that the Commission could utilize to establish support amounts?

23. *AMMES Cost Calculator.* The ARCC petitioned the Commission to adopt its AMMES plan directed at providing cost-based support to carriers with “ultra-high” middle-mile costs. The plan takes into account both the capital and the operational middle-mile expenses associated with providing high-speed broadband service, using its Alaska Middle Mile Calculator Template (AMMCAT) to identify the locations that need support. The Commission seeks comment on the accuracy and effectiveness of this tool. Does the Commission have broader applications in Alaska?

24. *Alaska Competitive Process.* The Commission seeks comment on whether to adopt a competitive process to award Alaska Connect Fund support either using a competitive process similar to the process in Puerto Rico and the US Virgin Islands under the Bringing Puerto Rico Together and the Connect USVI

programs; or using an auction mechanism similar to the Rural Digital Opportunity Fund (RDOF). Is there enough competition in Alaska to make a competitive process meaningful? Is an Alaska-specific cost model a necessary safeguard for a competitive process? The Commission again notes that Congress required a competitive process for BEAD funding awardees, including Alaska. The Commission seeks comment on whether there are any lessons that can be learned so far from the development of the BEAD process that it should consider in developing the Alaska Connect Fund.

25. *Frozen Support.* The ATA Petition suggests the Commission maintain current frozen support amounts for each carrier (adjusted for inflation). The Commission seeks comment on whether or under what circumstances this is the appropriate way to allocate support for recipients of the Alaska Connect Fund. How would the Commission determine support amounts for ACS and any other new participants in the program? Should the Commission take the same overall support amount (adjusted for inflation), but reallocate those amounts among the current recipients, and if so how?

26. The Commission seeks comment on an appropriate budget for the Alaska Connect Fund. In considering the budget for the Alaska Connect Fund, the Commission seeks to balance the need to provide support that is sufficient to achieve its goals, while meeting the Commission’s obligation not to unnecessarily burden American consumers. As the Commission has previously recognized, the cost of universal service is ultimately borne by American consumers and businesses. Support that is greater than necessary therefore violates the Commission’s obligation to be a good steward of the USF. In this NPRM, the Commission seeks comment on providing two types of funding: (1) support for areas that still require buildout; and (2) ongoing support for areas already built out. The Commission seeks comment on the budget needed for each. The 2016 *Alaska Plan Order* provided for \$1.5 billion in frozen high-cost support over ten years. The *ACS Order* provided for \$200 million in frozen high-cost support over ten years. The ATA Petition suggests, even with potentially more participants, that the budget is acceptable if adjusted for inflation, and the ARCC Petition proposed \$25 million for the first four years of its plan to support middle-mile costs only. How should deployment progress and expenditures to date inform the budget for the Alaska Connect Fund? How

should allowing new participants impact the budget?

27. Additionally, the State of Alaska and the ABO are currently engaged in the planning phase for BEAD funding, and there are several other broadband projects already underway. The BEAD program overall has a goal of affordable high-speed internet for all residents in all 50 states, DC, and the territories by 2030, and Alaska has been allocated more than \$1 billion in BEAD funding. The Commission seeks comment on how Alaska’s BEAD and other government funding should affect the budget for the Alaska Connect Fund. In the *Future of USF Report*, the Commission noted that preventing duplicative support was its primary goal in interagency coordination regarding broadband funding, particularly BEAD funding. Accordingly, the Commission seeks comment on determining a budget that meets its public interest obligations, complements BEAD and other sources of broadband funding, and avoids duplicate support.

28. The ATA Petition suggests that the existing Alaska Plan budget be adjusted for inflation and adjusted annually going forward. The Commission has adjusted for inflation in various situations in the past. For example, in 2018, the Wireline Competition Bureau (Bureau) set the budget and an annual increase for inflation for legacy rate-of-return carriers receiving CAF (Connect America Fund) Broadband Loop Support. The Commission used an inflation adjustment factor based on the United States Department of Commerce’s Gross Domestic Product-Chained Price Index to determine the amount of adjustment. The Commission has also used other tools for indexing for inflation, for example, the Consumer Price Index from the Department of Labor, Bureau of Labor Statistics. Recently, however, the Commission declined to adopt an annual inflation adjustment to E-ACAM support amounts. The Commission seeks comment on whether the budget for the Alaska Connect Fund should be adjusted for inflation, and if so, by how much and how often. What is the appropriate method for adjusting for inflation? Do all carriers experience the same pressures of inflation? If the Alaska Connect Fund supports different carriers and services than the Alaska Plan, is an initial inflation adjustment necessary or already built in to the newly established budget? ATA suggests that the budget should be increased annually. If the Commission decides to adjust the budget going forward based on inflation, is annually the right interval?

29. The Commission seeks comment on the public interest obligations for the Alaska Connect Fund—in particular, speed, latency, data usage, and reasonably comparable rates. Should those obligations differ based on the whether the location is: (1) served by the ILEC only; (2) served by both the ILEC and an unsubsidized provider; (3) served by an unsubsidized provider only; or (4) unserved? Does the Commission need to establish obligations for underserved locations? In addition, how should it account for the type of middle mile being used to serve the location? If the Alaska Connect Fund provides support for middle mile infrastructure, how does the Commission safeguard against opportunistic pricing?

30. *Performance Plan.* In the Alaska Plan, each carrier was required to submit a performance plan that was reviewed and approved by the Bureau. The plans were, and still are, subject to modification based on changed circumstances. The Commission seeks comment on whether it should continue to use this approach, particularly in light of the Infrastructure Investment and Jobs Acts (Infrastructure Act) use of specific speed, latency and other minimums. If the Commission conducts a competitive process based on ability to meet certain requirements, is a performance plan still necessary?

31. *Speed.* The Commission prioritized 10/1 Mbps in both the 2016 *Alaska Plan Order* and the *ACS Order*, adopting 10/1 Mbps as the minimum broadband speed requirement, but it authorized approval of some *Alaska Plan* carrier performance plans that offered faster or slower speeds in certain instances. Indeed, some Alaska Plan carriers have committed to speeds higher than 10/1 Mbps, including 100/5 Mbps and 1GB/100Mbps. Similarly, carriers receiving A–CAM support were obligated to provide service at speeds of 25/3 Mbps, 10/1 Mbps or $\frac{4}{1}$ Mbps depending on the housing unit density of the eligible areas in the offer. Recently, the Commission adopted a speed requirement of 100/20 Mbps for E–ACAM recipients.

32. A recent interested party explained that requiring 10/1 Mbps has been detrimental in areas that could benefit from support to improve their networks but still may not be able to reach 10/1 Mbps. Others suggest the minimum speed requirements should be higher to encourage more advanced services. The Infrastructure Act requires that its programs establish a minimum speed of 100/20 Mbps. The Commission seeks comment on what the appropriate minimum broadband speed requirement

should be for the Alaska Connect Fund. What factors should the Commission consider to determine a minimum broadband speed requirement? Should the Commission allow exceptions to the minimum speed requirement, and if so, under what conditions? In light of new technologies, such as low Earth orbit satellites, are exceptions to the speed and latency requirements necessary?

33. *Latency.* The Alaska Plan, ACS, and A–CAM recipients are all currently subject to requirements to provide and certify the provision of service with roundtrip network latency of 100 milliseconds or less, subject to middle mile limitations. Under Commission rules, this requires recipients to certify to offering “voice and broadband service with latency suitable for real-time applications” The Commission seeks comment on whether this requirement remains appropriate for the Alaska Connect Fund or whether modifications may be warranted.

34. *Data Usage.* Participants in the Alaska Plan are required to provide a usage allowance that evolves over time to remain reasonably comparable to usage by subscribers in urban areas, similar to the approach adopted for price cap carriers and other rate-of-return carriers. ACS was allowed some flexibility to “offer a usage allowance consistent with the usage level of 80 percent of its own broadband subscribers, including those subscribers that live outside of Phase II-funded areas,” although it does not offer plans with usage limits. The Commission seeks comment on the minimum data allowance requirement and whether it needs to tailor it in light of changes to the network due to availability in access to middle-mile.

35. *Satellite Backhaul Exception.* The Commission exempts from the speed, latency, and data usage standards (public interest obligations) those areas in which carriers rely exclusively on the use of satellite backhaul to deliver service. The Commission made this decision based on reports from the Regulatory Commission of Alaska that there are areas of Alaska that can only be served by satellite, and the assertions that satellite backhaul is limited in its functionality compared with terrestrial backhaul. Indeed, carriers seeking the exemption must certify that they lack the ability to obtain terrestrial backhaul and that they are unable to satisfy the broadband public interest obligations due to the limited functionality of satellite backhaul. More recently, satellite companies have insisted that their services are fast, reliable, and affordable. The Commission recognizes that there are remote areas of Alaska

where satellite service may be the only solution for voice and broadband, and it seeks information and data on satellite service speed and reliability. Should the Commission adjust the benchmarks to account for advancements and availability in satellite backhaul technology? Alternatively, should the Commission establish benchmarks for carriers serving locations with satellite and microwave middle-mile facilities in the Alaska Connect Fund?

36. *Affordability Requirement.* The Commission seeks comment on requiring the offering of a low-cost plan as a condition of receiving Alaska Connect Fund support. The Commission proposes to condition Alaska Connect Fund support on participation in the Affordable Connectivity Program (ACP) or substantially similar successor program. The Commission recently adopted a similar requirement for *Enhanced A–CAM Order* recipients, and affordability remains a considerable barrier for many Alaskan residents in gaining and broadband access. The ACP plays an important role in helping low-income consumers obtain affordable internet services. There are currently a number of carriers participating in the ACP that serve Alaska. Would the same requirement be appropriate for all or some of the recipients of the Alaska Connect Fund? Additionally, the Commission notes that beyond it, the Infrastructure Act requires subgrantees of the BEAD program to provide at least one “low-cost broadband service option.”

37. *Cybersecurity and Supply Chain Risk Requirements.* The Commission proposes to condition the receipt of Alaska Connect Fund support on the creation, implementation and maintenance of operational cybersecurity and supply chain risk management plans. Specifically, the Commission proposes that Alaska Connect Fund support recipients be required to implement a cybersecurity risk management plan that reflects the latest version of the National Institutes of Standards and Technology (NIST) Framework for Improving Critical Infrastructure Cybersecurity, and that reflects an established set of cybersecurity best practices, such as the standards and controls set forth in the Cybersecurity & Infrastructure Security Agency (CISA) Cybersecurity Cross-sector Performance Goals and Objectives or the Center for Internet Security Critical Security (CIS) Controls. The Commission also proposes that carriers be required to implement supply chain risk management plans that incorporate the key practices discussed in NISTIR 8276, Key Practices in Cyber Supply

Chain Risk Management Observations from Industry, and related supply chain risk management guidance from NIST 800–161. Would it be appropriate for Alaska Connect Fund recipients to submit to USAC their updated cybersecurity and supply chain risk management plans within 30 days of making a substantive modification thereto, as E–ACAM recipients must? In the *Enhanced A–CAM Order*, the Commission adopted these requirements for recipients of E–ACAM support, making conforming plans due by the start of the support term and imposing a reduction in monthly support of 25% for non-compliance. The Commission seeks comment on adopting the same requirements for Alaska Connect Fund recipients. Do Alaska carriers have such plans already created and implemented? Is the same non-compliance withholding of 25% appropriate for Alaska Connect Fund recipients? What are the differences (if any) between Alaska Connect Fund recipients and E–ACAM recipients that might warrant different approaches to ensuring cybersecurity? Are there other security standards or flexibilities the Commission should consider for Alaska Connect Fund recipients?

38. *Reasonably Comparable Rates—Broadband and Voice.* The Commission proposes that carriers receiving Alaska Connect Fund support, like all other recipients of USF high-cost program support, will be required provide voice and broadband service at rates that are reasonably comparable to those offered in urban areas. For broadband, an ETC has two options for demonstrating that its rates comply with this statutory requirement: certifying compliance with reasonable comparability benchmarks or certifying that it offers the same or lower rates in rural areas as it does in urban areas. Due to the unique challenges that remain in Alaska, the Commission proposes that carriers receiving Alaska Connect Fund support will still be subject to the Alaska-specific reasonable comparability broadband benchmarks established by the Bureau. The Commission seeks comment on whether it should revise how the Alaska-specific comparability benchmarks are calculated. How will support amounts affect carriers' ability to meet the Commission's broadband rate benchmarks?

39. For voice service, ETCs are required to make an annual certification that the rates for their voice service are in compliance with the same reasonable comparability benchmark as required for the other programs. The current benchmark for voice services is \$59.62 nationwide. While the Commission has

seen no evidence that carriers are unable to comply with the voice benchmarks, it seeks comment on whether its voice benchmark calculations are still appropriate for Alaska? Does the Commission need to create an Alaska-specific voice benchmark?

40. Earlier this year, the Bureau sought comment on modifying the calculation method for determining broadband benchmarks and on other changes related to the benchmarks. Are these inquiries also applicable to the Commission's considerations for the Alaska-specific benchmarks? In the *2023 Broadband Benchmarks Public Notice*, the Bureau stated that “[i]n addition to an increasing range of speeds, in the last few years the Bureau has also noted that Survey data show that some variables, such as upload speed and capacity allowances, have become less relevant to setting benchmark rates. For example, in some cases, the Commission has found that inclusion of upload speed in rate calculations can result in anomalies where the benchmark rate rises as upload speed falls, likely because download speed is more significant to price levels. In addition, in some instances the Commission has found that capacity allowances have little to no effect on the benchmark rate.” Does Alaska experience the same anomalies and impact related to upload speed and capacity allowances? Is there similar confusion in Alaska regarding discounted and non-discounted pricing? Should the Commission consider similar definitional updates related to census data? The Commission seeks comment on whether there are any challenges for current Alaska A–CAM carriers in meeting the Alaska-specific benchmark should they be allowed to become Alaska Connect Fund recipients.

41. *Deployment Milestones.* The Commission seeks comment on what the deployment milestones should be for the Alaska Connect Fund. In the Alaska Plan, carriers were required to meet only two specific milestones; one by the end of the fifth year of support year and then by the end of the final year and report their progress annually. This was done to provide flexibility for planning based on the shortened construction season and the carrier-submitted performance plans identifying the location obligation. How does the term of support impact the interval of required milestones, e.g. should an intermediate milestone be required if the Commission adopts a support term of something less than ten years, and should more intermediate

milestones be set if it adopts a support term of more than ten years? Are there other factors to consider in establishing deployment milestones, both intermediate and final?

42. The Commission seeks comment on a support term for the Alaska Connect Fund. The Alaska Plan and ACS CAF II commitments, along with several other high-cost programs, have previously established ten-year support terms that require mid-point evaluations and milestone achievements. The ATA Petition asks the Commission to cut the original Alaska Plan program short and start the Alaska Connect Fund in 2024 rather than at the end of 2026, when the Alaska Plan term is over. It also asks for the Alaska Connect Fund to run through 2034, and for that term to extend at one-year intervals thereafter absent some other decision by the Commission. The AMMES plan proposes an eight-year term of support, but support amounts are reduced after year four. Given the life expectancy of current technology, the rate of technological advancement, and the changing landscape of competition in Alaska, the Commission seeks comment on the appropriate support term for the Alaska Connect Fund. Does addressing high-cost support in Alaska more frequently allow the Commission to more precisely address competition and changes in the marketplace? Would a shorter support term improve planning and deployment? What impact does the shortened construction season have in considering a shorter term of support? Alternatively, would a longer support term allow Alaska providers to better plan for network deployments and upgrades? What impact do supply chain and labor shortage challenges have in considering the length of the term of support?

43. Given that Alaska, like other states, is still in the planning phase for BEAD funding, the Commission seeks comment on when it should begin the Alaska Connect Fund support program. Would it be more prudent for us to wait to move forward with the Alaska Connect Fund until the conclusion of BEAD planning and the planning for other projects are complete, in order to better coordinate the Alaska Connect Fund with other Federal programs? Would waiting impact the ability of Alaska carriers to pursue BEAD funding and the resources necessary to support BEAD-funded projects? If it does, how so? The Commission seeks comment on measures to avoid duplicative support if the Commission does not wait to initiate the Alaska Connect Fund. In what ways can Alaska Connect Fund support complement BEAD funding?

44. The Commission relies on mandatory deployment, reporting, and testing requirements and oversight rules to reduce waste, fraud, and abuse of program support and to ensure that carriers are meeting their commitments to provide high-quality broadband services. As the Commission did with the Alaska Plan, it proposes to establish reporting, performance testing, document retention, and oversight requirements for the Alaska Connect Fund recipients. The Commission proposes to maintain the existing framework for potential reductions in support for failure to meet any of the Alaska Connect Fund obligations. Furthermore, as for all ETCs, the Commission proposes that all Alaska Connect Fund recipients will be subject to compliance audits and other investigations and enforcement measures as necessary. The Commission seeks comment on these proposals.

45. The Commission seeks comment on any reporting, performance testing, or accountability issues in the Alaska Plan that need to be refined for the Alaska Connect Fund. Should the Alaska Connect Fund require new accountability or oversight procedures, and if so, what should those look like? Should the Commission require monitoring and reassessment in the Alaska Connect Fund as it has in the Tribal Nations and Tribal Lands in Alaska.

46. The Commission is committed to working with Tribes and Tribal leaders. The Commission seeks comment generally on considerations necessary for including Tribal governments, Tribal Nations, Tribal lands, and residents of Tribal Lands in the Alaska Connect Fund. What progress has been made with NTIA's Tribal Broadband Connectivity Program and other Tribal broadband program support received in Alaska? How has that changed who is providing service to the communities? Are the services being provided on Tribal Lands affordable for residents? Is there any need to revisit the definition of Tribal lands in Alaska—are there Tribal Nations, Tribal lands or Tribal entities in Alaska that do not fit into the current definition but should be included for the purpose of the Alaska Connect Fund?

47. The Commission recently discussed with Tribal Nations in Alaska and their representatives issues related to obtaining ETC status for purposes of receiving high-cost and Alaska Plan program support. The Commission allows carriers serving Tribal lands to seek ETC status directly from the Commission in certain situations. The Commission seeks comment on whether

there are still barriers for Tribal Nations in Alaska in obtaining ETC status. How can the Commission streamline the ETC process or other processes to increase Tribal Nation access to Alaska Connect Fund support?

48. Recognizing that engagement between Tribal Nations and service providers "is vitally important to the successful deployment and provision of service," the Commission implemented an annual obligation that requires carriers to demonstrate that they have meaningfully engaged Tribal governments in their supported areas. The Commission seeks comment on the experience of Tribal Nations and Tribal governments and providers in Alaska with the Commission's Tribal engagement requirement. Has this obligation led to the successful deployment and provision of service on Tribal lands in Alaska? The Commission invites comment on whether the its Tribal engagement requirements in Alaska need to be strengthened. How can the Commission help ensure that service providers meet their existing Tribal engagement requirement in Alaska? How can the Commission better encourage the participation of Tribal governments in decisions regarding deployment of service on their lands. Are there unique considerations regarding engagement with Tribal governments in Alaska that the Commission should take into account? The Commission seeks comment on the potential consequences of failing to meet this requirement and whether those outcomes have been sufficient to ensure that service providers meet the Tribal engagement requirement in Alaska? Should the receipt of Alaska Connect Fund support be conditioned on obtaining Tribal consent to provide broadband service for carriers serving Tribal Nations and Tribal Lands in Alaska? Or should the Commission adopt a Tribal consent framework similar to the BEAD program? Is there another framework that could better benefit the Tribal Nations, Tribal Lands, and Tribal residents of Alaska?

49. As previously discussed, carriers are receiving high-cost support for Alaska through several different mechanisms, and the term for each is set to conclude in a different year: Alaska Plan support and A-CAM I will end in 2026, ACS CAF II frozen support will end at the end of December 2025. Historically, where a carrier's support term has ended before the next phase of support begins, the Commission has approved an extension of support to bridge this gap. For example, recently the Commission approved transitional support for mobile wireless service in

Puerto Rico and USVI. The support term begins the month after a carrier's final program disbursement and is there to bridge the gap until the Commission adopts a long-term support mechanism. If the Alaska Connect Fund begins in 2027, ACS will have at least a year of gap between its last disbursement and the initiation of the Alaska Connect Fund disbursements. If Alaska Connect Fund support has not been established by 2027, there will be a gap in disbursements for Alaska Plan participants as well. The Commission seeks comment on whether and how it continues to provide support so that carriers do not experience a gap in support before the start of the Alaska Connect Fund. How does Alaska's shortened construction season impact the timing and length of providing transitional support?

50. In addition, the Commission has phased down support for providers when changes in the program result in changes in support. For example, the Commission established a phase down period for ILEC fixed support carriers receiving high-cost support in Puerto Rico following the competitive process. The Commission seeks comment on phasing down support for the ILEC in any areas in which it is not authorized to receive Alaska Connect Fund support.

51. *Alaska Connect Fund for Mobile Wireless Carriers.* The mobile wireless portion of the Alaska Plan—like the fixed portion—is scheduled to end on December 31, 2026. While progress has been made toward mobile deployment to remote areas in Alaska in the first half of the Alaska Plan, the Commission notes that much still needs to be done to ensure that Alaskans in remote areas have access to reliable, advanced mobile service, as more than 70,000 Alaskans in eligible Alaska Plan areas are still without at least 4G LTE at ¼ Mbps. In the document, the Commission seeks comment on what the Alaska Connect Fund should look like for mobile service providers. As the Commission considers how to address the realities of mobile deployment in Alaska, as well as the changes that have occurred since the original Alaska Plan was adopted, the Commission draws on its experience from the existing Alaska Plan for mobile support, as well as the submissions and comments of stakeholders.

52. The Commission has previously recognized that Alaska is unique and that mobility support mechanisms in Alaska need to be flexible enough to account for Alaska's "remoteness, lack of roads, challenges and costs associated with transporting fuel, lack of scalability per community, satellite and backhaul

availability, extreme weather conditions, challenging topography, and short construction season.” The mobile portion of the Alaska Plan aims to provide Alaskans in remote areas with advanced mobile communications services at rates that are reasonably comparable to those in urban areas. Based on data from FCC Form 477 filings, the 2016 Alaska Plan increased the number of Alaskans served with 4G LTE from 33,133 to 85,865, out of 149,610 Alaskans in eligible areas. According to data from the BDC, 79,340 Alaskans in eligible areas were served by $\frac{5}{4}$ Mbps 4G LTE as of December 31, 2022. The Commission seeks comment on what actions it should take to ensure that Alaskans in remote areas, particularly unserved and underserved areas, can access and continue to receive reliable and secure mobile service at reasonable prices.

53. The Commission seeks comment on whether the Alaska Plan’s frozen support continues to be the right mechanism to address concerns with mobile service in Alaska going forward, or whether other types of programs or subsidies would be better suited to address concerns. The Commission notes that several mobile providers have exhibited varying levels of noncompliance with their interim commitments in the Alaska Plan. Examples of noncompliance include insufficient buildout to meet commitments to Alaskans; inaccurate data filings; failure to demonstrate rates and services that are reasonably comparable with Anchorage; and failure to update performance plans as required. In light of this, how can the Commission better ensure that high-cost support in Alaska is helping to bring advanced mobile communications services to remote areas in the state? The Commission seeks comment on all matters related to the next version of the Alaska Plan, particularly the ways in which the original Alaska Plan could be improved upon to deliver more reliable and secure mobile service, as well as how the Alaska Connect Fund should account for other support mechanisms or funding programs in Alaska.

54. The Commission seeks comment on how to determine eligible areas and services for the mobile portion of the Alaska Connect Fund. An area had to satisfy two criteria to be considered an eligible area for mobile services under the *2016 Alaska Plan Order*. First, it had to be a “remote area[] in Alaska,” which the Commission defined as all of Alaska except most of Anchorage, Juneau, Fairbanks, Chugiak, and Eagle River. Second, eligible areas “include[d] only those census blocks where, as of

December 31, 2014, less than 85% of the population was covered by the 4G LTE service of providers that [were] either currently unsubsidized by the high-cost mechanism or subject to a phase down of all current mobile support in the relevant cell block.”

55. The Commission seeks comment on how to define eligible areas for the next version of the plan. What, if any, changes should the Commission make to the eligible areas criteria that the Commission used in the *2016 Alaska Plan Order*? Under the BDC, the Commission displays mobile coverage availability data based on both stationary/pedestrian coverage and in-vehicle coverage. Which coverage data should the Commission use to determine the eligible areas for the Alaska Connect Fund?

56. As an initial matter for determining eligible areas, the Commission seeks comment on how to define a base geographic unit for purposes of determining eligible areas. Instead of census blocks, which were used in the Alaska Plan, the Commission proposes to use the H3 hexagonal geospatial indexing system (H3 system), consistent with the BDC, to identify the areas eligible for high-cost support similar to the approach it is considering for the 5G Fund? The Wireless Telecommunications Bureau (WTB), Office of Economics and Analytics (OEA), and Office of Engineering and Technology adopted the H3 system to identify geographic areas where a challenge to a provider’s mobile BDC availability data can be created based on the locations of on-the-ground challenger speed tests, and the system has been integrated into the BDC verification process. The H3 system is useful because it provides a canonical way to reference, index, and compare wireless coverage using boundaries that are of a nearly uniform size. In addition, the nested nature of the hexes allows aggregation of like-sized areas to like-sized areas, unlike scaling up from blocks to block groups to tracts since these geographic areas can be of widely divergent sizes. The H3 system is used to divide the National Broadband Map into specific geographic areas, and the Map shows the percentage of a hexagon that is “covered” (*i.e.*, where a provider has claimed it can make broadband available) at different resolutions and levels of granularity as a user zooms in or out on the map. Mobile broadband coverage is displayed down to the resolution-9 hexagon level (hex-9) on the map, and data on such coverage is made available for download based on hex-9s. Because of its nested structure, using the H3 system allows the

Commission to categorize geographic areas at multiple levels of granularity.

57. If the Commission were to use hexagons as the base geographic unit to identify the areas eligible for high-cost support, it seeks comment on which hexagonal resolution level—*e.g.*, hex-8, hex-9—in the H3 hierarchy should be used. Should the Commission determine the eligible areas based on the H3 hexagonal units, specifically as hexagons at resolution 9? Hex-9s are nearly uniform and standardized and can be clearly identified and referenced. Because hex-9s are relatively small, with an average area of approximately 0.1 square kilometer, any reduction in map resolution when converting from raw propagation model output (as filed by providers) to hex-9s is minimal. Hex-9s can be aggregated when focusing on an area, such as all of the hex-9s that overlap a census geography. However, the small size of a hex-9 could also lead to an increase in administrative burden, as it takes more of them for a full assessment of an area, given their small size. The Commission seeks comment on using the hex-9 and hex-8 resolutions, as the basis for identifying specific geographic areas that are eligible for high-cost support under the Alaska Connect Fund. In the *5G Fund Further Notice*, 88 FR 66781, September 28, 2023, the Commission proposed that the eligible area would be smaller than a census tract and larger than a census block group, and it could aggregate hex-9s that overlap any desired census boundary. Given that some census blocks are very large in Alaska, would a combination of census blocks and hex-9s that contain locations indicated by the Fabric and road segments be more suitable for Alaska? Would hex-9s be too small for this purpose in Alaska, and if so, why and what size hexagon should be used?

58. The Commission seeks comment on how to define remote areas for the Alaska Connect Fund. Under the Alaska Plan, eligible areas were limited to remote areas of Alaska. The definition of “‘remote areas in Alaska’ includes all of Alaska except: (A) the ACS-Anchorage incumbent study area; (B) the ACS-Juneau incumbent study area; (C) the fairbankszone1 disaggregation zone in the ACS-Fairbanks incumbent study area; and (D) the Chugiak 1 and 2 and Eagle River 1 and 2 disaggregation zones of the Matanuska Telephone Association incumbent study area.” Should the Commission still use the definition of “remote areas in Alaska” as defined in § 54.307(e)(3)(i) of its rules? If not, what changes should the Commission make to the definition for the purposes of the Alaska Connect

Fund? For example, should the Commission publish a list of ineligible hex-9s and make that the operative definition of nonremote areas in Alaska? The Commission seeks comment on this approach as well as other approaches in how best to define eligible areas.

59. The Commission also seeks comment on what, if any, changes it should make to the requirement in the Alaska Plan that to be eligible, a remote census block needed to have less than 85% of the population covered by the 4G LTE service of providers that were either unsubsidized or not eligible for frozen support in Alaska as of December 31, 2014. Under the Alaska Connect Fund, should areas be re-evaluated for eligibility based on coverage by an unsubsidized provider or a provider that is deemed ineligible to participate in the plan? If the Commission were to use hex-9s as the base geographic unit for defining eligible areas, should it aggregate the hex-9s to a larger geographic area and then measure the percentage of that area that lacks covered hex-9s? If so, which larger geographic area should be used to aggregate hex-9s to determine eligibility? Should a larger-resolution H3 hexagon, such as a “parent” hex-8 or hex-7, or a larger Census-defined boundary such as a census block, block group, or tract be used? Further, what should that percentage be? For example, should census blocks that have 85% or greater coverage of hex-9s with 4G LTE or better coverage by an unsubsidized or ineligible provider, based on the latest BDC coverage data, be excluded from eligibility in the next version of the plan? Alternatively, if less than 85% of a hex-8 or hex-7 lacks unsubsidized 4G or better coverage based on the hex-9s within it, should that hex-8 or hex-7 geographic unit be considered eligible? If a boundary other than a larger “parent” hexagon is used to aggregate hex-9s, the Commission will need to determine how to assign and aggregate hex-9s to the larger boundary. Should the Commission analyze whether the centroid, or a particular areas percentage, of the hex-9 falls within the other boundary? If an unsubsidized or ineligible mobile provider is offering 4G LTE or 5G–NR service in a geographic area based on BDC data where another provider is receiving universal service support, should the Commission continue to provide universal service support in those geographic areas? Should areas with multiple providers, even if both are subsidized, be eligible? In the *5G Fund Further Notice*, the Commission proposed making ineligible those areas served with 5G–NR at

speeds of at least 7/1 Mbps by an unsubsidized provider. The Commission seeks comment on this proposal for the Alaska Connect Fund.

60. *Middle Mile*. The Commission seeks comment on ways to improve access to middle mile for mobile providers in the next version of the plan. The *2016 Alaska Plan Order* created three solutions to address the limitations presented by scarce middle mile in Alaska. First, the *2016 Alaska Plan Order* explicitly clarified that frozen support may be used to build and upgrade middle mile, even outside of the eligible areas, when needed to meet commitments within the eligible areas. Second, to better understand the extent of middle mile scarcity, the *2016 Alaska Plan Order* required all Alaska Plan participants to file maps of their fiber and microwave networks and update these maps if they deployed middle mile in the previous calendar year, with a format for these maps to be decided by the Bureaus. Third, as this was a ten-year plan, if a provider did not commit to provide 4G LTE at 10/1 Mbps to an area and new middle-mile services became commercially available to that area, the provider needed to submit a new performance plan incorporating the new middle mile. Moreover, several providers throughout the course of the Alaska Plan have noted that middle-mile transport can be prohibitively expensive when paying a third-party, especially in areas where there is little or no comparable competitive providers.

61. The Commission seeks comment on how to address middle mile concerns for mobile providers in an Alaska Connect Fund. Based on the fiber and microwave network maps and middle mile updates that the original eight mobile providers submitted, it appears that several of the mobile-provider participants could reach areas with multiple transport providers—which are areas most likely to offer transport at competitive prices—but mobile-provider participants either need to add microwave towers or fiber to reach those areas or to link up their own network so that all of their service areas can benefit from the areas with multiple transport providers. For such situations, how can the Commission best proceed in the next version of the plan to ensure that mobile provider service areas are connected to areas with multiple transport providers? The Alaska Plan explicitly allows funds to be spent on building out middle mile, but should the Commission set aside funds, as part of the Alaska Connect Fund, to cover capital costs of middle mile that can have an outsized impact on the last-mile service to an area? If so, how should the

Commission make such a determination? Do additional conversations need to occur with individual mobile providers so that a plan is tailored for them to build the necessary infrastructure to reach areas with multiple transport providers?

62. In an Alaska Connect Fund, should the Commission dedicate some portion of support to middle mile buildout? If so, how should the Commission allocate such support, and where should that funding come from? The Commission seeks comment, for example, on whether some portion of the \$162 million being allocated for unserved areas could be used to support middle mile buildout. If so, how should the Commission allocate those funds? For example, could some portion of the \$162 million be reallocated to a fund dedicated to ensuring middle mile is being constructed to areas with multiple transport providers or internet gateways, where a last-mile provider’s traffic would have transport pricing subject to more competitive pressures? If the Commission were to reallocate a portion of the \$162 million fund, how could this reallocation occur so as to still serve those 5,000 unserved Alaskans who were to benefit from that funding? Could some type of reimbursement program—where a provider submits to the Commission its costs for constructing infrastructure to areas with lower transport costs—be included as part of the Alaska Connect Fund? If the Commission were to make such a fund a part of the Alaska Connect Fund, how could it do so without interfering with other infrastructure programs, such as BEAD? What impact will other infrastructure funding programs, including BEAD, have on mobile providers’ access to middle mile? In its petition, ARCC requests that the \$162 million that is being accumulated for the reverse auction be reallocated to support operating costs of middle mile transport where transport costs are above \$75 per Mbps. Should such a system that provides additional support for high-cost transport be integrated into the Alaska Connect Fund? If so, how could the Commission implement such a system without creating undesirable incentives for providers to incur higher transport costs in order to trigger receipt of this particular universal service support (*i.e.*, how could it encourage carriers to seek the lowest cost, most-efficient middle mile access under ARCC’s proposal)? In particular, how would such a system impact mobile service in Alaska, and are there considerations regarding this issue specifically for mobile services?

63. If the Commission does provide funding opportunities specifically for middle mile construction, what requirements should it impose on providers that receive such funding? Should providers receiving support for the construction of middle-mile facilities be required to share capacity with other carriers on certain terms and conditions, and if so, what should those terms and conditions be? Should the appropriate standard for offering such middle-mile capacity be just and reasonable, commercially available, or something else? Should providers receiving support for the construction of middle-mile facilities be required to commit to not raising rivals' costs or charging monopoly prices? What wholesale and nondiscrimination requirements should apply to providers receiving middle mile funding? What sort of evidence should be provided to demonstrate noncompliance with such conditions, and what kinds of penalties should incur where noncompliance is found? For example, if an Alaska Connect Fund provider is charging lower transport rates in areas with multiple transport providers than areas where it has an effective monopoly, can it have its last-mile support withheld until it lowers its middle-mile rates? Could there be some other form of cap on transport prices by Alaska Connect Fund participants?

64. The Commission also seeks comment on the best approach for determining whether the availability of new middle mile service should result in changes to Alaska Connect Fund mobile providers' performance plans. Should the Commission conclude that middle mile is not commercially available if the Alaska Connect Fund participant must pay a particular price per Mbps? If so, what price per Mbps makes middle-mile effectively not commercially available to mobile-provider participants so that they could not provide rates and services that are reasonably comparable to urban areas, such as Anchorage? If new middle mile becomes available, but an Alaska mobile provider claims it is too expensive to be commercially available, should the Commission adopt a process whereby WTB provides notice to the mobile provider on whether it is required to submit a new performance plan after reviewing the costs and terms associated with the new middle mile service? Should providers that are providing fixed services at speeds above their mobile services commitments be deemed to have sufficient middle mile available to it or are there reasons to believe that middle mile is constrained

for the mobile provider, even if its wireline affiliate is meeting its commitments in an area?

65. Has the evolution of satellite networks and hybrid satellite-terrestrial networks restrained middle mile prices at sufficient service quality levels that can be integrated into considerations of middle mile being commercially available to an area? The Commission seeks comment more broadly on how the evolution of satellites, particularly the hybrid satellite-terrestrial networks, would impact services offered under the Alaska Connect Fund.

66. *Areas Receiving Duplicative Support.* The Commission has sought to eliminate duplicative support—the provision of support to more than one competitive ETC in the same area—in the high-cost program. To address the potential for duplicative support over time in the Alaska Plan, the Commission indicated that it would implement a process in the second half of the Plan to eliminate such support in areas where Alaska Plan support was going to two or more subsidized 4G LTE providers as of December 31, 2020, as reflected in the March 31, 2021 FCC Form 477 data. The *2016 Alaska Plan Order* also included a Further Notice of Proposed Rulemaking to address the logistics of how to handle situations where the Commission addresses areas receiving duplicative support with 4G LTE under the Alaska Plan.

67. It is generally not the policy of the USF to subsidize competition. Under the Alaska Plan, however, in some areas as many as three mobile-provider participants are receiving support and serving the same eligible area. In a filing before its petition for rulemaking, ATA indicated that the Commission should not address duplication before BDC data became available. In a more recent filing, ATA indicated that reducing support would threaten the financial stability of carriers and impact their ability to meet their commitments. How should the Commission address situations where two or more prospective participants of the Alaska Connect Fund cover the same geographic area? Now that BDC data are available for use, what is the best way to determine which areas are receiving duplicative support? For example, would requiring a provider's performance plan to specify each hex-9 that it is serving help to identify duplication?

68. Should the Commission continue to provide universal service support to two or more providers in the same geographic area? If there are multiple subsidized providers serving the same area, should the Commission allow only

one subsidized provider to continue receiving support in that area? Should the level of service being provided be a factor in determining the approach? For example, if two providers are offering 2G or one is offering 2G and another 3G, should that be treated differently than if two providers are offering 4G LTE? Alternatively, does the fact that multiple providers are covering the same area indicate that the area should be deemed ineligible for support? If an unsubsidized provider enters an area for which another provider is receiving support under the Alaska Connect Fund, should that provider continue to receive support for that area?

69. In areas where multiple subsidized providers serve the same area, would a reverse auction be the most appropriate method to determine which provider should receive the funding for those areas and how much funding should be awarded? If the Commission were to distribute future funding consistent with a reverse auction format or other competitive allocation mechanism, would that be sufficient to address concerns about duplicative support going to an area? For example, could an area-specific reverse auction determine the provider that is willing to meet the public interest requirements for the area at the lowest cost? If the Commission were to address duplicative support via a reverse auction, what barriers to auction participation, if any, would smaller providers face? What actions could the Commission take to reduce those barriers, and what would the costs and benefits of doing so be? For example, should the Commission offer bidding credits to smaller providers that seek to compete in such an auction? Alternatively, would a competitive process similar to the Bringing Puerto Rico Together and the Connect USVI programs be an appropriate mechanism for determining which mobile providers in Alaska receive support? The Commission seeks comment on the evaluation criteria consistent with this approach that would best determine which provider should receive support.

70. If the Commission does not use a reverse-auction or competitive process format, how can the Commission address duplicative support going forward in Alaska? If the Alaska Connect Fund continues under a similar structure as the Alaska Plan, could the Commission prevent duplicative support at the front end by simply not awarding support to more than one mobile carrier per eligible area? For example, should the Commission immediately redistribute support where there are multiple mobile providers

serving the same area? If so, how would the Commission determine which provider should continue receiving support if it does not use a reverse auction?

71. How should the Commission redistribute the duplicative funds that were going to such areas? Could this redistribution be done by calculating the support that eligible providers are receiving per hexagon across all of that provider's service areas and subtracting the support that the provider receives per hexagon in a particular service area? Should this redistributed funding go into a middle-mile fund, unserved-areas fund, or something else? Alternatively, where such duplication is found, should the Commission allow the providers that would no longer receive support for that particular area to submit new hex-9s (where there is no duplication), in order to retain the same level of support? The Commission seeks comment on how to address duplicative support in remote Alaska, as well as ATA's concerns with addressing any such duplication.

72. Eligibility to participate in the Alaska Plan was limited to competitive ETCs that were serving remote areas in Alaska and certified that they served covered locations in remote areas in Alaska in their September 30, 2011 filing of line counts. Eligible providers interested in participating in the Alaska Plan were required to submit a performance plan and to have that performance plan approved by WTB. The Commission seeks comment on how to determine mobile provider eligibility for the next version of the plan. Should the Commission limit potential participants to the eight mobile providers that participate in the Alaska Plan? Should the Commission determine eligibility using the same criteria as before or apply different criteria?

73. The Alaska Plan provided a one-time option for eligible carriers to elect to participate and barred the participation of any entrants after that point. This structure did not allow for new entrants to receive support, even if they fulfilled needs in eligible areas consistent with the deployment standard of the Alaska Plan. The Bringing Puerto Rico Together and Connect USVI Funds had similar structures for support in Puerto Rico and the U.S. Virgin Islands, respectively. What lessons can be learned from these plans about not allowing new entrants to opt-in during the term of support? If the Commission relies on performance plans in the Alaska Connect Fund, could the Commission accept later entrants after

the plan has initiated? Should the Commission use the same structure for determining the participants in the Alaska Connect Fund? Or, should the Commission allow new entrants to opt-in during the term? How can the Commission ensure that new mobile providers in Alaska, including those that are not ETCs or other potential entrants that are not eligible for the Alaska Connect Fund, are not disadvantaged or discouraged from offering improved mobile services in an eligible area due to the existence of the Alaska Connect Fund support?

74. As mentioned in this document, some providers failed to meet their five-year commitments under the Alaska Plan. Should the Commission limit a mobile-provider participant's eligibility to participate in the next version of the plan if it failed to meet its commitments above a certain percentage at the Alaska Plan's interim or final milestone? If so, what should that non-compliance threshold be? Alternatively, should the Commission make full compliance with interim commitments of the Alaska Plan a prerequisite for a current participant's eligibility to participate in the Alaska Connect Fund? Likewise, should the Commission limit a mobile provider's eligibility if it failed to comply with the public interest obligations under the plan, such as the requirement to offer a similar plan, at a reasonably comparable rate, to one offered in Anchorage, Alaska?

75. The Commission seeks comment on how it should allocate support among the participants of the Alaska Connect Fund. For mobile services, \$739 million of frozen support was allocated to eight mobile providers over the ten-year period of the Alaska Plan. ATA requests that the Commission continue the current support that its members are receiving, adjusted for inflation. The Commission seeks comment on that approach. The support amounts for the Alaska Plan were set by freezing the "identical support" amounts, which were originally based on wireline costs, not mobile costs. As part of universal service reform in 2011, the Commission eliminated the identical support rule because this rule did not ensure efficient levels of funding for wireless carriers. Although the Commission intended to phase down the identical support in Alaska as well, the Commission, in order to avoid a flash cut in support to areas serving remote Alaska, including Alaska Native villages, allowed a delayed phase down of identical support in remote areas of Alaska, which was to begin in 2014 or upon the implementation of Mobility

Fund Phase II and Tribal Mobility Fund Phase II, whichever was later.

76. In 2014, as Mobility Fund Phase II was still being developed, the Commission sought comment on the possibility of freezing Alaskan competitive ETCs' phase down support and asked whether remote areas in Alaska should be subject to exceptions or other conditions for phase down in frozen support. ATA responded by proposing a plan, which would retain its members' respective support frozen at identical support levels, but members would commit to "operate, extend, and upgrade existing broadband networks and operate and deploy wireless service in remote Alaska." Support previously going to nonremote areas of Alaska would be reallocated to a reverse auction fund that would target unserved areas. The Commission adopted ATA's plan for mobile support in Alaska, with some modification, and continued the support levels that were frozen from the identical support rule. The Commission seeks comment on how these frozen support amounts, set over a decade ago, are relevant to mobile service in Alaska today. Are there other ways to allocate funding support in a more prudent and efficient way? Would a reverse auction format, which is to be used in the Alaska unserved areas and the 5G Fund, work for all eligible areas of the Alaska Connect Fund? Are there other methods for competitively allocating support?

77. As the Commission has reformed the high-cost program, it has aimed to base support amounts on a forward-looking cost model or a competitive process. The Commission seeks comment on using these mechanisms going forward for mobile support in eligible areas of Alaska. Under the current funding structure, one provider receives \$56 per committed-to person per year while another provider receives over \$1,500 per committed-to person per year. This vast difference in ranges does not seem to accurately reflect current needs or costs of providing mobile service. Is there a more equitable and/or efficient way to allocate the funding for the benefit of Alaskans, such as designating a particular dollar amount per person served, subject to possible exceptions? If so, should such funding be based on the number of Alaskans served, adjusted using 2020 census data and the population distribution model? What, if any, exceptions should apply? Should the Commission use Fabric data to determine this funding amount? Should a dollar amount be determined by the number of locations served, consistent with the BDC Fabric, and hex-9s with road segments? If the Commission set an

upper bound on the amount of support that can be received per person or location committed to, should it redistribute excess funds to those getting the least amount of money per person/location or use some other method of support distribution that can better serve Alaskans? How should the Commission weight population-less hex-9s that have road segments?

78. The Alaska Plan is a ten-year plan that froze support to the eight mobile-provider participants specified at the beginning of the plan. If new entrants are able to join the Alaska Connect Fund after the plan has begun, what conditions should be met to allow late entry and from what pool of funds should the Commission consider providing support to new entrants in the market? Should any future universal service support allow for additional or alternative competitive ETCs to receive support?

79. As the Commission considers appropriate support amounts, it seeks comment generally on an appropriate budget for the Alaska Connect Fund for mobile service. The Commission seeks comment on how to provide sufficient support amounts to achieve the goals of encouraging secure mobile service deployment, while ensuring prudent use of universal service funds. In what ways should the progress made and challenges encountered during the Alaska Plan inform the budget for the Alaska Connect Fund?

80. *Unserviced Area Funds.* When the Commission adopted the *2016 Alaska Plan Order*, the Commission collected funds that were previously going to areas that the Alaska Plan deemed ineligible or to providers that were deemed ineligible and reallocated those funds to help bring service to unserved areas. The *2016 Alaska Plan Order* defined “unserved areas” as “those census blocks where less than 15% of the population within the census block was within any mobile carrier’s coverage area.” Commission staff estimated that, based on 2010 Census data, these areas contained about 5,000 Alaskans. For these unserved areas, the Commission planned to conduct a reverse auction to distribute the reallocated funds, which staff estimates will total \$162 million by December 31, 2026.

81. The Commission has not yet created the reverse auction contemplated in the *2016 Alaska Plan Order* to bring service to unserved areas. To the extent that areas that were unserved in 2016 are now being served by mobile providers, how can the Commission best bring service to unserved areas? Should the Commission

continue on a path towards completing a reverse auction using these funds? If not, what other alternatives could it consider? For example, could a reverse auction similar to that used by the Commission in the CAF-II and RDOF auctions be used to determine which areas will receive support given the budget, and how much support those areas will receive, with support going to no more than one bidder per area? Would it be problematic if some of the most costly areas were not to be supported through the auction? Should the Commission consider a process similar to the competitive process similar to the Bringing Puerto Rico Together and the Connect USVI Funds? Does waiting on a reverse auction create an incentive not to serve these areas out of fear that it would cause a provider willing to serve that area to lose potential funding? If \$162 million is not the appropriate amount of funding to serve these areas, as it could exceed the per line cap amount, how should the amount be determined, and if there are unused funds, how should the funds be redistributed for the benefit of Alaskans?

82. *Deployment Standard.* In the *2016 Alaska Plan Order*, the Commission stated that it expected that Alaska Plan participants would work to extend 4G LTE throughout remote Alaska. Recognizing the limitations in some areas of remote Alaska, however, the Commission authorized WTB to approve lesser commitments where middle mile was limited, but where new-generation satellite or terrestrial-based middle mile became commercially available over the course of the ten-year Alaska Plan, providers were required to submit new performance plans, factoring in the new backhaul. In addition, mobile providers that could not commit to providing 4G LTE at a minimum of 10/1 Mbps were subject to additional requirements. Since the adoption of the *2016 Alaska Plan Order*, however, the Commission has moved towards supporting 5G-NR as the standard for high-cost mobile-wireless deployment.

83. The Commission seeks comment on the level of service that it should expect from mobile providers that receive support under the Alaska Connect Fund. More than seven years have passed since the Commission set the standard at 4G LTE at 10/1 Mbps. During this time, mobile wireless technologies have advanced significantly. What minimum speeds should the Commission expect mobile participants to achieve, especially when support may be used to deploy advanced technologies such as 5G-NR?

The Alaska Plan supports 2G, 3G, and 4G LTE. For the Alaska Connect Fund, should the Commission continue to support 2G and 3G technologies when most consumers in the U.S. are receiving 4G LTE and 5G services? Should the Commission require a minimum, universal level of technology of 4G LTE, or should it require 5G-NR? If 5G-NR is the new standard of deployment, the Commission seeks comment about also making 7/1 Mbps or 35/3 Mbps the universal standard for the purposes of the Alaska Connect Fund. If the Commission makes the standard of deployment less than 5G-NR at 35/3 Mbps or 7/1 Mbps, is it adequately pursuing the statutory universal service principle that consumers in rural and high-cost areas “should have access to” advanced communications “that are reasonably comparable to those services provided in urban areas”? If the Commission requires a minimum of 4G LTE at the beginning of the Alaska Connect Fund, should it have a mechanism to transition to a 5G-NR technology requirement during the term of the plan? On a related note, if over the course of the Alaska Connect Fund a new technology generation—i.e., 6G—begins receiving support from other high-cost programs, should the Alaska Connect Fund have a mechanism to make that the deployment standard during the plan?

84. *Performance Plans.* In the Alaska Plan, eligible mobile-provider participants were required to have a performance plan approved by WTB, and they were required to update these performance plans periodically. Participating mobile providers were required to identify in their performance plans: (1) the types of middle mile used on that carrier’s network; (2) the level of technology (2G, 3G, 4G LTE, etc.) that carrier provides service at for each type of middle mile used; (3) the delineated eligible populations served, at each technology level by each type of middle mile as they stand currently and at years 5 and 10 of the support term; and (4) the minimum download and upload speeds at each technology level by each type of middle mile as they stood at the beginning of the plan and at years 5 and 10 of the support term. Alaska Plan participants that indicated in their approved performance plans that they were “rely[ing] exclusively on performance-limiting satellite backhaul for a certain portion of the population in their service area” were required to certify when new backhaul with “technical characteristics comparable to at least microwave backhaul” became

“commercially available.” Mobile-provider participants that had not “already committed to providing 4G LTE at 10/1 Mbps to the population served by the newly available backhaul by the end of the plan term” were required to submit revised performance plans factoring in the availability of the new backhaul options when it became commercially available.

85. Given the complexities involved with the administration of Alaska Plan funds, should the Commission continue to require each mobile provider to comply with specific performance obligations under a provider-specific performance plan with management of such obligations delegated to WTB? If the Commission retains this approach, what changes should it adopt to ensure that universal service funds are being used to provide Alaskans with advanced mobile service and providers are meeting their build-out obligations? The Commission seeks comment on what, if any, changes it should make to the performance plan requirements in the next version of the plan, particularly in light of technological advances since the 2016 Alaska Plan and changes to how providers must submit their coverage data to the Commission. Should the Commission consider adding a latency requirement and, if so, should it be the same as the latency requirements for fixed carriers of the Alaska Connect Fund? Should there be a minimum data usage allowance as part of the deployment standard?

86. The BDC has greatly improved mobile coverage maps, but the BDC specifications and requirements are significantly different than the FCC Form 477 coverage maps on which the Alaska Plan commitments were based. Assuming that the Commission requires provider-specific performance plans in the Alaska Connect Fund, it seeks comment on what changes it should make to the performance plan requirements in light of the BDC specifications and reporting requirements. For example, in the original Alaska Plan, FCC Form 477 allowed providers the option of selecting what minimum mobile broadband speeds users could expect to receive, such as 4/1 Mbps from 4G LTE technology, and the provider could submit a coverage polygon for 4G LTE at 4/1 Mbps, accordingly. However, the BDC does not allow 4G LTE coverage polygons to be submitted at speeds less than 5/1 Mbps. The Commission intends to use BDC maps in the next version of the plan to the maximum extent possible. In light of this, the Commission seeks comment on what the appropriate floor should be for

speed commitments, and how it should capture these data using the BDC. If commitments are set at speeds higher than the minimum levels required by the BDC (e.g., 5/1 Mbps 4G LTE; 7/1 Mbps 5G–NR; and 35/3 Mbps 5G–NR), can the Commission require providers to submit their BDC data at these higher speeds? If commitments can be set lower than the BDC floor, how should the Commission capture that data consistent with the Broadband DATA Act’s requirement to base new funding on the BDC?

87. The BDC requires mobile providers to submit mobile availability coverage maps for both outdoor stationary and in-vehicle mobile environments. An outdoor stationary environment typically results in a larger coverage footprint than an in-vehicle mobile environment. Which maps should the Commission require for creation of performance plans? Depending on the BDC maps that the Commission chooses to rely on for a provider’s commitments, what impacts would this have on providers’ obligations and the funding that it provides? For example, would the choice of outdoor stationary environment preclude all in-vehicle mobile testing?

88. Under the Alaska Plan, mobile providers were permitted to offer lesser commitments than 10/1 Mbps 4G LTE if they were constrained by middle mile but were subject to additional requirements. For example, if new middle mile became commercially available in an area where a mobile provider committed to provide less than 10/1 Mbps 4G LTE, the mobile provider had to submit a new performance plan. Under the Alaska Connect Fund, should the Commission continue to permit lesser commitments if providers are constrained by middle mile? Have technological advances, such as the development of new satellite capacity, particularly low-earth orbital satellites, lessened middle mile constraints? If the Commission does allow providers to offer lesser commitments, what information should be provided to demonstrate that an area is middle-mile constrained? The Alaska Plan required providers to categorize their performance plan commitments by the particular type of available middle mile. This categorization ensured that commitments were commensurate with the middle-mile capability available. If the Commission forgoes discrete middle-mile technology rows in the performance plans, should it affect the commitments that providers would make? If the Commission does not require information about middle mile

technology, are there other ways to address concerns about providers offering lesser commitments based on middle mile limitations? For example, could the Commission address concerns about lesser commitments by imposing requirements similar to the extra requirements imposed in the 2016 *Alaska Plan* Order for providers that commit to less than 10/1 Mbps 4G LTE (e.g., submitting an updated plan when new middle mile becomes available)? If a provider commits to less than 35/3 Mbps, should the Commission require the mobile provider to identify all such areas, based on the chosen base geographical unit, where it is not committing to 35/3 Mbps, so if new middle mile becomes commercially available to those areas, it will trigger a new performance plan filing?

89. The Commission also seeks comment on what changes, if any, it should make to coverage commitment requirements. In the Alaska Plan, the mobile provider performance plans committed to cover a specified number of people. To determine the covered population of each provider, WTB and OEA adopted the *Alaska Population Distribution Order*, which distributed the population of a census block to areas where the population is most likely to reside. Where an exception was granted for the Alaska Population Distribution Model, it was often due to having more specific data on where housing was located. Now that the BDC has developed a location Fabric, should the Fabric be used to determine where populations are likely to be located, instead of the Alaska Population Distribution Model for the Alaska Connect Fund? Should the Commission somehow translate Fabric locations to population, and if so, how should that work? If not, should the Commission do it based on coverage of the hex-9 centroid or another method? What implications would this approach have for mobile service in Alaska? Would commitments based on population from the Fabric lead to some unpopulated roads or travel routes remaining unserved, even though mobile service is needed along those routes? If so, how could the Commission address such a situation? Should it consider a hybrid approach that uses both Fabric data and a population methodology or Fabric data and uncovered-roads methodology? Alternatively, should the Commission move to a geographic coverage requirement or some other type of coverage commitment? For example, instead of committing to cover population, should the provider commit to cover the eligible hex-9 (or whatever

base geographic unit the Commission uses) to account for the need to cover unpopulated road areas (e.g., roads that connect populated areas)? What type of coverage commitments will lead to the best coverage in remote Alaska?

90. *Updating Performance Plans.*

Participants were required to update their performance plans during the course of the Alaska Plan under three circumstances: (1) at the four-year mark of the Alaska Plan—December 31, 2020—for the second half of the ten-year term of the Plan; (2) if the provider committed to provide less than 4G LTE at 10/1 Mbps and new terrestrial backhaul or next-generation satellite became commercially available to an area; or (3) if WTB determined that the filing of revised commitments was justified by developments that occurred after the approval of the initial commitments. During the course of the Alaska Plan so far, only two providers submitted additional performance plans that were accepted by WTB, and both were submitted due to the introduction of new middle mile capacity becoming commercially available to an area. Several additional providers were instructed to provide updated performance plans, based on developments that occurred after the initial commitments, but failed to provide updates that reflected the developments. The Commission seeks comment on what, if any, changes it should make to the requirements to update performance plans during the course of the Alaska Connect Fund term to ensure funds are used the most effectively for the benefit of Alaskans. In particular, the Commission seeks comment on how to determine when new commitments would be triggered, how new commitments should be determined, and what penalties it should consider for failure to comply with requirements to submit updated commitments.

91. *Additional Public Interest Obligations.*

Alaska Plan mobile participants have additional public interest obligations. First, providers had to maintain at least the level of service that they had been providing as of the date their individual plans were adopted by WTB and to offer a stand-alone voice service. Second, providers had to certify in their annual compliance filings that their rates were reasonably comparable to rates for comparable offerings in urban areas. Each mobile provider must also demonstrate compliance with this requirement at the end of the five-year and 10-year milestones and may do this by showing that its required stand-alone voice plan, and one service plan that

offers broadband data services, if it offers such plans, were substantially similar to those offered by at least one mobile service provider in the cellular market area for Anchorage and offered at the same or lower rate. Were these additional public interest obligations, in addition to the other obligations of the Alaska Plan, sufficient to ensure that the public interest was being met in extending mobile services in remote areas of Alaska? The Commission seeks comment on what, if any, changes it should make to these public interest obligations. With respect to the reasonably comparable rate requirement, should the Commission adjust the requirement in any way? In the Alaska Plan, some mobile providers have committed to provide 2G and 3G data services. If the Commission allows providers to continue to receive funds for these older generations of technology, how should it compare the 2G and 3G plans to plans in the Anchorage area, which do not appear to have available data plans using these older technologies? Should a provider need to meet the § 54.308(d) requirement in every area it provides service? How can the Commission best advance in Alaska section 254(b)(3) of the Act, which seeks to ensure that advanced telecommunications and information services in rural areas “are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.”

92. The Alaska Plan is set to end on December 31, 2026. The Commission has not determined how support will be allocated to mobile providers in eligible areas after this date. ATA asks the Commission to start a new version of the plan by January 2024, or as soon as possible thereafter, citing the need for advanced planning for future deployments. The Commission seeks comment on when to start the Alaska Connect Fund. Should the Alaska Connect Fund begin as soon as possible, with new commitments? Or should the Commission start it after the Alaska Plan ends? Alternatively, if necessary, should the Commission extend existing funding until after BEAD support has been allocated, as this may affect the type, availability, and cost of middle mile access for mobile services? To the extent that funding stability is needed beyond the end of the Alaska Plan, as ATA suggests, would this also be an issue at the end of an Alaska Connect Fund; and if so, how can providers be held to their final commitments? The Commission also seeks comment on

how to ensure that final commitments to Alaskans in the Alaska Plan are honored if a new plan were to start before the final commitments are required to be fulfilled.

93. If the Commission has not made a decision about an alternate plan by the end of the Alaska Plan—December 31, 2026—should current participants have their support continue indefinitely until the effective date of the new plan or some other potential end date, such as the date on which the Commission approves participants for the new plan or the start of disbursements under the new plan? Should the Alaska Plan support be subject to phase down, consistent with the original identical support phase down? Also, should participants of the Alaska Plan that choose to opt out of or are deemed ineligible for the Alaska Connect Fund stop receiving support on December 31, 2026, consistent with the Alaska Plan? Or should their support phase out on an updated schedule similar to § 54.307(e)(3)(iv)?

94. The Commission seeks comment on how other funding programs should influence the timing of the Alaska Connect Fund for mobile providers. In light of the fact that Alaska will receive more than \$1 billion in funding for broadband deployments under the BEAD program, which has yet to be allocated to specific projects, and that one provider will separately receive approximately \$89 million in Federal funding to deploy middle mile in Alaska, should the Commission wait to start the Alaska Connect Fund until after it has more information about these deployment projects, so that it can ensure the most efficient and effective use of high-cost funds? What impact will these and other broadband infrastructure programs have on mobile service in Alaska, and how can the Commission avoid overlap? ATA suggests that the BEAD program is a reason to act quickly to ensure funding is stable beyond 2026, as “project bidders must provide evidence that they are able to provide sustained operation and committed service of a BEAD-funded network.” ATA notes that if improved middle mile becomes commercially available in an area served due to the BEAD program, new commitments could be triggered in the Alaska Connect Fund. While this approach is similar to the Alaska Plan, which requires providers to submit updated performance commitments when new middle mile becomes commercially available, the Commission notes that the failure of some providers to update performance plans when required was a problem in the Alaska

Plan. The Commission seeks comment on ATA's recommendation that it begin the Alaska Connect Fund before BEAD funding is allocated. In addition, the Commission seeks comment generally on how best to maximize Alaska Connect Fund support and administration for mobile services in light of BEAD and other broadband infrastructure programs.

95. The Commission also seeks comment on the term of the Alaska Connect Fund. Given the pace of technology advancements in mobile services, the Commission seeks comment on whether extending the high-cost support to Alaska through 2034, as ATA suggests, would create an appropriate support term. Would a shorter term promote flexibility and encourage technology advances? Or, alternatively, would a shorter term limit the ability of mobile providers to plan for future deployments and upgrades? Would a longer term have any benefits? The Commission also seeks comment on ATA's proposal that it allows for automatic extensions of a new plan in one-year intervals at the end of the term unless the Commission acts otherwise.

96. The Commission seeks comment on how to ensure accountability and oversight of the Alaska Connect Fund. The Alaska Plan employs carrier self-reporting and drive tests to determine whether providers are meeting their commitments to Alaskans. Mobile-provider participants in the Alaska Plan also were required to file voice and broadband coverage data, consistent with FCC Form 477, which the Commission uses to evaluate whether providers were covering the number of Alaskans with the minimum speeds and technology they were promised. The *2016 Alaska Plan Order* required use of the FCC Form 477 for the Commission's evaluation of coverage, and though the Commission now uses coverage maps from the BDC, WTB and OEA have issued an order requiring continued filing of data pursuant to FCC Form 477 rules in order to have like comparisons throughout the duration of the Alaska Plan. Providers were also required to certify that they had met their commitments at the five-year and ten-year milestones. As noted in this document, several mobile providers had to re-file their Form 477 data based on inaccuracies in their initial filing. What additional accountability measures can the Commission employ to ensure that providers are filing accurate coverage data? The Commission also seeks comment on additional accountability and oversight measures. Under the *2016 Alaska Plan Order*, mobile-provider participants receiving more than \$5

million annually—GCI and Copper Valley Wireless—had to conduct drive testing with a statistically significant number of tests in the vicinity of residences being covered. This required WTB and OEA to construct a drive test model and provide GCI and Copper Valley Wireless a sampling of grid cells in order for GCI and Copper Valley Wireless to meet this requirement.

97. For providers receiving \$5 million or less annually, USAC hired a third-party drive tester to measure performance on some of those providers' networks to verify their coverage. What, if any, changes should the Commission make to the on-the-ground testing requirements under a new plan? If the Commission used the BDC outdoor stationary coverage maps to measure compliance with providers' performance plans, would on-the-ground testing be limited to outdoor, stationary tests and there would be no in-motion testing? Should USAC administer all on-the-ground testing, even for those providers receiving more than \$5 million annually, to ensure uniformity? Should providers receiving more than \$5 million annually from the Alaska Connect Fund either conduct the tests themselves or cover the costs of USAC-administered on-the-ground testing as a condition of participating in a universal service fund? Should the Commission impose any additional accountability measures, such as requiring mobile providers to submit infrastructure data for the areas they receive support that meet the infrastructure specifications that mobile providers would submit through the BDC challenge and verification processes or otherwise expand on the audit provision of the prior plan?

98. Should the Commission consider using the methodologies adopted in the BDC mobile verification process as the basis for substantiating coverage and demonstrating compliance? Specifically, the Commission seeks comment on whether to require providers to submit either on-the-ground test data or infrastructure data, or a combination of the two, to substantiate their coverage in the areas for which they receive Alaska Connect Fund support. In particular, should providers be required to submit on-the-ground test data for areas that are accessible and infrastructure data for areas that are inaccessible? Should they submit infrastructure data sufficient to generate a "core coverage area," as defined in the BDC mobile verification process, and on-the-ground test data for areas outside of such a core coverage area? Alternatively, should providers be allowed to submit either type of data regardless of the type of area in which

they are deploying service? For performance-plan commitments made pursuant to outdoor stationary maps in the BDC, would in-motion audit testing be appropriate for testing that mobile service, and if so, what sort of in-motion testing would be appropriate? For performance-plan commitments made pursuant to in-vehicle BDC coverage, would a minimum in-motion speed of 15 mph be appropriate for drive testing?

99. How can the Commission best ensure a coverage commitment that is enforceable? For example, should the Commission require mobile providers to identify all of the specific hex-9s they commit to serve? Should commitment information be made public? In addition to requiring providers to submit coverage area information to ensure they have met their commitments, should the Commission also require that they submit infrastructure data and/or on-the-ground speed test data for the supported areas, as contemplated in the *5G Fund Further Notice*?

100. If a provider chooses to submit on-the-ground test data in response to a BDC mobile verification request, it must provide such data based on a sample of on-the-ground tests that is statistically appropriate for the area tested. In the BDC, the sampled area is based on H3 resolution-8 hexagonal areas, and the provider must submit the results of at least two tests within each hexagon, and the time of the tests must be at least four hours apart, irrespective of date. The tests are then evaluated to confirm, using a one-sided 95% statistical confidence interval, that the cell coverage has at least a 90% probability of meeting the minimum speed requirements at the cell edge. Should the Commission apply this BDC mobile verification process to the Alaska Connect Fund, at a hex-9 resolution, instead of a hex-8, and require mobile providers to submit on-the-ground test data based on a sample of supported areas? The Commission seeks comment on this approach. Do commenters believe that more tests or fewer tests should be required within a hexagonal area? Should the tests be spaced further than four hours apart or closer together?

101. If a provider chooses to submit infrastructure data in response to a BDC mobile verification request, it must submit additional information beyond what is submitted as part of its biannual BDC availability data (propagation modeling details, as well as link budget and clutter data), including cell-site and antenna data for the targeted area. Should the Commission require the same additional infrastructure data that is required in the mobile verification process when a provider chooses to

submit infrastructure data to substantiate coverage in areas supported by the Alaska Connect Fund? The Commission seeks comment on this approach.

102. In the *2016 Alaska Plan Order*, the interim milestone commitments were due December 31, 2021. This initial assessment resulted in several noncompliance letters and occasional confusion regarding what the mobile-provider participant had committed to. Should the next version of the plan have more than just one interim-commitment milestone dates to ensure that each provider is making steady progress toward its final commitments, as well as ensure that the provider has more opportunities to comply where it may have a misunderstanding of its obligations? Would having multiple interim milestones within the Alaska Connect Fund term raise concerns? Could compliance issues also be improved through annual progress meetings? Should the Commission impose stricter requirements on providers that had a higher percentage of non-compliance, such as annual on-the-ground testing requirements or quarterly submission of infrastructure data based on the BDC infrastructure data specifications or a combination of both? What safeguards can the Commission adopt to improve compliance?

103. As noted in this document, the Commission is committed to working with Tribes and Tribal leaders. The Commission seeks comment on issues related to Tribal Nations and Tribal Lands in Alaska as it considers the Alaska Connect Fund for mobile providers. Are there any Tribal concerns that arise from or could be addressed by the Alaska Connect Fund that are specific to mobile service, and if so, how should those issues best be addressed?

104. *Cybersecurity*. Are there any cybersecurity concerns that arise from or could be addressed by an Alaska Connect Fund that are specific to mobile service, and if so, how should those issues best be addressed? The Supply Chain Reimbursement Program proceedings, for example, have required three mobile-provider participants in the Alaska Plan to remove equipment from untrusted suppliers and, as a practical matter, allowed for network upgrades in the process. Are there security advantages from that proceeding that other providers should integrate? Should mobile-provider participants in the Alaska Connect Fund be required to use the NIST Framework for Improving Critical Infrastructure Cybersecurity to manage cybersecurity

risks and certify accordingly? The Commission proposes that Alaska Connect Fund support recipients be required to implement a cybersecurity risk management plan that reflects the latest version of the NIST Framework for Improving Critical Infrastructure Cybersecurity, that reflects an established set of cybersecurity best practices, such as the standards and controls set forth in the CISA Cybersecurity Cross-sector Performance Goals and Objectives or the CIS Critical Security Controls as these elements pertain to mobile service. The Commission also proposes that carriers be required to implement supply chain risk management plans that incorporate the key practices discussed in NISTIR 8276, Key practices in the Cyber Supply Chain Risk Management Observations from Industry, and related supply chain risk management guidance from NIST 800–161. Would it be appropriate for Alaska Connect Fund recipients to submit to USAC their updated cybersecurity and supply chain risk management plans within 30 days of making a substantive modification thereto, as E-ACAM recipients must? The Commission proposes providers receiving support under the Alaska Connect Fund adopt the same cybersecurity reporting requirements that were adopted in the E-ACAM Notice for both mobile and fixed carriers. The Commission seeks comment on this proposal. What reasons, if any, would support differences in cybersecurity requirements between the mobile and fixed carriers under the Alaska Connect Fund?

105. *Open RAN*. The Commission seeks comment on whether it should use the Alaska Connect Fund to encourage the deployment of Open RAN, and if so, how. In its March 2021 *Open RAN NOI*, 86 FR 16349, March 29, 2021, the Commission sought input on “whether, and if so, how, deployment of Open RAN-compliant networks could further the Commission’s policy goals and statutory obligations, advance legislative priorities, and benefit American consumers by making state-of-the-art wireless broadband available faster and to more people in additional parts of the country.” Soon after the *Open RAN NOI* was adopted, the President signed Executive Order 14036, which encouraged the Commission to “consider . . . providing support for the continued development and adoption of 5G Open Radio Access Network . . . protocols and software.” The Commission has since sought comment in the *5G Fund Further Notice* on

whether and how it should factor the use of Open RAN technologies into the 5G Fund, noting that “Open RAN has the potential to allow carriers to promote the security of their networks while driving innovation, in particular in next-generation technologies like 5G, lowering costs, increasing vendor diversity, and enabling more flexible network architecture.” Should the Alaska Connect Fund encourage Open RAN? If so, how should it do this? In addressing these questions, commenters should identify with particularity industry-accepted Open RAN specifications, standards, or technical requirements that would represent suitable evaluative criteria for mobile providers in remote Alaska.

106. *Renewable Energy*. Fuel costs are expensive in Alaska. And some of this directly affects communications infrastructure operation, such as microwave towers that may be isolated from other infrastructure and require diesel fuel to be brought to the site via helicopter to remote sites. Can the Commission require or create incentives for the use of renewable energy—such as a combination of wind, solar, and batteries—to be used at microwave tower or other communications infrastructure sites, which could lower operational expenditures around fuel costs, as well as be more environmentally friendly?

107. To the extent not already addressed, the Commission, as part of its continuing effort to advance digital equity for all, including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, the Commission seeks comment on how its inquiries may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the Commission’s relevant legal authority.

II. Procedural Matters

Paperwork Reduction Act

108. The NPRM contains possible new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, will invite the general public and the Office of Management and Budget to comment on the information collection requirements contained in the NPRM, as required by the Paperwork Reduction Act of 1995,

Public Law 104–13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

109. *Providing Accountability Through Transparency Act.* The Providing Accountability Through Transparency Act requires each agency, in providing notice of a rulemaking, to post online a brief plain-language summary of the proposed rule. Accordingly, the Commission will publish the required summary of the NPRM on <https://www.fcc.gov/proposed-rulemakings>.

110. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the NPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided in the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the NPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.

111. In the NPRM, the Commission seeks comment regarding the best approach for developing the next phase for the Alaska Connect Fund in order to determine the most effective means of supporting Alaska's remote areas once fixed and mobile support for both incumbent and competitive LECs have ended. The Commission has recognized the inherent challenges in serving these areas of Alaska and understands the necessity in providing innovative solutions and unique accommodations to residents and businesses alike. The Commission also recognizes that there are areas of Alaska that still lack high-quality affordable broadband, where residents may be deprived of the opportunity to keep up with the advancements in technology that Americans living elsewhere benefit from. Currently, the Commission provides high-cost support to Alaska Plan fixed and mobile carriers, ACS, and A–CAM carriers. In the *2016 Alaska Plan Order*, the Commission stated that it would conduct a rulemaking prior to the close of the 10-year support term to determine whether and how support

would be provided after the end of the 10-year support term, and that the Commission would consider adjustments for marketplace changes and the realities of the current time. In the *ACS Order*, the Commission stated that it would conduct a rulemaking in year eight of the program to determine how support would be awarded for the areas at the conclusion of the program. In the NPRM, the Commission initiates those rulemakings as a means of assessing all of the changes, both in technology and in the broadband funding landscape, that have occurred in Alaska since the inception of the Alaska Plan and the *ACS Order* in 2016. The Commission also undertakes a fresh look at the most efficient use of Universal Service Fund high-cost support in Alaska going forward not only to help connect unserved Alaskan communities but also to support existing service and service funded through other Federal and state programs. The Commission relies on the experiences of the Alaskan carriers—many of which are small business entities—and the record stemming from proposals in recent petitions to build a record on how best to structure and target Alaska Connect Fund support.

112. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.” A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

113. *Small Businesses, Small Organizations, and Small Governmental Jurisdictions.* The Commission's actions, over time, may affect small entities that are not easily categorized at present. The Commission therefore describes here, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States which

translates to 33.2 million businesses. Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.” The Internal Revenue Service (IRS) uses a revenue benchmark of \$50,000 or less to delineate its annual electronic filing requirements for small exempt organizations. Nationwide, for tax year 2020, there were approximately 447,689 small exempt organizations in the U.S. reporting revenues of \$50,000 or less according to the registration and tax data for exempt organizations available from the IRS. Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.” U.S. Census Bureau data from the 2017 Census of Governments indicate there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number, there were 36,931 general purpose governments (county, municipal, and town or township) with populations of less than 50,000 and 12,040 special purpose governments—independent school districts with enrollment populations of less than 50,000. Accordingly, based on the 2017 U.S. Census of Governments data, the Commission estimates that at least 48,971 entities fall into the category of “small governmental jurisdictions.”

114. Small entities potentially affected by the rules herein include Wired Telecommunications Carriers, LECs, Incumbent LECs, Competitive LECs, Interexchange Carriers (IXC's), Local Resellers, Toll Resellers, Other Toll Carriers, Prepaid Calling Card Providers, Fixed Microwave Services, Cable and Other Subscription Programming, Cable Companies and Systems (Rate Regulation), Cable System Operators (Telecom Act Standard), Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, Satellite Telecommunications, Wireless Telecommunications Carriers (except Satellite), All Other Telecommunications, Wired Broadband internet Access Service Providers (Wired ISPs), Wireless Broadband internet Access Service Providers (Wireless ISPs or WISPs), internet Service Providers (Non-Broadband), and All Other Information Services.

115. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has

considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”

116. In the NPRM, the Commission takes steps to minimize the economic impact on small entities and considers significant alternatives by proposing and seeking alternative proposals designed to balance its requirements to provide support that is sufficient to achieve the Commission’s universal service goals, while also providing appropriate incentives for prudent and efficient expenditures. With these goals in mind, in the NPRM, the Commission took the steps of considering measures related to the budget for the Alaska Connect Fund support mechanism that could potentially benefit legacy support recipients, including small entities, by having their support shifted towards costs that are trending higher for such carriers. For example, the Commission considered providing funding for both areas that still requires buildout and ongoing support for areas that are already built out. In addition, the Commission also considered allowing the option to participate in the Alaska Connect Fund for small entities and other carriers that are not current support recipients. In considering these matters, the Commission notes that the costs of high-cost universal service is ultimately borne by consumers through the contributions factors assessed on their bills.

117. The Commission also considered alternatives for specific deployment obligations for carriers receiving Alaska Plan support. For example, the Commission considered whether it should change the obligations to require the deployment of broadband at a different speed, for example 100/20 Mbps consistent with the Infrastructure Act. Alternatively, the Commission considered retaining the existing requirement that support recipients offer broadband at speeds of 25/3 Mbps deployment obligations, as well as revisiting deployment obligations to account for another government agency making a qualifying award with enforceable deployment obligations in the carrier’s service area. If the Commission were to adopt lower

broadband speed obligations, like 25/3 Mbps, it might reduce costs for small and other legacy support recipients. A carrier’s costs may also be reduced if other funding programs award funding in the rate-of-return carrier’s service area, and that carrier is no longer required to serve the locations receiving the alternative funding. However, these scenarios may affect support for such carriers if the Commission adjusts support to account for the lower costs or duplicative funding.

118. Additionally, the Commission considered alternatives for specific deployment obligations for mobile-provider participants that receive Alaska Connect Fund support. For example, the Commission considered whether it should require the deployment of 5G–NR at 35/3 Mbps, or whether it should revisit deployment obligations to account for another agency making a qualifying award with enforceable deployment obligations in the carrier’s service area. If the Commission were to adopt lower broadband speed obligations, like 25/3 Mbps, it might reduce costs for small and other legacy support recipients. A carrier’s costs may also be reduced if other funding programs award grants in the mobile participant’s awarded area, and if carriers receiving duplicative support are no longer required to serve the locations receiving the alternative funding. However, as is the case for rate-of-return carriers, these scenarios may result in the reduction of support for these carriers if the Commission adjusts support to account for the lower costs or duplicative funding.

119. Lastly, in consideration of reducing the economic burden small and other entities might experience, the Commission seeks comment on alternatives for reducing a carrier’s support amount to reflect the availability of funding from other Federal and state programs in their service areas or to reflect that an unsubsidized competitor serves the area. For example, the Commission could identify whether the timing for BEAD funding, which instructs states to award funding for unserved locations, underserved locations and community anchor institutions, overlaps with the Alaska Connect Fund funding, thereby warranting changing the timing for awarding support amounts.

120. The matters discussed in the NPRM are designed to ensure the Commission has a better understanding of both the benefits and the potential burdens associated with the different actions and methods before adopting its final rules.

121. To assist in the Commission’s evaluation of the economic impact on small entities, as a result of actions it has proposed in the NPRM, and to better explore options and alternatives, the Commission has sought comment from the parties. In particular, the Commission seeks comment on whether any of the burdens associated the filing, recordkeeping and reporting requirements described in this document can be minimized for small businesses. Through comments received in response to the NPRM and the IRFA, including costs and benefits information and any alternative proposals, the Commission expects to more fully consider ways to minimize the economic impact on small entities. The Commission’s evaluation of the comments filed in this proceeding will shape the final alternatives it considers, the final conclusions it reaches, and the actions it ultimately takes in this proceeding to minimize any significant economic impact that may occur on small entities as a result of any final rules that are adopted.

III. Ordering Clauses

122. *It is ordered* that, pursuant to the authority contained in sections 1, 2, 4, 5, 201–06, 214, 218–220, 251–52, 254, 256, 301, 303, 309, 332, and 403, and of the Act, as amended, 47 U.S.C. 151–52, 154–55, 201–06, 214, 218–20, 251–52, 254, 256, 301, 303, 309, 332, and 403 this NPRM is *adopted*. This NPRM will be *effective* upon publication in the **Federal Register**, with comment dates indicated therein.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–25375 Filed 11–16–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 23–380; RM–11968; DA 23–1053; FR ID 184411]

Television Broadcasting Services Missoula, Montana

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Video Division, Media Bureau (Bureau), has before it a petition for rulemaking filed August 16, 2023, by Sinclair Media Licensee, LLC (Petitioner or Sinclair), the licensee of KECI-TV, channel 13, Missoula, Montana (Station or KECI-TV). As discussed below, the

Station is currently operating on channel 13 and Sinclair successfully petitioned to have its channel changed from channel 13 to channel 20. The Petitioner now requests the substitution of channel 21 for channel 20 at Missoula, Montana (Missoula) in the Table of TV Allotments.

DATES: Comments must be filed on or before December 18, 2023 and reply comments on or before January 2, 2024.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 45 L Street NE, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for the Petitioner as follows: Paul A. Cicelski, Esq., Lerman Senter, PLLC, 2001 L Street NW, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Joyce Bernstein, Media Bureau, at (202) 418-1647; or Joyce Bernstein, Media Bureau, at Joyce.Bernstein@fcc.gov.

SUPPLEMENTARY INFORMATION: In 2021, the Bureau granted Sinclair's request to substitute UHF channel 20 for VHF channel 13 at Missoula, and Sinclair currently holds a construction permit to modify its facility to operate on channel 20. While the adopted channel 20 noise limited service contour (NLSC) did not completely encompass the relevant channel 13 NLSC, the Bureau found there would only be a loss of service to approximately 65 persons, a number the Commission considers *de minimis*. In addition, the adopted channel 20 facility is predicted to serve a total of 252,689 persons, a net gain of 38,879 potential viewers over the existing KECI-TV channel 13 facility. Sinclair simultaneously had requested and was granted the substitution of UHF channel 20 for VHF channel 6 for co-owned station KTVM-TV, Butte, Montana. As a result, both KTVM-TV and KECI-TV would operate on a co-channel basis. Sinclair had determined that predicted interference from both stations operating on channel 20 would affect less than 1 percent of the populations within the noise limited service contours. The Petitioner now requests that we substitute channel 21 for channel 20 for KECI-TV, stating that in preparing to construct the new facilities on channel 20, local engineering staff realized that the real-world interference consequences of both stations operating on channel 20 would result in a significant number of persons receiving interference, a greater impact than was realized when the *TVStudy* analyses had been done. The Petitioner went on to state that "such interference would not be localized, but rather would be spread throughout large portions of the

Missoula and Butte service areas. An analysis provided by the Petitioner using the Commission's *TVStudy* software tool indicates that operation of KECI-TV on channel 21 instead of channel 20 would result in an estimated 40,481 additional persons within the Station's NLSC being able to receive the Station's signal. This is an increase of 1,602 person over the population that would be served if the Station were to remain on channel 20.

We believe that the Petitioner's channel substitution proposal for KECI-TV warrants consideration. Channel 21 can be substituted for channel 20 at Missoula, Montana, as proposed, in compliance with the principal community coverage requirements of section 73.625(a) of the Commission's Rules (rules) at coordinates 47°01'–04.0" N and 114°00'–50.0" W. In addition, we find that this channel change meets the technical requirements set forth in sections 73.616 and 73.623 of the rules. The proposed channel substitution would not cause any additional loss of service, but would increase the population served within KECI-TV's NLSC, as well as within KTVM-TV's NLSC, by resolving co-channel interference issues caused by the stations' approved co-channel operation.

This is a synopsis of the Commission's *Notice of Proposed Rulemaking*, MB Docket No. 23–380; RM–11968; DA 23–1053, adopted November 7, 2023, and released November 7, 2023. The full text of this document is available for download at <https://www.fcc.gov/edocs>. To request materials in accessible formats (braille, large print, computer diskettes, or audio recordings), please send an email to FCC504@fcc.gov or call the Consumer & Government Affairs Bureau at (202) 418–0530 (VOICE), (202) 418–0432 (TTY).

This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, do not apply to this proceeding.

Members of the public should note that all *ex parte* contacts are prohibited from the time a Notice of Proposed Rulemaking is issued to the time the matter is no longer subject to Commission consideration or court review, *see* 47 CFR 1.1208. There are,

however, exceptions to this prohibition, which can be found in section 1.1204(a) of the Commission's rules, 47 CFR 1.1204(a).

See Sections 1.415 and 1.420 of the Commission's rules for information regarding the proper filing procedures for comments, 47 CFR 1.415 and 1.420.

Providing Accountability Through Transparency Act: The Providing Accountability Through Transparency Act, Public Law 118–9, requires each agency, in providing notice of a rulemaking, to post online a brief plain-language summary of the proposed rule. The required summary of this Notice of Proposed Rulemaking/Further Notice of Proposed Rulemaking is available at <https://www.fcc.gov/proposed-rulemakings>.

List of Subjects in 47 CFR Part 73

Television.

Federal Communications Commission.

Thomas Horan,

Chief of Staff, Media Bureau.

Proposed Rule

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICE

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.

■ 2. Amend § 73.622, in the table in paragraph (j), under "Montana", by revising the entry for "Missoula" to read as follows:

§ 73.622 Digital television table of allotments.

*	*	*	*	*
(j) * * *				
Community			Channel No.	
*	*	*	*	*
Montana				
*	*	*	*	*
Missoula		* 11, 21, 23, 25.		
*	*	*	*	*

[FR Doc. 2023–25392 Filed 11–16–23; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 207, 215, 227, and 252

[Docket DARS–2023–0044; Req No. DARS–2024–00016–FR]

RIN 0750–AL24

Defense Federal Acquisition Regulation Supplement: Modular Open Systems Approaches (DFARS Case 2021–D005)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Advance notice of proposed rulemaking.

SUMMARY: DoD is seeking information that will assist in the development of a revision to the Defense Federal Acquisition Regulation Supplement (DFARS) to implement certain elements of sections of the National Defense Authorization Acts for Fiscal Years 2012, 2017, and 2021, which establish contract requirements that enable modular open system approaches. In addition to the request for written comments, DoD will hold a public meeting to hear the views of interested parties.

DATES: Comments on the advance notice of proposed rulemaking should be submitted in writing to the address shown below on or before January 16, 2024, to be considered in the formation of a proposed rule.

Public Meeting: A virtual public meeting will be held on December 14, 2023, from 1:00 p.m. to 5:00 p.m., Eastern time. DoD also plans to reserve time on a separate date to be determined. The public meeting will end at the stated time, or when the discussion ends, whichever comes first.

Registration: Registration to attend the public meeting must be received no later than close of business on December 7, 2023. Information on how to register for the public meeting is provided under the **SUPPLEMENTARY INFORMATION** section of this notice.

ADDRESSES:

Public Meeting: A virtual public meeting will be held using Zoom video conferencing software.

Submission of Comments: Submit comments identified by DFARS Case 2021–D005, using any of the following methods:

○ **Federal eRulemaking Portal:** <https://www.regulations.gov>. Search for “DFARS Case 2021–D005.” Select “Comment” and follow the instructions

to submit a comment. Please include “DFARS Case 2021–D005” on any attached documents.

○ **Email:** osd.dfars@mail.mil. Include DFARS Case 2021–D005 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: David E. Johnson, telephone 202–913–5764.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is seeking information from experts and interested parties in the Government and the private sector that will assist in the development of a revision to the DFARS to implement certain elements of section 804 of the National Defense Authorization Act (NDAA) for FY 2021 (Pub. L. 116–283), section 809 of the NDAA for FY 2017 (Pub. L. 114–328), and section 815 of the NDAA for FY 2012 (Pub. L. 112–81). These statutes apply to DoD only; they do not impact other Federal agencies. Sections 804, 809, and 815 amended 10 U.S.C. 2320 (currently 10 U.S.C. 3771), and section 804 amended 10 U.S.C. 2446a (currently 10 U.S.C. 4401).

Sections 804 and 809 address rights in technical data for interfaces developed exclusively at private expense or with mixed funding. To the maximum extent practicable, section 804 also requires that DoD solicitations and contracts include modular system interfaces for modular systems deemed relevant in the acquisition strategy or other requirements documentation, and other contract deliverables that enable modular open system approaches. Section 815 addresses rights in technical data necessary for segregation and reintegration activities.

DoD previously published in the **Federal Register** proposed DFARS revisions to implement some of these statutory revisions as part of DFARS Case 2012–D022 on June 16, 2016, at 81 FR 39481. That case was suspended during the pendency of the Government-Industry Advisory Panel pursuant to section 813 of the NDAA for FY 2016. As part of the resumption and reorganization of the DFARS data rights cases after the conclusion of the Government-Industry Advisory Panel, this statutory subject matter has been broken out in this separate case.

II. Public Meeting

DoD is interested in continuing a dialogue with experts and interested parties in the Government and the private sector regarding amending the DFARS to implement elements of the aforementioned NDAA sections, which establish contract requirements that enable modular open system approaches.

Registration: Individuals wishing to participate in the virtual meeting must register by December 7, 2023, to facilitate entry to the meeting. Interested parties may register for the meeting by sending the following information via email to osd.dfars@mail.mil and include “Public Meeting, DFARS Case 2021–D005” in the subject line of the message:

- Full name.
- Valid email address, which will be used for admittance to the meeting.
- Valid telephone number, which will serve as a secondary connection method. Registrants must provide the telephone number they plan on using to connect to the virtual meeting.
- Company or organization name.
- Whether the individual desires to make a presentation.

Pre-registered individuals will receive instructions for connecting using the Zoom video conferencing software not more than one week before the meeting is scheduled to commence.

Presentations: Presentations will be limited to 5 minutes per company or organization. This limit may be subject to adjustment, depending on the number of entities requesting to present, in order to ensure adequate time for discussion. If you wish to make a presentation, please submit an electronic copy of your presentation via email to osd.dfars@mail.mil no later than the registration date for the specific meeting. Each presentation should be in PowerPoint to facilitate projection during the public meeting and should include the presenter’s name, title, organization affiliation, telephone number, and email address on the cover page.

Correspondence, Comments, and Presentations: Please cite “Public Meeting, DFARS Case 2021–D005” in all correspondence related to the public meeting. There will be no transcription at the meeting. The submitted presentations will be the only record of the public meeting and will be posted to the following website at the conclusion of the public meeting: https://www.acq.osd.mil/dpap/dars/technical_data_rights.html.

III. Discussion and Analysis

An initial draft of the DFARS revisions under consideration is

available in the Federal eRulemaking Portal at <http://www.regulations.gov>, by searching for “DFARS Case 2021–D005” and selecting “Supporting & Related Material”. The strawman is also available at https://www.acq.osd.mil/dpap/dars/change_notices.html under the publication notice for DFARS Case 2021–D005. The following is a summary of the approach DoD is considering and the feedback DoD is seeking from industry and the public.

A. New or Updated Terms and Definitions Related to Modular Open System Approaches (MOSA)

DoD is considering a revision to the DFARS to include various MOSA-related terms that are adopted or adapted from 10 U.S.C. 3771 and 4401 (formerly 10 U.S.C. 2320 and 2446a), such as “desired modularity”, “interfaces”, “major system component”, “major system platform”, “modular open system approach”, “modular system”, and “modular system interface.” To the extent practicable, the DFARS definitions of these terms parallel those provided in the statutes. Although some of these terms are limited to weapon systems or major defense acquisition programs, 10 U.S.C. 4401 requires application of MOSA to all defense acquisition programs to the maximum extent practicable. To resolve these scope of applicability issues, the revisions under consideration do not limit the above terms to weapon systems or major systems. However, when required in accordance with 10 U.S.C. 3771 and section 804 of the NDAA for FY 2021, limitations regarding certain types of programs or systems are added to the guidance for contracting officers and the clauses.

In addition, DoD is considering updates to existing terms to enable the MOSA objectives of the statutes being implemented. For example, the revisions under consideration update the term “form, fit, and function data” to include the overall characteristics of an item, component, or process that enable modular open system approaches. These revisions are made in the clauses at DFARS 252.227–7013, Rights in Technical Data—Other Than Commercial Products or Commercial Services; 252.227–7015, Technical Data—Commercial Products and Commercial Services; and 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program. The revisions under consideration clarify the definition of “form, fit, and function data” by incorporating additional

elements that “permit identification of physically or functionally equivalent items or processes” from the Federal Acquisition Regulation definition of “form, fit, and function data”, such as configuration, mating, and attachment characteristics. The revisions under consideration also add similar MOSA-enabling characteristics to this definition that “permit identification of physically or functionally equivalent items or processes”, such as architecture, logical, interface, interoperability, compatibility characteristics. For the same reasons, the analogous term “form, fit, and function software” is added to DFARS 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, and 252.227–7018, as well as the guidance for contracting officers. The revisions under consideration delineate the scope of these terms by expressly indicating that these terms do not include detailed manufacturing and process data, computer programs, or source code.

In addition, new terms “interface specification”, “interface implementation data”, and “interface implementation software” are added to 252.227–7013, 252.227–7014, 252.227–7015, and 252.227–7018. The updated definition of “form, fit, and function data” creates a need for the new DFARS term “interface specifications”, which is a subset of form, fit, and function data or form, fit, and function software that pertains to or describes an interface. To enable the MOSA principles in sections 804 of the NDAA for FY 2021, 809 of the NDAA for FY 2017, and 815 of the NDAA for FY 2012, the terms “interface implementation data” (IID) and “interface implementation software” (IIS) are added to capture MOSA-enabling technical data and software that provide a greater level of detail than form, fit, and function data and software regarding a developer’s implementation of an interface. In particular, IID is defined as technical data that—

(i) Describes the detailed steps, sequences, characteristics, and conditions used or specified by the developer to implement an interface; and

(ii) Has sufficient detail necessary to permit segregation of an item or process from, or reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes.

Similarly, IIS is defined as computer software that—

(i) Describes the detailed steps, sequences, characteristics, and conditions used or specified by the

developer to implement an interface; and

(ii) Has sufficient detail necessary to permit segregation of computer software from, or reintegration of that software (or a physically or functionally equivalent item or process) with, other software.

A related DFARS Case 2019–D044, Rights in Technical Data, implements 10 U.S.C. 3772(a)(9), which references sections of 10 U.S.C. 3771 that are implemented in this case. Accordingly, the MOSA-related definitions and other content under consideration in this case are consistent with proposed revisions in DFARS 2019–D044 for which an advance notice of proposed rulemaking is being published on the same date as these proposed revisions for DFARS Case 2021–D005. DoD recommends review and consideration of both of these cases in tandem for a more holistic view of the proposed revisions for these related subject matters.

B. License Rights Related to Interface Data and Software

DoD is considering a revision to the DFARS to implement statutory amendments to 10 U.S.C. 3771 (formerly 10 U.S.C. 2320) related to technical data rights. In addition, DoD is considering analogous changes to the DFARS related to software rights. These amendments primarily affect: (1) the types of technical data and software for which the Government has a “Government purpose rights” license; and (2) instances when disclosure outside of the Government is permitted for technical data or software related to privately developed technology.

Consistent with 10 U.S.C. 3771(b)(4)(A)(ii) (formerly 10 U.S.C. 2320(a)(2)(D)(i)(II)), the definition of the term “limited rights” is revised to permit disclosure outside the Government if the reproduction, release, disclosure, or use is a release or disclosure of interface implementation data necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes, subject to existing protections in the clauses (e.g., notice and nondisclosure agreements). Similarly, the definition of the term “restricted rights” is revised to permit contractors or subcontractors to use, modify, reproduce, perform, display, release, or disclose interface implementation software necessary for segregation of computer software from, or reintegration of that software (or functionally equivalent software) with, other

computer software, subject to existing protections in the clauses.

Consistent with 10 U.S.C. 3771(b)(7) (formerly 10 U.S.C. 2320(a)(2)(G)), the license grant sections in DFARS 252.227-7013, DFARS 252.227-7014, DFARS 252.227-7015, and DFARS 252.227-7018 are updated to provide the Government with a “Government purpose rights” license to interface implementation data or software pertaining to a modular system interface—

(i) Used in a modular open system approach;

(ii) For a modular system connected to a weapon system, major system, or major system component;

(iii) Developed exclusively at private expense; and

(iv) Identified in a solicitation or a contract.

Similarly, these requirements are applied to commercial software in the guidance at DFARS 227.7202-3(c) because there is no clause for commercial computer software. The existing guidance to contracting officers for commercial software centers around the standard customer licenses customarily provided to the public, unless the standard license does not meet the needs of the Government. To fit within this existing licensing framework for commercial software, the guidance under consideration at DFARS 227.7202-3(c) establishes the Government needs regarding license rights to support modular open systems approaches or modular systems.

DoD’s approach to defining form, fit, and function data and software, IID, and IIS was critical in implementing the above license scheme in 10 U.S.C. 3771 (formerly 10 U.S.C. 2320). As discussed, IID and IIS provide a greater level of detail than form, fit, and function data and software. However, IID and IIS only have the level of detail necessary to enable segregation and reintegration activities. There were three objectives behind DoD’s approach to defining these terms and developing this license scheme: (1) clarifying the scope of form, fit, and function data and software to better enable the MOSA objectives of the statutes being implemented; (2) limiting overlap and avoiding confusion between IID or IIS and form, fit, and function data or software; and (3) providing clear boundaries on instances when limited rights data and restricted rights software that is IID or IIS may be disclosed outside of the Government. To accomplish this last objective and protect the private technology development investments of contractors, content requirements are included in the definitions of IID and IIS, and

requirements related to the purpose of the Government’s authorized use and release of such data and software are included in the limited rights and restricted rights definitions.

In addition, the revisions under consideration incorporate the new term “form, fit, and function software” within the license grant section of the software rights clauses. Because the Government has an unlimited rights license in form, fit, and function data, DFARS 252.227-7014, DFARS 252.227-7018, and the guidance for contracting officers related to commercial software at DFARS 227.7202-3(c)(1) are revised to indicate that the Government has an unlimited rights license in form, fit, and function software.

C. MOSA-Related Requirements for Acquisition Plans

In accordance with section 804(a)(2)(B) and (C), DoD is considering new requirements for acquisition plans in DFARS 207.103(i), which require that solicitations and contracts for new or existing systems identify modular system interfaces and certain MOSA-related technical data or software, to the maximum extent practicable. The new guidance for acquisition plans also requires that bilateral contract modifications or other contracts include these MOSA-related requirements, when the existing contract for a new or existing system does not include these requirements.

To enable application of these requirements of section 804(a)(2)(B) and (C) to commercial software, the revisions under consideration at DFARS 227.7102-1(a) and 227.7202-1(c)(1) expressly indicate that the Government may require delivery of form, fit, and function software and the MOSA-related commercial technical data and software that is not customarily provided to the public in the above solicitation and contract requirements.

D. MOSA-Related Revisions Related to Contractor Assertions of Data and Software Rights Restrictions

In view of the amendments to former 10 U.S.C. 2320(a)(2)(G), DoD is considering revisions to requirements related to contractor assertions of data and software rights restrictions. Generally, development at private expense, either exclusively or partially, is the basis for asserting restrictions. However, the revisions under consideration indicate that the Government has a government purpose rights license to interface implementation data or interface implementation software pertaining to a modular system interface, as described

in paragraph (b)(2) of DFARS 252.227-7013, 252.227-7014, and 252.227-7018. Accordingly, DFARS 252.227-7013(e), 252.227-7014(e), 252.227-7017(d), and 252.227-7018(e) are revised to include these new bases for contractor assertions for restrictions. The revisions under consideration also include a requirement for offerors and contractors to identify and describe modular system interfaces, if applicable.

E. Seeking Public Comment on Additional Topics

In addition to seeking public comment on the substance of the initial draft DFARS revisions, DoD is also seeking information regarding any corresponding change in the burden, including associated costs or savings, resulting from contractors and subcontractors complying with the initial draft DFARS implementation. More specifically, DoD is seeking information regarding any anticipated increase or decrease in such burden and costs relative to the burden and costs associated with complying with the current DFARS implementing language.

List of Subjects in 48 CFR Parts 207, 215, 227, and 252

Government procurement.

Jennifer D. Johnson,
Editor/Publisher, Defense Acquisition Regulations System.

[FR Doc. 2023-25407 Filed 11-16-23; 8:45 am]

BILLING CODE 6001-FR-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 227 and 252

[Docket DARS-2023-0045; Req No. DARS-2024-00015-FR]

RIN 0750-AK82

Defense Federal Acquisition Regulation Supplement: Rights in Technical Data (DFARS Case 2019-D044)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Advance notice of proposed rulemaking.

SUMMARY: DoD is seeking information that will assist in the development of a revision to the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Acts for Fiscal Years 2012 and 2017, which

address deferred ordering of technical data, including in cases when the Government does not challenge a restrictive marking or asserted restriction in technical data. In addition to the request for written comments on this proposed rule, DoD will hold a public meeting to hear the views of interested parties.

DATES: Comments on the advance notice of proposed rulemaking should be submitted in writing to the address shown below on or before January 16, 2024, to be considered in the formation of a proposed rule.

Public Meeting: A virtual public meeting will be held on December 15, 2023, from 1:00 p.m. to 5:00 p.m., Eastern time. DoD also plans to reserve time on a separate date to be determined. The public meeting will end at the stated time, or when the discussion ends, whichever comes first.

Registration: Registration to attend the public meeting must be received no later than close of business on December 8, 2023. Information on how to register for the public meeting is provided under the **SUPPLEMENTARY INFORMATION** section of this notice.

ADDRESSES:

Public Meeting: A virtual public meeting will be held using Zoom video conferencing software.

Submission of Comments: Submit comments identified by DFARS Case 2019–D044, using any of the following methods:

○ **Federal eRulemaking Portal:** <https://www.regulations.gov>. Search for “DFARS Case 2019–D044.” Select “Comment” and follow the instructions to submit a comment. Please include “DFARS Case 2019–D044” on any attached documents.

○ **Email:** osd.dfars@mail.mil. Include DFARS Case 2019–D044 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: David E. Johnson, telephone 202–913–5764.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is seeking information from experts and interested parties in the Government and the private sector that will assist in the development of a revision to the DFARS to implement

section 815(a)(2) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012 (Pub. L. 112–81) and section 809(c) of the NDAA for FY 2017 (Pub. L. 114–328). These statutes apply to DoD only; they do not impact other Federal agencies. Sections 815(a)(2) and 809(c) amended 10 U.S.C. 2320 (currently 10 U.S.C. 3771 and 10 U.S.C. 3772) by adding paragraphs (b)(9) and (b)(10), respectively. 10 U.S.C. 2320(b)(9) addressed the Government’s rights for deferred ordering of technical data. 10 U.S.C. 2320(b)(10) established that the Government is not foreclosed from requiring the delivery of the technical data by the Government’s failure to challenge restrictive markings or asserted rights in technical data.

DoD previously published in the **Federal Register** proposed DFARS revisions to implement the statutory revisions in the NDAA for FY 2012 as part of DFARS Case 2012–D022 on June 16, 2016, at 81 FR 39481. That case was suspended during the pendency of the Government-Industry Advisory Panel pursuant to section 813 of the NDAA for FY 2016. During that pause in rulemaking, section 809(c) of the NDAA for FY 2017 further revised the deferred ordering statutory framework. As part of the resumption and reorganization of the DFARS data rights cases after the conclusion of the Government-Industry Advisory Panel, the implementation of these two statutory revisions has been broken out in this separate case due to the distinct subject matter and limited nature of the statutory revisions.

II. Public Meeting

DoD is interested in continuing a dialogue with experts and interested parties in the Government and the private sector regarding amending the DFARS to implement the aforementioned NDAA sections.

Registration: Individuals wishing to participate in the virtual meeting must register by December 8, 2023, to facilitate entry to the meeting. Interested parties may register for the meeting by sending the following information via email to osd.dfars@mail.mil and include “Public Meeting, DFARS Case 2019–D044” in the subject line of the message:

- Full name.
- Valid email address, which will be used for admittance to the meeting.
- Valid telephone number, which will serve as a secondary connection method. Registrants must provide the telephone number they plan on using to connect to the virtual meeting.
- Company or organization name.
- Whether the individual desires to make a presentation.

Pre-registered individuals will receive instructions for connecting using the Zoom video conferencing software not more than one week before the meeting is scheduled to commence.

Presentations: Presentations will be limited to 5 minutes per company or organization. This limit may be subject to adjustment, depending on the number of entities requesting to present, in order to ensure adequate time for discussion. If you wish to make a presentation, please submit an electronic copy of your presentation via email to osd.dfars@mail.mil no later than the registration date for the specific meeting. Each presentation should be in PowerPoint to facilitate projection during the public meeting and should include the presenter’s name, title, organization affiliation, telephone number, and email address on the cover page.

Correspondence, Comments, and Presentations: Please cite “Public Meeting, DFARS Case 2019–D044” in all correspondence related to the public meeting. There will be no transcription at the meeting. The submitted presentations will be the only record of the public meeting and will be posted to the following website at the conclusion of the public meeting: https://www.acq.osd.mil/dpap/dars/technical_data_rights.html.

III. Discussion and Analysis

An initial draft of the DFARS revisions under consideration is available in the Federal eRulemaking Portal at <https://www.regulations.gov>, by searching for “DFARS Case 2019–D044”, and selecting “Supporting & Related Material.” The strawman is also available at https://www.acq.osd.mil/dpap/dars/change_notices.html under the publication notice for DFARS Case 2019–D044.

In addition, the revisions under consideration for this case include some definitions and other content that is consistent with revisions contained in a related case DFARS Case 2021–D005, Modular Open Systems Approaches, for which an advance notice of proposed rulemaking is being published on the same date as these revisions under consideration for DFARS Case 2019–D044. DoD recommends review and consideration of both of these cases in tandem for a more holistic view of the revisions under consideration for these related subject matters.

The following is a summary of the approach DoD is considering and the feedback DoD is seeking from industry and the public.

A. Deferred Ordering of Technical Data

Consistent with 10 U.S.C. 3772(a)(9) (formerly 10 U.S.C. 2320(b)(9)), DoD is considering a revision to the clause at DFARS 252.227–7027, Deferred Ordering of Technical Data or Computer Software, and the associated guidance to contracting officers at DFARS 227.7103–8 and 227.7203–8. In particular, the revisions under consideration include the statutory requirement for a determination that—

- The technical data is needed for the purpose of procurement, sustainment, modification, or upgrade (including through competitive means) of a major system or subsystem thereof, a weapon system or subsystem thereof, or any noncommercial product or process; and
- The technical data pertains to an item or process developed in whole or in part with Federal funds; or is described in subparagraphs (D)(i)(II), (F), and (G) of subsection (a)(2) of 10 U.S.C. 2320.

Subparagraphs (D)(i)(II), (F), and (G) of subsection (a)(2) of 10 U.S.C. 2320 (currently 10 U.S.C. 3771(b)(4)(A)(ii), (b)(6), and (b)(7)) reference technical data related to interfaces necessary for segregation and reintegration activities, technical data pertaining to interfaces developed with mixed funding, and technical data pertaining to modular system interfaces developed exclusively at private expense or with mixed funding, respectively.

The definition and other implementation of these types of technical data that enable modular open system approaches (MOSA) are core elements of the revisions under consideration in DFARS Case 2021–D005, which implement these and other new MOSA-related statutory requirements. To ensure consistency with DFARS Case 2021–D005, the revisions under consideration in this DFARS Case 2019–D044 incorporate the relevant definitions of such MOSA-related terms as they appear in DFARS Case 2021–D005, including the terms “interface implementation data”, “interface implementation software”, and “interface specification”. “Interface implementation data” means technical data that—

- Describes the detailed steps, sequences, characteristics, and conditions used or specified by the developer to implement an interface; and
- Has sufficient detail necessary to permit segregation of an item or process from, or reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes.

The term “interface implementation software” is defined similarly to cover computer software, rather than technical data, that meets the same criteria.

“Interface specification” means form, fit, and function data or form, fit, and function software that pertains to or describes an interface. The terms “form, fit, and function data” and “form, fit, and function software” are also defined in this case and DFARS Case 2021–D005.

In particular, the revisions under consideration focus on the following categories of technical data in the implementation of 10 U.S.C. 2320(b)(9)(B)(ii) (currently 10 U.S.C. 3772(a)(9)(B)(ii)):

- Technical data described at 10 U.S.C. 3771(b)(4)(ii) (formerly 10 U.S.C. 2320(a)(2)(D)(i)(II)) is implemented by the combination of interface specification technical data and interface implementation data between an item or process or other items or processes necessary for the segregation of an item or process from, or the reintegration of that item, process, or a physically or functionally equivalent item or process with, other items or processes.

- Technical data described at 10 U.S.C. 3771(b)(7) (formerly 10 U.S.C. 2320(a)(2)(G)), and more specifically the subtype of such data related to an interface developed exclusively at private expense, is implemented by the combination of interface specification technical data and interface implementation data pertaining to a modular system interface as described in paragraph (b)(2) of the clauses at DFARS 252.227–7013, Rights in Technical Data—Other Than Commercial Products or Commercial Services; 252.227–7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation; 252.227–7015, Technical Data—Commercial Products and Commercial Services; and 252.227–7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program.

This implementation does not separately reference the technical data covered by 10 U.S.C. 3771(b)(6) (formerly 10 U.S.C. 2320(a)(2)(F)), which is technical data that pertains to interfaces developed with mixed funding, because this data is subsumed within another category of technical data already covered in the clause at DFARS 252.227–7027: “technical data [that] pertains to an item or process developed . . . with mixed funding”. Therefore, it is unnecessary to list “technical data that pertains to

interfaces developed with mixed funding” as a separate category of technical data in the clause.

In short, DoD’s approach to the DFARS revisions under consideration is centered on enabling MOSA, which is consistent with the statutory intent of 10 U.S.C. 3771(b)(4)(A)(ii), (b)(6), and (b)(7) (formerly 10 U.S.C. 2320(a)(2)(D)(i)(II), (F), and (G), respectively). As discussed in the advance notice of proposed rulemaking for DFARS Case 2021–D005, interface implementation data (IID) (and analogously, interface implementation software (IIS)) provides a greater level of detail than an interface specification (*i.e.*, form, fit, and function data or form, fit, and function software that pertains to an interface). Although the statutory framework allows the deferred ordering of IID or IIS that is necessary for segregation or reintegration or related to modular system interfaces, in any individual case DoD may not require the detail in IID or IIS and may require only the lesser detail provided in an interface specification.

For the same reasons, the revisions under consideration similarly apply the statutory amendments in 10 U.S.C. 3772(a)(9) (formerly 10 U.S.C. 2320(b)(9)) to computer software and computer software documentation in the clause at DFARS 252.227–7027, as well as the associated guidance for contracting officers.

B. Statutory Amendments Related to Challenges to Restrictive Markings or Asserted Restrictions in Technical Data

Consistent with 10 U.S.C. 3772(a)(10) (formerly 10 U.S.C. 2320(b)(10)), DoD is proposing to revise the clause at DFARS 252.227–7037, Validation of Restrictive Markings on Technical Data. In particular, the revisions under consideration at DFARS 252.227–7037, paragraph (j), indicate that a decision by the Government, or a determination by the contracting officer, to not challenge a restrictive marking or asserted restriction shall not foreclose the Government from requiring delivery of the technical data.

Consistent with long-standing DFARS implementation of the procedures for validation of asserted restrictions, the revisions required by statute for technical data are also being considered for the analogous clause covering noncommercial computer software at DFARS 252.227–7019, Validation of Asserted Restrictions—Computer Software. The revisions under consideration add a new paragraph (i) related to software and documentation that closely parallels the language in DFARS 252.227–7037, paragraph (j).

C. Seeking Public Comment on Additional Topics

In addition to seeking public comment on the substance of the draft DFARS revisions, DoD is also seeking information regarding any corresponding change in the burden, including associated costs or savings, resulting from contractors and subcontractors complying with the draft revised DFARS implementation. More specifically, DoD is seeking information regarding any anticipated increase or decrease in such burden and costs relative to the burden and costs associated with complying with the current DFARS implementing language.

List of Subjects in 48 CFR Parts 227 and 252

Government procurement.

Jennifer D. Johnson,
Editor/Publisher, Defense Acquisition Regulations System.

[FR Doc. 2023–25406 Filed 11–16–23; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 231113–0266]

RIN 0648–BM59

Fisheries of the Northeastern United States; 2024 and Projected 2025 Specifications for the Summer Flounder and Scup Fisheries, and 2024 Specifications for the Black Sea Bass Fishery

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes 2024 specifications for the summer flounder, scup, and black sea fisheries, and projected 2025 specifications for summer flounder and scup. The implementing regulations for the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan require

us to publish specifications for the upcoming fishing year for each of these species and to provide an opportunity for public comment. The proposed specifications are intended to establish allowable harvest levels for these species that will prevent overfishing, consistent with the most recent scientific information.

DATES: Comments must be received on or before December 2, 2023.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2023–0131, by the following method:

Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <https://www.regulations.gov> and enter NOAA–NMFS–2023–0131 in the Search box. Click on the “Comment” icon, complete the required fields, and enter or attach your comments.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are part of the public record and will generally be posted for public viewing on <https://www.regulations.gov> without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

A Supplemental Information Report (SIR) was prepared for the 2024 black sea bass specifications. An Environmental Assessment (EA) was prepared for the 2024 and projected 2025 summer flounder and scup specifications. Copies of the SIR and EA are available on request from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 North State Street, Dover, DE 19901. The SIR and EA are also accessible via the internet at <https://www.mafmc.org/supporting-documents>.

FOR FURTHER INFORMATION CONTACT: Emily Keiley, Fishery Policy Analyst, (978) 281–9116, or emily.keiley@noaa.gov.

SUPPLEMENTARY INFORMATION:

General Background

The Mid-Atlantic Fishery Management Council and the Atlantic States Marine Fisheries Commission cooperatively manage the summer flounder, scup, and black sea bass fisheries. The Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) outlines the Council’s process for establishing specifications. The FMP requires NMFS to set an acceptable biological catch (ABC), annual catch limit (ACL), annual catch targets (ACT), commercial quotas, recreational harvest limits (RHL), and other management measures, for 1 to 3 years at a time. This action proposes 2024 ABCs, as well as the recreational and commercial ACLs, ACTs, commercial quotas, and RHLs for all three species, consistent with the recommendations made by the Commission’s Summer Flounder, Scup, and Black Sea Bass Board and Council at their joint August 2023 meeting. This action also proposes projected 2025 ABCs and corresponding specifications for summer flounder and scup.

Proposed 2024 and Projected 2025 Specifications

Summer Flounder Specifications

The Council and Board-recommended 2024 and projected 2025 summer flounder catch and landings limits are shown in table 1. The recommendations are based on the averaged 2024–2025 ABCs recommended by the Council’s Science and Statistical Committee (SSC). This approach allows for constant catch and landings limits across both years. The ABCs are based on the overfishing limit (OFL) and the Council’s risk policy, resulting in a 32- to 38-percent probability of overfishing. For summer flounder, this results in a 42-percent decrease in the recommended 2024 and 2025 ABC relative to the 2023 ABC. The proposed 2024–2025 commercial quota represents a 42-percent decrease compared to the 2023 quota, and an approximately 30-percent reduction compared to 2022 reported landings. The proposed 2024–2025 RHL is a 40-percent decrease compared to the 2023 RHL.

TABLE 1—SUMMARY OF 2024 AND PROJECTED 2025 SUMMER FLOUNDER FISHERY SPECIFICATIONS

Specifications	Million lb	Metric ton
OFL	22.98 (2024) 24.97 (2025)	10,422 (2024) 11,325 (2025)
ABC	19.32	8,761
Commercial ACL = ACT	10.62	4,819

TABLE 1—SUMMARY OF 2024 AND PROJECTED 2025 SUMMER FLOUNDER FISHERY SPECIFICATIONS—Continued

Specifications	Million lb	Metric ton
Commercial Quota	8.79	3,987
Recreational ACL = ACT	8.69	3,942
Recreational Harvest Limit	6.35	2,879

The initial 2024 state-by-state summer flounder quotas are provided in table 2. As required in Amendment 21 (85 FR 80661), if the commercial quota in any year is higher than 9.55 million lb (4,332 mt), the first 9.55 million lb (4,322 mt) is distributed according to the baseline formula, and any additional quota, beyond this threshold, will be

distributed in equal shares to all states except Maine, Delaware, and New Hampshire, which would split 1 percent of the additional quota. Because this year's quota is below the threshold, the state-by-state allocations below are based on the baseline allocations (the baseline allocations were established through Amendment 2 and modified by

Amendment 4). Through the final rule for this action, prior to the start of the fishing year, we will announce any adjustments necessary to address any long-standing overages or potential 2023 overages to provide the states with their final quotas.

TABLE 2—INITIAL 2024 SUMMER FLOUNDER STATE-BY-STATE QUOTAS

State	Percent share	Initial 2024 quotas * (lb)	Initial 2024 quotas * (mt)
ME	0.04756	4,180	1.90
NH	0.00046	40	0.02
MA	6.82046	599,507	271.93
RI	15.68298	1,378,507	625.28
CT	2.25708	198,394	89.99
NJ	7.64699	672,157	304.89
DE	16.72499	1,470,098	666.83
MD	0.01779	1,564	0.71
VA	2.03910	179,233	81.30
NC	21.31676	1,873,707	849.90
NC	27.44584	2,412,443	1,094.27
Total	100	8,789,830	3,987.02

* Initial quotas do not account for any previous overages.

This action makes no changes to the current commercial management measures, including the minimum fish size (14-inch (36-centimeters (cm)) total length), gear requirements, and possession limits. Changes to 2024 recreational management measures (bag limits, size limits, and seasons) are not considered in this action, but will be considered by the Board and Council later this year.

Black Sea Bass Specifications

No updated stock assessment information is available for black sea bass this year; therefore, the SSC decided to set the 2024 ABC equal to the 2023 ABC. The Council and Board made no changes to the ACLs or ACTs compared to 2023. While the ACLs and ACTs are the same as 2023, updated dead-discard projections for each sector led to a change in the commercial quota and RHL. The Council and Board

approved a 2024 commercial quota of 6 million pound (lb) (2,721 mt), which is a 25-percent increase from 2023, and a 2024 RHL of 6.27 million lb (2,845 mt), which is a 5-percent decrease from 2023. An updated management track stock assessment is anticipated to be available in 2024 for setting future specifications. The Council and Board recommended 2024 black sea bass catch and landings limits are shown in table 3.

TABLE 3—2024 BLACK SEA BASS CATCH AND LANDINGS LIMITS

Specifications	2024	
	Million lb	Metric ton
OFL	17.01	7,716
ABC	16.66	7,557
Expected Commercial Discards	1.50	680
Expected Recreational Discards	2.89	1,311
Commercial ACL = ACT	7.50	3,401
Commercial Quota	6.00	2,721
Recreational ACL = ACT	9.16	4,156
RHL	6.27	2,845

This action proposes no changes to the 2024 commercial management measures for black sea bass, including the commercial minimum fish size (11-inch (27.94-cm) total length) and gear requirements. Changes to 2024 recreational management measures (bag limits, size limits, and seasons) are not considered in this action, but will be considered by the Board and Council later this year.

On August 2, 2023, we partially approved Amendment 23 to the Summer Flounder, Scup, and Black Sea Bass FMP. The approved measures change the Federal coastwide commercial in-season accountability measure such that the commercial fishery will now close when the quota plus an additional buffer of up to 5 percent is projected to be landed. The intent of this buffer is to minimize negative economic impacts when the coastwide quota is reached before all states have fully harvested their

allocations due to overages in individual states.

Each year, through the specification process, the Council and Board will recommend a buffer from 0 to 5 percent. For 2024, the Council and Board have recommended a 5-percent commercial in-season closure buffer, and this action proposes this buffer. Given recent patterns in the fishery, an in-season closure is not expected for 2024; however, the Council and Board agreed that, in the unlikely event it is needed, a 5-percent buffer could have socioeconomic benefits with little risk to stock status.

We are in the process of publishing a final rule to implement the approved buffer provision. If the Amendment 23 final rule is published and effective prior to the final rule implementing these specifications, we intend to implement the Council and Board's proposed 5-percent commercial in-season closure buffer in the final rule for this specifications action. If the Amendment 23 final rule is not

published prior to the finalization of these specifications, we will consider implementing the buffer for 2024 through that action.

Scup Specifications

The Council and Board-recommended 2024–2025 scup catch and landings limits are shown in table 4. The SSC recommended 2024–2025 ABCs are based on the OFL and the Council's risk policy, resulting in a 49-percent probability of overfishing. To ensure that the probability of overfishing remained below 50 percent in each year, the SSC recommended annually varying ABCs for 2024 and 2025. This results in a proposed 2024 ABC that is 49 percent higher than the 2023 ABC; and a proposed 2025 ABC that is 35 percent higher than the 2023 ABC. The proposed scup commercial quota for 2024 is 52 percent higher than the 2023 commercial quota. The proposed 2024 RHL is 43 percent higher than the 2023 RHL.

TABLE 4—2024–2025 SCUP CATCH AND LANDING LIMITS

Specifications	2024		2025	
	Million lb	Metric ton	Million lb	Metric ton
OFL	44.74	20,295	40.55	18,393
ABC	44.13	20,015	39.99	18,139
Expected Commercial Discards	7.39	3,350	7.08	3,211
Expected Recreational Discards	2.17	984	2.08	943
Commercial ACL = ACT	28.68	13,010	25.99	11,790
Commercial Quota	21.30	9,660	18.91	8,579
Recreational ACL = ACT	15.44	7,005	14.00	6,349
RHL	13.27	6,021	11.92	5,406

The commercial scup quota is divided into three commercial fishery quota periods, as outlined in table 5.

TABLE 5—COMMERCIAL SCUP QUOTA ALLOCATIONS FOR 2024 BY QUOTA PERIOD

Quota period	Percent share	lb	mt
Winter I	45.11	9,608,430	4,358
Summer	38.95	8,296,350	3,763
Winter II	15.94	3,395,220	1,540
Total	100.0	21,300,000	9,661

The current quota period possession limits are not changed by this action and are outlined in table 6.

TABLE 6—COMMERCIAL SCUP POSSESSION LIMITS BY QUOTA PERIOD

Quota period	Percent share	Federal possession limits (per trip)	
		lb	kg
Winter I	45.11	50,000	22,680
Summer	38.95	N/A	N/A

TABLE 6—COMMERCIAL SCUP POSSESSION LIMITS BY QUOTA PERIOD—Continued

Quota period	Percent share	Federal possession limits (per trip)	
		lb	kg
Winter II	15.94	12,000	5,443
Total	100.0	N/A	N/A

The Winter I scup commercial possession limit will drop to 1,000 lb (454 kg) when 80 percent of that period's allocation is landed. If the Winter I quota is not fully harvested, the

remaining quota is transferred to Winter II. The Winter II possession limit may be adjusted (in association with a transfer of unused Winter I quota to the Winter II period) via notice in the **Federal**

Register. The regulations specify that the Winter II possession limit increases consistent with the increase in the quota, as described in table 7.

TABLE 7—POTENTIAL INCREASE IN WINTER II POSSESSION LIMITS BASED ON THE AMOUNT OF UNUSED SCUP ROLLED OVER FROM WINTER I TO WINTER II

Initial Winter II possession limit		Rollover from Winter I to Winter II		Increase in initial Winter II possession limit		Final Winter II possession limit after rollover from Winter I to Winter II	
lb	kg	lb	kg	lb	kg	lb	kg
12,000	5,443	0–499,999	0–226,796	0	0	12,000	5,443
12,000	5,443	500,000–999,999	226,796–453,592	1,500	680	13,500	6,123
12,000	5,443	1,000,000–1,499,999	453,592–680,388	3,000	1,361	15,000	6,804
12,000	5,443	1,500,000–1,999,999	680,389–907,184	4,500	2,041	16,500	7,484
12,000	5,443	* 2,000,000–2,500,000	907,185–1,133,981	6,000	2,722	18,000	8,165

* This process of increasing the possession limit in 1,500 lb (680 kg) increments would continue past 2,500,000 lb (1,122,981 kg), but we end here for the purpose of this example.

This action proposes no changes to the 2024 commercial management measures for scup, including the minimum fish size (9-inch (22.9-cm) total length), gear requirements, and quota period possession limits.

This action proposes a potential change to the recreational scup management measures. Currently, there is a Federal recreational scup closure from January 1–April 30. The Board and Council previously asked if we would reconsider this closure. Due to the timing of the closure and the recreational regulation-setting process, we are proposing the removal of the closure through this action. In the fall, additional recreational data and model results will be available, allowing us to determine if it is appropriate to remove the closure. We will reconsider the Federal closure if the analyses available in December demonstrate that the closure is not needed to constrain scup catch to the target level, or if additional Federal or state measures are proposed that eliminate the need for the closure. If there are insufficient data, or, if we determine that the closure remains necessary to constrain scup harvest to the required levels, we will not remove the closure. We will announce our final decision on the closure in the final rule for this action. Additional recreational management measure changes

(including additional adjustments to the open season, possession limits, and minimum fish size) will be considered at the joint Council and Commission meeting in December 2023.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the Summer Flounder, Scup, and Black Sea Bass FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

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

NMFS finds that a 15-day comment period for this action provides a reasonable opportunity for public participation in this action pursuant to Administrative Procedure Act section 553(c) (5 U.S.C. 553(c)), while also ensuring that the final specifications are in place for the start of the fishing year on January 1, 2024 as required by court order (*North Carolina Fisheries Association v. Daley*). A longer comment period and subsequent potential delay in implementation past the start of the 2023 fishing year would be contrary to the public interest, as it could create confusion both in the

industry around current quotas, and with state agencies as they prepare their annual management measures.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities.

The Mid-Atlantic Fishery Management Council conducted an evaluation of the potential socioeconomic impacts of the proposed measures in conjunction with an EA and a SIR. The proposed action would set the 2024 catch and landings limits for summer flounder, scup, and black sea bass based on the recommendations of the SSC, the Council, and Board. This action also proposes projected 2025 summer flounder and scup specifications; however, a future action would be needed to implement these specifications or alternative measures.

Vessel ownership data were used to identify all individuals who own fishing vessels. Vessels were then grouped according to common owners. The resulting groupings were then treated as entities, or affiliates, for purposes of identifying small and large businesses that may be affected by this action.

Affiliates were identified as primarily commercial fishing affiliates if the

majority of their revenues in 2022 came from commercial fishing. Some of these affiliates may have also held party/charter permits. Affiliates were identified as primarily for-hire fishing affiliates if the majority of their revenues in 2022 came from for-hire fishing. Some of these affiliates may have also held commercial permits. Affiliates were identified as small or large businesses based on their average revenues during 2018–2022.

A total of 729 primarily commercial affiliates were identified as potentially impacted by this action based on the definitions above. A total of 723 (99 percent) of these commercial affiliates were classified as small businesses and 6 (1 percent) were classified as large businesses.

A total of 482 primarily for-hire affiliates were identified as potentially impacted by this action based on the definitions above. All 482 of these for-hire affiliates were categorized as small businesses.

Expected Impacts on Commercial Entities

The six potentially impacted primarily commercial large business affiliates had average total annual revenues of \$20.6 million, and \$403,440 on average in annual revenues from summer flounder, scup, and/or black sea bass during 2020–2022. On average, summer flounder, scup, and/or black sea bass accounted for about 2 percent of total annual revenues for these six large businesses.

The 723 potentially impacted primarily commercial small business affiliates had average total annual revenues of \$457,771, and \$53,567 on average in annual revenues from commercial landings of summer flounder, scup, and/or black sea bass during 2020–2022. Summer flounder, scup, and/or black sea bass accounted for an average of 12 percent of the total revenues for these 723 small businesses.

The proposed 2024–2025 summer flounder commercial quotas are expected to result in moderate negative socioeconomic impacts for commercial fishery participants because they would require a decrease in commercial landings and therefore would be expected to result in a decrease in revenues. Some of these negative impacts are expected to be offset if a decrease in landings results in an increase in price. The analysis described in the EA [See **ADDRESSES**] predicted an expected price of \$3.40 per pound under the proposed 2024–2025 quota based on previous landings and price information, resulting in a total expected value of the harvest of \$29.87

million. Compared to the 2022 total value of \$30.41 million, the expected total reduction in revenue is 1.74 percent, spread among all vessels in the fleet. Impacts may vary by state and by fishery participant, particularly if potential price increases do not occur to the same degree in all areas.

The proposed 2024–2025 scup commercial quotas are expected to result in similar levels of commercial scup landings and revenues as the past several years. Commercial scup landings appear to be influenced more by market facts than the annual commercial quota. The preferred 2024–2025 scup quotas represent an increase from 2022–2023; however, it is unlikely that commercial effort or landings would increase given recent trends. In general, the preferred 2024–2025 scup quotas are expected to have moderate positive impacts for both the small and large businesses identified above given they are expected to result in revenues similar to those over the past several years.

The proposed 2024 commercial quota is slightly higher than recent black sea bass landings. By allowing for slightly higher levels of landings, and therefore revenues, compared to recent years, the proposed 2024 quota is expected to have moderate positive impacts for small and large commercial fishing businesses. Given recent patterns in the black sea bass fishery, it is not expected that the proposed 5-percent in-season closure buffer will be needed for black sea bass in 2024. In the unlikely event that it is needed, it could allow landings to exceed the quota by up to 5 percent. This is not expected to result in notably different impacts than the impacts of the quota.

Expected Impacts on Recreational Entities

As previously stated, 482 for-hire fishing affiliates were identified as potentially impacted by this action based on the definition above. All these affiliates were categorized as small businesses based on their average 2018–2022 revenues. These 482 small businesses had average total annual revenues of \$130,921 during 2020–2022. Their average revenues from recreational for hire fishing (for a variety of species) was \$107,429. Average annual revenues from for-hire fishing ranged from less than \$10,000 for 195 affiliates to over \$1,000,000 for 8 affiliates. On average, recreational fishing accounted for 85 percent of the total revenues for these 482 small businesses.

It is not possible to derive what proportion of the for-hire revenues came from fishing activities for an individual

species. Nevertheless, given the popularity of summer flounder, scup, and black sea bass as recreational species, revenues generated from these species are likely important to many of these businesses, at least at certain times of the year.

For-hire revenues are impacted by a variety of factors, including regulations and demand for for-hire trips for summer flounder, scup, black sea bass, and other potential target species, as well as weather, the economy, and other factors. Recreational measures for 2024–2025 are not yet known. However, this action does propose the potential removal of the Federal recreational scup closure that is currently effective from January 1–April 30. Given the timing of the current closure and the limited proportion of recreational scup fishing that occurs in Federal water any benefit of the closure removal would be minimal. The approach for Federal waters recreational measures will be determined by the Council and Board in December 2023. States will work through the Commission process to determine the state waters measures in early 2024.

This action is not expected to adversely impact revenues for commercial and recreational vessels that fish for summer flounder, scup, and black sea bass. Because this rulemaking will not have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis is not required and none has been prepared.

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

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: November 13, 2023.

Samuel D. Rauch, III,

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

For the reasons set out in the preamble, NMFS proposed to amend 50 CFR part 648 as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. Revise § 648.127 to read as follows:

§ 648.127 Scup recreational fishing season.

Fishermen and vessels that are not eligible for a scup moratorium permit under § 648.4(a)(6), may possess scup from January 1 through December 31, subject to the possession limit specified

in § 648.128(a). The recreational fishing season may be adjusted pursuant to the procedures in § 648.122. Should the recreational fishing season be modified, non-federally permitted scup vessels abiding by state regulations may transit

with scup harvested from state waters on board through the Block Island Sound Transit Area following the provisions outlined in § 648.131.

[FR Doc. 2023–25431 Filed 11–16–23; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 88, No. 221

Friday, November 17, 2023

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

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

Comments regarding this information collection received by December 18, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

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

Farm Service Agency

Title: Increasing Land, Capital, and Market Access Program

OMB Control Number: 0560–NEW.

Summary of Collection: The purpose of the program is to fund projects that support a diverse set of farmers, ranchers, and forest landowners (producers) on the edge financially; moving them from surviving to thriving as they address core barriers to attain land, capital, and market access. The Increasing Land, Capital, and Market Access Program is funding cooperative agreements or grants (awarded) for projects that are designed to align with and respond to land, capital, and market access needs of the underserved farmers, ranchers, and forest landowners while concurrently providing wraparound technical assistance to ensure that program participants have the information, training, and customized support they require.

Need and Use of the Information: FSA will be collecting the initial report and progress reports quarterly and annually. Without the information, FSA would not be able to assess the performance of the program.

Description of Respondents: Farms; Business or other for profit.

Number of Respondents: 100.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 3,650.

Farm Service Agency

Title: Disaster Assistance—General (7 CFR part 1945–A).

OMB Control Number: 0560–0170.

Summary of Collection: The regulation (7 CFR 759) defines the responsibilities of the Secretary of Agriculture in making disaster area determinations, the types of incidents that can result in a disaster area determination, and the factors used in making disaster area determinations. The Farm Service Agency (FSA) is managing the collection. The determination of a disaster area is prerequisite to authorizing emergency (EM) loans to qualified farmers as specified in the 7 CFR 764. EM loan funds may be used to restore or replace essential property, pay all or part of production costs incurred by the farmer or rancher in the year of the disaster, pay for essential family living expenses, pay to reorganize the farming operation or refinance USDA and non-USDA creditors. The information collection

occurs when the Secretary receives a letter from an individual farmer, local government officials, State Governor, State Agriculture Commissioners, State Secretaries of Agriculture, other State government officials, and Indian Tribal Council, requesting a Secretarial natural disaster determination. Supporting documentation of losses for all counties having disaster is provided by the County Emergency Boards in the form of a report called Loss assessment report (LAR).

Need and use of the Information: FSA collects the following information to determine if the county is eligible to qualify for a natural disaster designation: (1) The nature and extent of production losses; (2) the number of farmers who have sustained qualifying production losses; and (3) the number of farmers that have sustained qualifying production losses that other lenders in the county have indicated that they will not be in a position to finance. The collection of information is necessary to determine whether the counties did sustain sufficient production losses to qualify for a natural disaster designation.

Description of Respondents: State, Local or Tribal Government.

Number of Respondents: 1,312.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 626.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–25450 Filed 11–16–23; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Forest Service

Forest Service Manual 2300—Recreation, Wilderness, and Related Resource Management, Chapter 2350—Trail, River, and Similar Recreation Opportunities, Section 2355—Climbing Opportunities

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of availability for public comment.

SUMMARY: The Forest Service, United States Department of

Agriculture (Forest Service or Agency), is proposing to revise its directives to provide guidance on climbing opportunities on National Forest System (NFS) lands, including climbing opportunities in Congressionally designated wilderness (wilderness).

DATES: Comments must be received in writing by January 16, 2024.

ADDRESSES: Comments may be submitted electronically to <https://cara.fs2c.usda.gov/Public/CommentInput?project=ORMS-3524>. Written comments may be mailed to Peter Mali, National Wilderness Program Manager, 1400 Independence Avenue SW, Washington, DC 20250-1124. All timely comments, including names and addresses, will be placed in the record and will be available for public inspection and copying. The public may inspect comments received at <https://cara.fs2c.usda.gov/Public/ReadingRoom?project=ORMS-3524>.

FOR FURTHER INFORMATION CONTACT: Peter Mali, National Wilderness Program Manager, SM.FS.ClimbDir@usda.gov, (202) 823-0773. Individuals who use telecommunications devices for the hearing impaired may call the Federal Relay Service at 800-877-8339, 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION: Climbing is a growing sport in the United States. According to the Outdoor Industry Association's 2022 Report on Outdoor Participation Trends, there were nearly 10.3 million climbers in the United States in 2021. Approximately 30 percent of outdoor climbing in the United States occurs on NFS lands. In recent years, line officers have expressed concerns about climbing-related impacts on resources and conflicts among users.

Current Forest Service directives do not provide guidance for climbing opportunities on NFS lands. The Joint Explanatory Statement accompanying the 2021 Consolidated Appropriations Act directs the Forest Service to issue general guidance on climbing opportunities on NFS lands, including the application of the Wilderness Act (16 U.S.C. 1131-1136) to climbing opportunities and appropriate use of fixed anchors and fixed equipment in wilderness. To address impacts associated with increased climbing on NFS lands and consistent with the Joint Explanatory Statement, the Forest Service is proposing revisions to its directives to provide guidance on climbing opportunities on NFS lands.

The proposed directive would provide guidance on climbing opportunities inside and outside

wilderness on NFS lands and would provide for climbing opportunities that serve visitor needs; meet land management and recreation policy objectives; emphasize the natural setting of NFS lands; align with natural and cultural resource protection and the Agency's responsibility to Indian Tribes; and are consistent with applicable law, directives, and the applicable land management plan.

The proposed directive would add a new section, 2355, to Forest Service Manual (FSM) 2300—Recreation, Wilderness, and Related Resource Management, chapter 2350—Trail, River, and Similar Recreation Opportunities, which would provide that climbing is an appropriate use of NFS lands (proposed FSM 2355.03, para. 1)—including in wilderness—when conducted in accordance with applicable law and Forest Service directives and consistent with the applicable land management plan (proposed FSM 2355.03, para. 4); that a climbing management plan be developed, as funding and resources allow, for climbing opportunities in wilderness, and for climbing opportunities outside wilderness where the District Ranger determines that climbing is causing adverse resource impacts or use conflicts (proposed FSM 2355.21); that fixed anchors and fixed equipment are installations for purposes of section 4(c) of the Wilderness Act (16 U.S.C. 1133(c)) (proposed FSM 2355.32, para. 1); that a Forest Supervisor may authorize the placement or replacement of fixed anchors and fixed equipment in wilderness based on a case-specific determination that they are the minimum necessary for administration of the area for Wilderness Act purposes, including primitive or unconfined recreation and preservation of wilderness character (proposed FSM 2355.32, para. 1); that existing fixed anchors and fixed equipment in wilderness may be retained pending completion of a Minimum Requirements Analysis, as funding and resources allow, that determines they are the minimum necessary to facilitate primitive or unconfined recreation or otherwise preserve wilderness character (FSM 2355.32, para. 5); and that the issuance and administration of special use permits are encouraged to enhance visitor access to climbing opportunities and visitor education concerning low impact climbing practices (proposed FSM 2355.03, para. 9).

To allow for enforcement of restrictions and prohibitions in climbing management plans as needed, the Forest Service will be proposing revisions via a separate **Federal Register** notice to its

regulations at 36 CFR part 261, subpart A, General Prohibitions.

The minimum 120-day Tribal consultation for the proposed directive was initiated November 8, 2021, and will conclude at the end of the 60-day comment period for the proposed directive.

After the comment period closes, the Forest Service will consider timely comments that are within the scope of the proposed directive in the development of the final directive. A notice of the final directive, including a response to comments, will be posted on the Forest Service's web page at <https://www.fs.usda.gov/about-agency/regulations-policies>.

Dated: November 6, 2023.

Gregory Smith,

Associate Deputy Chief, National Forest System.

[FR Doc. 2023-25426 Filed 11-16-23; 8:45 am]

BILLING CODE 3411-15-P

DEPARTMENT OF AGRICULTURE

Forest Service

Stanislaus National Forest; California; Social and Ecological Resilience Across the Landscape 2.0 EIS

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Forest Service ("Forest Service"), United States Department of Agriculture, is preparing an Environmental Impact Statement (EIS) for the Social and Ecological Resilience Across the Landscape 2.0 (SERAL 2.0) project. The project area is approximately 160,000 acres in size, including approximately 119,000 acres of Forest Service lands. The project area includes the remainder of the Stanislaus Landscape—a Wildfire Crisis Strategy Priority Landscape identified in 2022. The project area also spans multiple High Risk Western Firesheds identified by the Secretary of Agriculture in January 2023.

DATES: Comments concerning the scope of the analysis must be received by December 18, 2023. The draft environmental impact statement is expected in early February 2024, and the final environmental impact statement is expected in April 2024.

ADDRESSES: Scoping comments may be submitted electronically through <https://cara.ecosystem-management.org/Public/commentInput?Project=63557>. Written

comments may be submitted via mail or by hand delivery to Stanislaus National Forest, Attn: SERAL 2.0, 19777 Greenley Road, Sonora, CA 95370.

FOR FURTHER INFORMATION CONTACT: Benjamin Cossel (Stanislaus National Forest Public Affairs Officer) by email at benjamin.cossel@usda.gov. Individuals who use telecommunication devices for the deaf and hard of hearing (TDD) may call the Federal Relay Service at 800-877-8339, 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

The purpose of SERAL 2.0 is to prepare the landscape for the safe reintroduction of fire as a key ecological process; increase the landscape's resilience and adaptive capacity to natural disturbances such as fire, drought, insects and disease; reduce the risk of fire spreading into communities or damaging critical infrastructure; and to manage the forest in a cost-effective manner, including making wood products available to local industries and businesses. The actions proposed in the SERAL 2.0 project are needed to minimize the potential for large-, high-severity fire and habitat loss; shift the landscape vegetation structure and composition towards conditions that are more in alignment with future desired conditions, control occurrences of invasive, non-native plants; and support prescribed fire and wildfire management operations.

Proposed Action

The Stanislaus National Forest is proposing multiple actions to meet the purpose and need of the project. A combination of mechanical thinning and prescribed fire is proposed. Treatment objectives to create both late-open and mid-open forest structure will be achieved through mechanical thinning with strategically placed openings (gaps) and retained groups of trees (clumps) scattered throughout the treated landscape. Gaps and clumps will generally range in size between 0.1 and 0.5 acres, each averaging approximately 0.25 acres in size and a gap frequency of approximately one every two acres. Thinning would primarily consist of timber harvesting but also includes non-commercial methods such as mastication and biomass removal. Multiple logging systems, road maintenance, temporary road construction, and landing development would be required for commercial timber harvest. A proportion of the proposed restoration treatments will occur within California spotted owl

protected activity centers and territories designed to incorporate the management approaches and conservation measures specifications presented in the Conservation Strategy for the California Spotted Owl in the Sierra Nevada (USDA Forest Service 2019).

The construction and maintenance of a shaded fuelbreak network is also proposed. The purpose of this proposed network is to break up large expanses of continuous fuels, support firefighter access and safety, increase suppression opportunities, and provide control points for the implementation of prescribed fire. To construct these fuelbreaks, trees may be thinned to shaded fuelbreak standards and continuous vegetation under 8" DBH (the diameter of each tree is measured at "breast height") or 12 feet tall will be broken up into naturally appearing clumps or islands of varied size and shape. Salvage of insect-, disease-, drought-, and fire-killed trees is included as part of the proposed action. The area of potential salvage varies: for insect-, disease-, and drought-killed trees, the area of potential salvage is limited to within 0.25 miles of maintenance level 2, 3, 4, and 5 National Forest System (NFS) roads; not requiring a new temporary road greater than 500 feet within forested areas; outside of protected activity centers (PACs), and outside of wild and scenic river corridors. For fire-killed trees, the area of potential salvage is further limited to only 500 acres per Hydrologic Unit Code (HUC) 6 watershed.

Non-native invasive weed control and eradication treatments are proposed for mapped known invasive weed locations, additional acres to account for a 20 percent rate of spread from those known locations, and a limited number of acres where future infestations are discovered after analysis.

Forest Plan Amendments

The proposed project-specific forest plan amendments are designed to implement the management approaches and conservation measures presented in the Conservation Strategy for the California Spotted Owl in the Sierra Nevada ("The CSO Strategy"; USDA Forest Service 2019). The amendments are specific to the approximate 160,000-acre project area and proposed actions. The proposed amendments incorporate CSO Strategy conservation measures that provide some immediate stability for individual owls while implementing actions to better increase landscape resilience. The CSO Strategy concludes that short term impacts are a trade-off that is warranted to best develop resilient habitat conditions that will

provide long term stability and future CSO habitat.

Expected Impacts

This project is expected to significantly increase landscape resilience to natural disturbances which is the primary objective of SERAL 2.0. The treatments proposed to meet the desired landscape conditions may cause short term impacts to sensitive resources, including California spotted owl PACs. SERAL 2.0 is the second project on the Stanislaus National Forest to fully adopt and implement the CSO Strategy's management approaches and conservation measures (SERAL 1.0 in 2022 was the first). Although the long-term benefits are expected to far outweigh the risks to resources from applying these new approaches, a measure of uncertainty is also present. The proposed actions have been designed based on best available science and are well supported. However, at present, there are not any documented post-treatment case-studies of the outcomes of the treatments to directly inform the analysis, and thus the uncertainty.

Responsible Official

The Responsible Official will be Jason Kuiken, Forest Supervisor, Stanislaus National Forest.

Scoping Comments

This notice of intent initiates the scoping process which guides the development of the EIS. In this process, the Forest Service is requesting comments on potential impacts, and identification of any relevant information, studies, or analyses of any kind concerning impacts affecting the quality of the human environment. Public comments regarding this proposal will assist the Forest Service in identifying issues and opportunities associated with the proposal, how to best manage resources, and to focus the analysis. The SERAL 2.0 project was authorized to use the Western Firesheds Emergency Action Declaration (Bipartisan Infrastructure Law, Section 40807) on April 14, 2023. Under this emergency authority, the SERAL 2.0 EIS will be developed to consider only a proposed action and no action alternative in detail, and the EIS and draft decision will not be subject to pre-decisional administrative review (Consolidated Appropriations Act of 2012 (Pub. L. 112-74) as implemented by Subparts A and B of 36 CFR part 218 or part 219).

It is important that reviewers provide their comments at such times and in such manner that they are useful to the

agency's preparation of the environmental impact statement. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewers' concerns and contentions. The Forest Service will use the scoping comments to help identify potential significant issues related to the proposed action while preparing the draft EIS (DEIS). The DEIS is expected to be available for a 45-day opportunity to comment in early February 2024.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered.

Nature of Decision To Be Made

Given the purpose and need, the Responsible Official will determine whether the proposed actions comply with all applicable laws governing Forest Service actions and with the applicable standards and guidelines found in the Forest Plan of the Stanislaus National Forest; whether the EIS has sufficient environmental analysis to make an informed decision; and whether the proposed action meets the purpose and need for action. With this information, the Responsible Official must decide whether to select the proposed action and what, if any, additional actions should be required.

Substantive Provisions

The substantive provisions of 36 CFR 219.8 through 219.11 that directly apply to the proposed amendments are 36 CFR 219.9 Diversity of Plant and Animal Communities, (a) Ecosystem plan components, (1) Ecosystem integrity (36 CFR 219(a)(1)); 36 CFR 219.9 Diversity of Plant and Animal Communities, (a) Ecosystem plan components, (2) Ecosystem diversity, (i) key characteristics associated with the terrestrial and aquatic ecosystem types (36 CFR 219(a)(2)(i)); 36 CFR 219.9 Diversity of Plant and Animal Communities, (a) Ecosystem plan components, (2) Ecosystem diversity, (ii) rare aquatic and terrestrial plant and animal communities (36 CFR 219(a)(2)(ii)); and 36 CFR 219.8 Sustainability, (b) Social and Economic Sustainability, (1) Social, cultural, and economic conditions relevant to the area influenced by the plan (36 CFR 219.8(b)(1)).

Dated: November 1, 2023.

Troy Heithecker,

Associate Deputy Chief, National Forest System.

[FR Doc. 2023-25427 Filed 11-16-23; 8:45 am]

BILLING CODE 3411-15-P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Tennessee Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA) that a meeting of the Tennessee Advisory Committee to the Commission will convene by Zoom on Thursday, December 14, 2023, at 11:30 a.m. (CST). The purpose of the meeting is to discuss their draft report on voting rights in the state.

DATES: The meeting will take place on Thursday, December 14, 2023, at 11:30 a.m. (CST).

Registration Link (Audio/Visual):
<https://www.zoomgov.com/j/1609335325?pwd=dGlwOU9STmhTV28vWmlycW5WcIR3QT09>.

Telephone (Audio Only): Dial (833) 568-8864 USA Toll Free; Access Code: 160 933 5325.

FOR FURTHER INFORMATION CONTACT:

Victoria Moreno at vmoreno@usccr.gov or by phone at 434-515-0204.

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

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

Persons who desire additional information may contact the Regional Programs Unit at (202) 809-9618. Records and documents discussed during the meeting will be available for public viewing as they become available at the www.facadatabase.gov. Persons interested in the work of this advisory committee are advised to go to the Commission's website, www.usccr.gov, or to contact the Regional Programs Unit at the above phone number or email address.

Agenda

Thursday, December 14, 2023, at 11:30 a.m. (CST)

1. Welcome & Roll Call
2. Chair's Comments
3. Discussion on Report
4. Next Steps
5. Public Comment
6. Adjourn

Dated: November 14, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023-25448 Filed 11-16-23; 8:45 am]

BILLING CODE 6335-01-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S-214-2023]

Foreign-Trade Zone 26; Application for Subzone; Helena Industries, LLC; Cordele, Georgia; Correction

The **Federal Register** notice published on November 14, 2023 (88 FR 77952) regarding the subzone application for Helena Industries, LLC, located in Cordele, Georgia, is corrected as follows:

In the first paragraph, first sentence, the grantee organization should read "Georgia Foreign-Trade Zone, Inc., grantee of FTZ 26".

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

Dated: November 14, 2023.

Elizabeth Whiteman,

Executive Secretary.

[FR Doc. 2023-25467 Filed 11-16-23; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

Renewable Energy and Energy Efficiency Advisory Committee

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice of an open meeting.

SUMMARY: The Renewable Energy and Energy Efficiency Advisory Committee (REEEAC or the Committee) will hold a virtual meeting, accessible to the public online, on Thursday, November 30, 2023, at the U.S. Department of Commerce in Washington, DC. Registration instructions for the public to attend virtually are provided below.

DATES: Thursday, November 30, 2023, from approximately 10:30 a.m. to 12:00 p.m. Eastern Standard Time (EST). Members of the public wishing to participate must register in advance with Cora Dickson at the contact information below by 5:00 p.m. EST on Monday, November 27, 2023, including any requests to make comments during the meeting or for accommodations or auxiliary aids.

ADDRESSES: To register, please contact Cora Dickson, Designated Federal Officer (DFO), Office of Energy and Environmental Industries (OEEI), Industry and Analysis, International Trade Administration, U.S. Department of Commerce at (202) 482-6083; email: Cora.Dickson@trade.gov.

FOR FURTHER INFORMATION CONTACT: Cora Dickson, DFO, Office of Energy and Environmental Industries (OEEI), Industry and Analysis, International Trade Administration, U.S. Department of Commerce at (202) 482-6083; email: Cora.Dickson@trade.gov. Registered participants joining virtually will be emailed the login information for the meeting, which will be accessible as a livestream via WebEx Webinar.

SUPPLEMENTARY INFORMATION: *Background:* The Secretary of Commerce established the REEEAC pursuant to discretionary authority and in accordance with the Federal Advisory Committee Act, as amended (5 U.S.C. 1001 *et seq.*), on July 14, 2010. The REEEAC was re-chartered most recently on May 27, 2022. The REEEAC provides the Secretary of Commerce with advice from the private sector on the development and administration of programs and policies to expand the export competitiveness of U.S. renewable energy and energy efficiency products and services. More information about the REEEAC, including the list of appointed members for this charter, is published online at <http://trade.gov/reeeac>.

On November 30, 2023, the REEEAC will hold the fifth meeting of its current charter term. The Committee will deliberate on approval of several recommendations. The agenda will be made available by November 27, 2023 upon request to Cora Dickson.

The meeting will be open to the public and will be accessible to people with disabilities. All guests are required to register in advance by the deadline identified under the DATE caption. Requests for auxiliary aids must be submitted by the registration deadline. Last minute requests will be accepted but may not be possible to fill.

A limited amount of time before the close of the meeting will be available for oral comments from members of the public attending the meeting. Members of the public attending virtually who wish to speak during the public comment period must give the DFO advance notice in order to facilitate their access. To accommodate as many speakers as possible, the time for public comments will be limited to two to five minutes per person (depending on number of public participants). Individuals wishing to reserve speaking time during the meeting must contact Cora Dickson using the contact information above and submit a brief statement of the general nature of the comments, as well as the name and address of the proposed participant, by 5:00 p.m. EST on Monday, November 27, 2023. If the number of registrants requesting to make statements is greater than can be reasonably accommodated during the meeting, the International Trade Administration may conduct a lottery to determine the speakers. Speakers are requested to submit a copy of their oral comments by email to Cora Dickson for distribution to the participants in advance of the meeting.

Any member of the public may submit written comments concerning the REEEAC's affairs at any time before or after the meeting. Comments may be submitted via email to the Renewable Energy and Energy Efficiency Advisory Committee, c/o: Cora Dickson, Designated Federal Officer, Office of Energy and Environmental Industries, U.S. Department of Commerce; Cora.Dickson@trade.gov. To be considered during the meeting, public comments must be transmitted to the REEEAC prior to the meeting. As such, written comments must be received no later than 5:00 p.m. EST on Monday, November 27, 2023. Comments received after that date will be distributed to the members but may not be considered at the meeting.

Copies of REEEAC meeting minutes will be available within 30 days following the meeting.

Man K. Cho,
Deputy Director, Office of Energy and Environmental Industries.

[FR Doc. 2023-25452 Filed 11-16-23; 8:45 am]

BILLING CODE 3510-DR-P

DEPARTMENT OF COMMERCE**International Trade Administration**
[C-570-153]**Certain Paper Shopping Bags From the People's Republic of China: Preliminary Affirmative Determination of Countervailable Subsidies, Preliminary Affirmative Determination of Critical Circumstances, and Alignment of Final Determination With Final Antidumping Duty Determination; Correction**

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

ACTION: Notice; correction.

SUMMARY: The U.S. Department of Commerce (Commerce) published a notice in the **Federal Register** of November 6, 2023, in which Commerce announced its preliminary determination in the countervailing duty (CVD) investigation of certain paper shopping bags (paper bags) from the People's Republic of China (China). This notice incorrectly spelled two of the company names listed in the table in the "Preliminary Determination" section.

FOR FURTHER INFORMATION CONTACT: Seth Brown, 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) 482-0029.

SUPPLEMENTARY INFORMATION:**Correction**

In the **Federal Register** of November 6, 2023, in FR Doc 2023-24473, on page 76181, in the second column, correct the spelling of the following company names in the table in the "Preliminary Determination" section as follows: Qingdao Chenyu Packaging Co., Ltd. and Shanghai Sanxi Paper Co., Ltd.

Background

On November 6, 2023, Commerce published in the **Federal Register** its preliminary determination in the CVD investigation of paper bags from China.¹ In the preliminary determination notice in the table in the "Preliminary Determination" section, Commerce incorrectly spelled the names of Qingdao Chenyu Packaging Co., Ltd.

¹ See *Certain Paper Shopping Bags From the People's Republic of China: Preliminary Affirmative Determination of Countervailable Subsidies, Preliminary Affirmative Determination of Critical Circumstances, and Alignment of Final Determination With Final Antidumping Duty Determination*, 88 FR 76180 (November 6, 2023).

and Shanghai Sanxi Paper Co., Ltd. as “Qindao Chenyu Packaging Co., Ltd.” and “Shanghai Shanxi Paper Co., Ltd.,” respectively.

Notification to Interested Parties

This notice is issued and published in accordance with sections 703(f) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.205(c).

Dated: November 13, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–25468 Filed 11–16–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD438]

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 (Pacific Council) will host an online meeting of the Area 2A Pacific halibut governmental management entities that is open to the public.

DATES: The online meeting will be held Tuesday, January 2, 2024, from 10:30 a.m. until 1 p.m., Pacific Time, or until business for the day has been completed.

ADDRESSES: This meeting will be held online. Specific meeting information, including directions on how to join the meeting and system requirements will be provided in the meeting announcement on the Pacific Council’s website (see www.pcouncil.org). You may send an email to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov) or contact him at (503) 820–2412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Ms. Robin Ehlke, Staff Officer, Pacific Council; telephone: (503) 820–2410.

SUPPLEMENTARY INFORMATION: The primary purpose of the online meeting is to prepare and develop recommendations for the 2024 International Pacific Halibut Commission’s (IPHC) annual meeting

held in Anchorage, Alaska from January 22 through January 26, 2024.

Recommendations generated from the 2A managers’ meeting will be communicated to the IPHC by the Pacific Council’s representatives. Attendees may also address other topics relating to Pacific halibut management.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov; (503) 820–2412) at least 10 days prior to the meeting date.

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

Dated: November 13, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–25390 Filed 11–16–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD536]

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will hold a one day in-person meeting of its Outreach and Education Technical Committee.

DATES: The meeting will convene on Tuesday, December 19, 2023, 8:30 a.m.–5 p.m., EST.

ADDRESSES: The meeting will be held in-person at the Gulf Council office. Please visit the Gulf Council website at www.gulfcouncil.org for meeting materials.

Council address: Gulf of Mexico Fishery Management Council, 4107 W.

Spruce Street, Suite 200, Tampa, FL 33607; telephone: (813) 348–1630.

FOR FURTHER INFORMATION CONTACT:

Emily Muehlstein, Public Information Officer, Gulf of Mexico Fishery Management Council; emily.muehlstein@gulfcouncil.org; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION:

Tuesday, December 19, 2023, 8:30 a.m.–5 p.m., EST.

The Meeting will begin with member and staff introductions, adoption of agenda, approval of December 6, 2022 meeting summary, and scope of work.

The Committee will discuss, receive presentations and make Committee Recommendations on the Fishery Ecosystem Plan Outreach, CMP Port Meetings and Recreational Initiative Outreach.

The Committee will review Communications Guidelines Book, Illegal Sale of Recreational Fish and History of Management Timeline Tool. The Committee will review the 2023 In-person Event Outreach Progress and 2024 Plan, the 2023 Communications improvement Plan Progress and 2023 analytics, including presentations and Committee Recommendations and Improvement Plan Ideas.

The Committee will discuss Other Business items, Future For-Hire Reporting Program Outreach and receive Public Comment before the meeting adjourns.

—Meeting Adjourns

The Agenda is subject to change, and the latest version along with other meeting materials will be posted on www.gulfcouncil.org.

Although other non-emergency issues not on the agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council’s intent to take-action to address the emergency.

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

Dated: November 14, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–25484 Filed 11–16–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****[RTID 0648–XD441]****Pacific Fishery Management Council; Public Meeting**

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

ACTION: Notice of public meetings and availability of reports.

SUMMARY: The Pacific Fishery Management Council (Pacific Council) is preparing for the annual preseason management process for the 2024 ocean salmon fisheries. This document announces public meetings planned for Winter 2024 and the anticipated availability of Pacific Council documents in the Winter/Spring of 2024.

DATES: The Pacific Council will convene two meetings of the Salmon Technical Team (STT). The meetings will be held: (1) January 16–19, 2024, and (2) February 20–23, 2024. The meetings will begin at 1 p.m. on the first day of each meeting and occur daily thereafter from 8 a.m. until 3 p.m. Pacific Time. Meeting times are an estimate, meetings will end when business for the day has been completed.

Pacific Council documents pertinent to the annual preseason management process will be available as each document is completed, which will occur between February and April in 2024 and posted on the Pacific Council website at <http://www.pcouncil.org>.

ADDRESSES: The STT meetings will be held at the Pacific Council office; however, the meeting venue may change to an online format if necessary due to unforeseen circumstances such as health and safety concerns.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

If there is a need to change to an online format, specific meeting information, including directions on how to join the meeting and system requirements will be provided in the meeting announcement on the Pacific Council's website (see www.pcouncil.org). You may send an email to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov) or contact him at (503) 820–2412 for technical assistance.

FOR FURTHER INFORMATION CONTACT: Robin Ehlke, Pacific Council; telephone: (503) 820–2410.

SUPPLEMENTARY INFORMATION: At the January 16–19, 2024, meeting the STT will hold a public work session to draft “Review of 2023 Ocean Salmon Fisheries, Stock Assessment and Fishery Evaluation Document for the Pacific Coast Salmon Fishery Management Plan”. At the February 20–23, 2024 meeting the STT will hold a public work session to draft “Preseason Report I—Stock Abundance Analysis and Environmental Assessment Part 1 for 2024 Ocean Salmon Fishery Regulations”. At both meetings, the STT may also consider any other estimation or methodology issues pertinent to the 2024 ocean salmon fisheries, and discuss additional topics as time allows, including but not limited to future Council agenda items, workload planning, salmon rebuilding plans, etc.

Anticipated publishing dates for Pacific Council documents include: Mid-February 2024: “Review of 2023 Ocean Salmon Fisheries, Stock Assessment and Fishery Evaluation Document for the Pacific Coast Salmon Fishery Management Plan.”

Early March 2024: “Preseason Report I—Stock Abundance Analysis and Environmental Assessment Part 1 for 2024 Ocean Salmon Fishery Regulations.”

Late March 2024: “Preseason Report II—Proposed Alternatives and Environmental Assessment Part 2 for 2024 Ocean Salmon Fishery Regulations.” The report will include a description of the adopted salmon management alternatives and a summary of their biological and economic impacts.

Late April 2024: “Preseason Report III—Council-Adopted Management Measures and Environmental Assessment Part 3 for 2024 Ocean Salmon Fishery Regulations.”

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris

Kleinschmidt (kris.kleinschmidt@noaa.gov; (503) 820–2412) at least 10 days prior to the meeting date.

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

Dated: November 13, 2023.

Key Israel Marquez,

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

[FR Doc. 2023–25395 Filed 11–16–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****[RTID 0648–XD528]****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) Ad-hoc Sacramento River Fall Chinook (SRFC) Workgroup will hold two 2-day meetings.

DATES: The online meetings will be held on (1) Tuesday, January 30 through Wednesday, January 31, 2024, daily from 9 a.m. until 3 p.m., Pacific Standard Time or when business for the day concludes, and (2) Wednesday, May 1 through Thursday, May 2, 2024, daily from 9 a.m. until 3 p.m., Pacific Daylight Time or when business for the day concludes.

ADDRESSES: This meeting will be held online. Specific meeting information, including directions on how to join the meeting and system requirements will be provided in the meeting announcement on the Pacific Council's website (see www.pcouncil.org). You may send an email to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov) or contact him at (503) 820–2412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Robin Ehlke, Staff Officer, Pacific Council; telephone: (503) 820–2410.

SUPPLEMENTARY INFORMATION: The purpose of the Workgroup is to develop potential improvements to SRFC assessment and management for Pacific Council consideration that would evaluate current management measures, provide a workplan to accomplish the work, and eventually provide new or

updated products for Pacific Council consideration. The first meeting will likely focus on collecting and summarizing relevant information on SRFC stock status, reviewing the current models and methods used for harvest management, and identifying data gaps. A draft outline of the workplan could be developed for discussion at the next meeting. At that second meeting, the Workgroup could refine the workplan and timeline, and assign tasks to address each item, coordinate analysis as needed, and prepare for the upcoming Pacific Council meeting.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov; (503) 820-2412) at least 10 days prior to the meeting date.

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

Dated: November 14, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023-25483 Filed 11-16-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD510]

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) Coastal Pelagic Species Management Team (CPSMT) will hold one public meeting.

DATES: The meeting will be held Thursday, January 11, 2024, from 12

p.m. to 4 p.m., Pacific Standard Time or until business for the day has been completed.

ADDRESSES: This meeting will be held online. Specific meeting information, including directions on how to join the meeting and system requirements will be provided in the meeting announcement on the Pacific Council's website (see www.pcouncil.org). You may send an email to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov) or contact him at (503) 820-2412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220-1384.

FOR FURTHER INFORMATION CONTACT: Jessi Doerpinghaus, Staff Officer, Pacific Council; telephone: (503) 820-2415.

SUPPLEMENTARY INFORMATION: The primary purpose of this online meeting is a work session of the CPSMT. Topics for discussion will include the stock assessment and fishery evaluation document, operational guidelines, and ecosystem related matters. Work products and recommendations for the Pacific Council's March and April 2024 meeting related to ecosystem and CPS related matters may also be discussed as well. No management actions will be decided by the CPSMT. CPSMT recommendations will be considered by the Pacific Council at their March or April Council meetings. The meeting agenda will be available on the Pacific Council's website in advance of the meeting.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov; (503) 820-2412) at least 10 days prior to the meeting date.

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

Dated: November 13, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023-25388 Filed 11-16-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD503]

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico

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

ACTION: Notice of modification to expiration date of letter of authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, its implementing regulations, and NMFS' MMPA Regulations for Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico (GOM), notification is hereby given that NMFS has modified the expiration date of a Letter of Authorization (LOA) issued to CGG Inc. (CGG) for the take of marine mammals incidental to geophysical survey activity in the GOM.

DATES: This LOA is effective through October 17, 2024.

ADDRESSES: The LOA, LOA request, and supporting documentation are available online at: <https://www.fisheries.noaa.gov/marine-mammal-protection/issued-letters-authorization-oil-and-gas-industry-geophysical-survey>. In case of problems accessing these documents, please call the contact listed below (**FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Rachel Wachtendonk, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings

are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined “negligible impact” in 50 CFR 216.103 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.

Except with respect to certain activities not pertinent here, 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).

On January 19, 2021, we issued a final rule with regulations to govern the unintentional taking of marine mammals incidental to geophysical survey activities conducted by oil and gas industry operators, and those persons authorized to conduct activities on their behalf (collectively “industry operators”), in U.S. waters of the GOM over the course of 5 years (86 FR 5322, January 19, 2021). The rule was based on our findings that the total taking from the specified activities over the 5-year period will have a negligible impact on the affected species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of those species or stocks for subsistence uses. The rule became effective on April 19, 2021.

Our regulations at 50 CFR 217.180 *et seq.* allow for the issuance of LOAs to industry operators for the incidental take of marine mammals during geophysical survey activities and prescribe the permissible methods of taking and other means of affecting the least practicable adverse impact on marine mammal species or stocks and their habitat (often referred to as mitigation), as well as requirements pertaining to the monitoring and

reporting of such taking. Under 50 CFR 217.186(e), issuance of an LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations and a determination that the amount of take authorized under the LOA is of no more than small numbers.

NMFS issued an LOA to CGG on March 24, 2023, for the take of marine mammals incidental to a three-dimensional (3D) ocean bottom node (OBN) survey over approximately 200 lease blocks in the Walker Ridge and Green Canyon areas of the central GOM, effective May 1 through December 31, 2023. Please see the **Federal Register** notice of issuance (88 FR 17819, March 24, 2023) for additional detail regarding the LOA and the survey activity.

CGG initially anticipated that the activity would occur at some point between May 1 and December 31, 2023. CGG requested an initial modification to the expiration date on August 17, 2023, upon which basis NMFS modified the expiration date of the originally issued LOA by extending it to April 7, 2024 (88 FR 70935, October 13, 2023). CGG subsequently informed NMFS that the survey would be further delayed, and requested a second modification to the expiration date of the LOA (from December 31, 2023 to October 17, 2024) to accommodate the delays. There are no other changes to CGG’s planned activity. Since issuance of the LOA, no survey work has occurred.

Authorization

NMFS has changed the expiration date of the LOA from April 7, 2024 to October 17, 2024. There are no other changes to the LOA as described in the March 24, 2023, **Federal Register** notice of issuance (88 FR 17819): the specified survey activity; estimated take by incidental harassment; and small numbers analysis and determination remain unchanged and are incorporated here by reference.

Dated: November 14, 2023.

Catherine Marzin,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.
[FR Doc. 2023–25434 Filed 11–16–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO–P–2023–0047]

Supplemental Guidance for Examination of Design Patent Applications Related to Computer-Generated Electronic Images, Including Computer-Generated Icons and Graphical User Interfaces

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Examination guidance.

SUMMARY: The United States Patent and Trademark Office (USPTO) is publishing supplemental guidance to be used by USPTO personnel in determining whether a design claim including a computer-generated electronic image is directed to statutory subject matter. This guidance reflects current USPTO practice.

DATES: This supplemental guidance is applicable as of November 17, 2023.

ADDRESSES: For reasons of government efficiency, comments must be submitted through the Federal eRulemaking Portal at www.regulations.gov. To submit comments via the portal, enter docket number PTO–P–2023–0047 on the homepage and click “Search.” The site will provide a search results page listing all documents associated with this docket. Find a reference to this document and click on the “Comment” icon, complete the required fields, and enter or attach your comments. Attachments to electronic comments will be accepted in Adobe® portable document format (PDF) or Microsoft Word® format. Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

Visit the Federal eRulemaking Portal for additional instructions on providing comments via the portal. If electronic submission of comments is not feasible due to a lack of access to a computer and/or the internet, please contact the USPTO using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Erin Harriman, Senior Legal Advisor, Office of Patent Legal Administration, at 571–272–7727; or Carolyn Kosowski, Senior Legal Advisor, Office of Patent Legal Administration, at 571–272–7688.

SUPPLEMENTARY INFORMATION: The USPTO has prepared supplemental guidance for use by USPTO personnel in determining whether a design patent claim including a computer-generated

electronic image per se or a computer-generated electronic image shown on a display panel (e.g., computer screen, monitor, computer display system, mobile phone screen, virtual reality/augmented reality goggles), or a portion thereof, satisfies the article of manufacture requirement in 35 U.S.C. 171. This guidance supplements the guidance provided in section 1504.01(a), subsection (I) of the Manual of Patent Examining Procedure (MPEP) (9th ed., Rev. 07.2022, February 2023).

This guidance does not constitute substantive rulemaking and therefore does not have the force and effect of law. It has been developed as a matter of internal USPTO management and is not intended to create any right or benefit, substantive or procedural, enforceable by any party against the USPTO. Rejections will continue to be based on the substantive law, and it is these rejections that are appealable. Consequently, any failure by USPTO personnel to follow the guidance is neither appealable nor petitionable.

This guidance is not intended to announce any new USPTO practice or procedure, and is meant to be consistent with current USPTO policy. However, if any earlier guidance from the USPTO, including any section of the current MPEP, is inconsistent with the guidance set forth in this notice, USPTO personnel are to follow this guidance. This guidance will be incorporated into the MPEP in due course.

I. Background

On December 21, 2020, the USPTO published a request for information seeking public input on “whether its interpretation of the article of manufacture requirement in the United States Code should be revised to protect digital designs that encompass new and emerging technologies.” See *The Article of Manufacture Requirement*, 85 FR 83063. A summary of the public comments is available to the public on the USPTO’s website at www.uspto.gov/sites/default/files/documents/USPTO-Articles-of-Manufacture-April2022.pdf.

The USPTO appreciates the feedback the public provided. MPEP section 1504.01(a)(I) offers guidelines for the examination of design patent applications for computer-generated icons (also referred to as “computer icons”) that has also been used during the examination of design patent applications related to graphical user interfaces (GUIs). In response to the feedback received, the USPTO has determined that the public would benefit from further clarifications to MPEP section 1504.01(a)(I). Such clarifications would also advance the

mission of the USPTO to issue and maintain robust and reliable patents. For example, the USPTO has determined that the public would benefit from additional clarity that the guidance in MPEP section 1504.01(a)(I) does not permit design patent protection for a mere image on a screen. Thus, the USPTO is issuing this notice to supplement the guidance in MPEP section 1504.01(a)(I). This supplemental guidance does not change the current guidance but provides important clarifications. The USPTO welcomes public feedback on this supplemental guidance. Instructions for submitting feedback are provided in the **ADDRESSES** section of this notice.

This supplemental guidance will raise awareness regarding how to file for protection for subject matter related to computer-generated electronic images, if appropriate, including the proper claim language and title to use when seeking such protection. Publishing these guidelines will also promote consistent analysis by USPTO personnel of the article of manufacture requirement in design patent applications and reexamination proceedings and by the Patent Trial and Appeal Board in both ex parte appeals and post-patent issuance proceedings. Thus, this notice supports the USPTO’s mission of promoting an efficient, effective, and fair intellectual property ecosystem.

II. General Principles Governing Compliance With the Article of Manufacture Requirement

35 U.S.C. 171 provides that “[w]hoever invents any new, original and ornamental design for an *article of manufacture* may obtain a patent therefor” (emphasis added). The language “new, original and ornamental design for an article of manufacture” set forth in 35 U.S.C. 171 has been interpreted to include at least three kinds of designs: (1) a design for an ornament, impression, print, or picture that is applied to or embodied in an article of manufacture (surface indicia); (2) a design for the shape or configuration of an article of manufacture; and (3) a combination of the first two categories. See *In re Schnell*, 46 F.2d 203, 8 USPQ 19 (CCPA 1931); *Ex parte Donaldson*, 26 USPQ2d 1250 (Bd. Pat. App. & Int. 1992). See also MPEP section 1504.01.

As discussed in MPEP section 1502, a “[d]esign is inseparable from the article to which it is applied and cannot exist alone merely as a scheme of surface ornamentation.” See *Curver Luxembourg, SARL v. Home Expressions, Inc.*, 938 F.3d 1334, 1340, 2019 USPQ2d 341902 (Fed. Cir. 2019)

(noting “that long-standing precedent, unchallenged regulation, and agency practice all consistently support the view that design patents are granted only for a design applied to an article of manufacture, and not a design *per se*”). Further, as discussed in MPEP section 1504.01, “a picture standing alone is not patentable under 35 U.S.C. 171. The factor which distinguishes statutory design subject matter from mere picture or ornamentation, *per se* (i.e., abstract design), is the embodiment of the design in an article of manufacture. Consistent with 35 U.S.C. 171, case law and USPTO practice, the design must be shown as applied to or embodied in an article of manufacture.” See also *Ex parte Strijland*, 26 USPQ2d 1259 (Bd. Pat. App. & Int. 1992).

III. Background Regarding MPEP Section 1504.0(a), Computer-Generated Icons

In 1992, the Commissioner of Patents and Trademarks (the agency’s principal at that time) and Deputy Commissioner sitting in an expanded panel of the USPTO Board of Patent Appeals and Interferences reviewed *In re Schnell*, 46 F.2d 203, 8 USPQ 19 (CCPA 1931) and *In re Zahn*, 617 F.2d 261, 204 USPQ 988 (CCPA 1980) and determined that “a picture standing alone is not protectable by a design patent,” and “[t]he factor which distinguishes statutory design subject matter from mere picture or surface ornamentation *per se* (i.e., abstract designs) is the embodiment of the design in an article of manufacture.” *Ex parte Strijland*, 26 USPQ2d at 1262. Applying prevailing case law to a new technology of presenting a picture on a computer screen, the expanded Board panel in *Strijland* explained that: “[i]t should be noted, however, we do not think that merely illustrating a picture displayed on the screen of a computer or other display device, such as a television or movie screen, is sufficient, alone, to convert a picture into a design for an article of manufacture. Mere display of a picture on a screen is not significantly different, in our view, from the display of a picture on a piece of paper. Only the medium of display is different.” *Strijland*, 26 USPQ2d at 1263. The panel also noted that appellants “provided declaration evidence demonstrating that the icon is an integral part of the operation of a programmed computer” and that “[t]he declarations indicate that the intended design is not merely a displayed picture, but an integral and active component in the operation of a programmed computer displaying the design.” *Id.* Thus, the expanded Board panel explained that such an icon, “if

properly presented and claimed would have constituted statutory subject matter under 35 U.S.C. 171.” *Id.*

Following the agency’s decision in *Ex parte Strijland*, the USPTO issued a notice of hearings and request for public comments. Public Hearings and Request for Comments on Patent Protection for Software-Related Inventions, 58 FR 66347 (December 20, 1993). Among other questions, the USPTO sought public feedback on the language in *Ex parte Strijland*, specifically asking whether “a description in a specification indicating how a displayed image is an ‘integral and active component in the operation of a programmed computer displaying the design’ provide[s] a workable line between statutory and non-statutory design subject matter.” *Id.* at 66352. The notice made clear that images displayed on a computer screen standing alone were treated the same as mere pictures and did not qualify as computer icons, which the agency had defined as integral and active components in the operation of a programmed computer displaying the design. *Id.* Thus, images merely displayed on a computer screen were not considered eligible under 35 U.S.C. 171.

Over the next few years, the USPTO engaged with the public in a process that resulted in the examination guidelines currently in MPEP section 1504.01(a), subsection (I) in which computer icons (as opposed to mere computer-generated images) are considered by the USPTO to comply with the article of manufacture requirement of 35 U.S.C. 171 because they are integral and active components in the operation of a programmed computer displaying the design. These guidelines have also been used in the examination of design patent applications related to GUIs in which GUIs are considered by the USPTO to be integral and active components in the operation of a programmed computer displaying the design. Therefore, if properly presented and claimed, a display panel with a computer icon or a GUI—as an integral and active component in the operation of a programmed computer displaying the design—constitutes statutory subject matter under 35 U.S.C. 171.

IV. Supplemental Guidelines for Examination of Design Patent Applications Related to Computer-Generated Electronic Images

In view of the above, the mere display of a computer-generated electronic image that is not a computer icon or a GUI (*i.e.*, that is not an integral and active component in the operation of a

computer) shown on a display panel does not constitute statutory subject matter under 35 U.S.C. 171. However, the USPTO considers a computer icon or a GUI shown on a display panel, or a portion thereof, to be more than a mere display of a picture on a screen because a computer icon or a GUI is an integral and active component in the operation of—*i.e.*, embodied in and/or applied to—a programmed computer displaying the computer icon or the GUI. Therefore, a computer icon or a GUI is eligible under 35 U.S.C. 171, if properly presented and claimed (*e.g.*, the drawing(s) fully discloses the design as embodied in the article of manufacture).

Office personnel must consider the complete disclosure when evaluating whether a design claim that includes a computer-generated electronic image complies with the article of manufacture requirement. More specifically, USPTO personnel must read the disclosure to determine what is claimed as the design and whether the design is embodied in an article of manufacture. USPTO personnel must:

a. Review the title and claim language to determine whether the title and claim adequately describe a design for an article of manufacture under 35 U.S.C. 171. USPTO personnel must also consider the following and, where appropriate, make the noted objections and rejections.

1. A computer-generated electronic image shown on a display panel that *is not* a computer icon or a GUI (*i.e.*, that *is not* an integral and active component in the operation of a computer) is a mere illustration of a picture displayed electronically. Therefore, a claim to the image per se, to a display panel (or a portion thereof) with the image, or to the image for display on a display panel, will not satisfy the article of manufacture requirement, and such a claim should be rejected under 35 U.S.C. 171 for failing to comply with the article of manufacture requirement.

2. The USPTO considers computer icons or GUIs to be two-dimensional images which standing alone are surface ornamentation (*i.e.*, an ornament, impression, print, or picture). See MPEP section 1504.01(a)(I). Therefore, the title and the claim should not be for a computer icon or a GUI alone, but must be for an article of manufacture, for example, a “display panel with computer icon.”

3. When a design claim is to a display panel with a computer-generated image, the USPTO considers the term “icon” or “GUI” in the title and the claim to be indicating that the image on the display panel is not merely a displayed picture,

but an integral and active component in the operation of a programmed computer displaying the image. See *Ex parte Strijland*, 26 USPQ2d at 1263. Therefore, a claim and title directed to a display screen with an icon or a GUI adequately describes a design for an article of manufacture under 35 U.S.C. 171. (Note that though the underlying article of manufacture for an icon or a GUI has functional properties, the design of the icon or the GUI itself is not functional, and thus this subsection is not in tension with, nor does it contradict, the functionality doctrine, which requires that design patent protection extend only to the “ornamental design” of an article of manufacture. See 35 U.S.C. 171(a); MPEP section 1504.01(c), subsection (I)).

4. The following are examples of claim language and titles that *DO NOT* adequately describe a design for an article of manufacture under 35 U.S.C. 171: “display screen with virtual image,” “virtual image for display on computer screen,” “computer icon,” and “icon for computer screen.” This list of examples is not exhaustive. These types of claims and titles should be objected to under 37 CFR 1.153(a) for failing to designate a particular article of manufacture, and the objection should be maintained until the title and the claim language are appropriately amended. See MPEP section 707.07(e). Note that a determination must be made as to whether a rejection under 35 U.S.C. 171 is appropriate (*e.g.*, the application fails to provide support for an icon or a GUI). See paragraph (i) above; see also section (b) and example 3 below.

5. The following are examples of claim language and titles that *DO* adequately describe a design for an article of manufacture under 35 U.S.C. 171: “computer screen with an icon,” “display panel with GUI,” “display screen or portion thereof with icon,” “portion of a computer screen with an icon,” “portion of a display panel with an icon,” and “portion of a monitor displayed with an icon.” This list of examples is not exhaustive.

b. Review the drawing to determine whether a display panel, or a portion thereof, is shown in sufficient views to fully disclose the design as embodied in the article. See Changes to Patent Practice and Procedure, 62 FR 53132, 53164 (October 10, 1997). USPTO personnel must also consider the following and, where appropriate, make the noted rejections.

1. If the drawing does not depict a computer icon or a GUI embodied in a display panel, or a portion thereof, in

either solid or broken lines, USPTO personnel must reject the claimed design under 35 U.S.C. 171 for failing to comply with the article of manufacture requirement. See MPEP section 1504(a), subsection (I)(B).

i. If the disclosure as a whole does not suggest or describe the claimed subject matter as a computer icon or a GUI embodied in a display panel, or a portion thereof, USPTO personnel must indicate that:

A. The claim is fatally defective under 35 U.S.C. 171; and

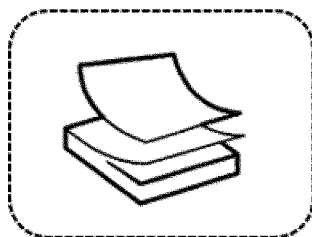
B. Amendments to the written description, drawings, and/or claim attempting to overcome a non-final rejection will ordinarily be entered; however, any new matter will be required to be canceled from the written description, drawings, and/or claims. If new matter is added, the claim should be rejected under 35 U.S.C. 112(a).

ii. If the disclosure as a whole suggests or describes the claimed subject matter as a computer icon or a GUI embodied in a display panel, or a

portion thereof, USPTO personnel must indicate that the drawing may be amended to overcome the rejection under 35 U.S.C. 171. USPTO personnel must also suggest amendments that would bring the claim into compliance with 35 U.S.C. 171.

V. Examples

Example 1



Title: Computer display screen with icon

Description: The figure is a front view of a computer display screen with icon, showing the new design. The broken lines showing a portion of the computer

display screen form no part of the claimed design.

Claim: The ornamental design for computer display screen with icon as shown and described

As presented, the claimed design in this example complies with 35 U.S.C. 171 because:

(1) the USPTO considers a computer icon or a GUI on a display panel to be an integral and active component in the operation of a programmed computer displaying the design and more than a displayed picture; and

(2) the application fully discloses the design as embodied in an article of manufacture, as the drawing depicts the design embodied in a computer screen in broken lines.

In addition, the title and claim comply with 37 CFR 1.153(a) because the title and claim adequately designate a particular article of manufacture (*i.e.*, the computer display screen).

Example 2

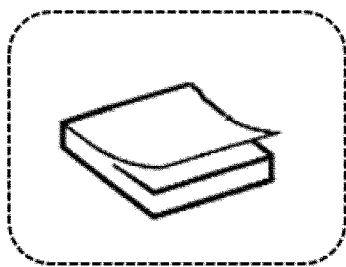


FIG. 1

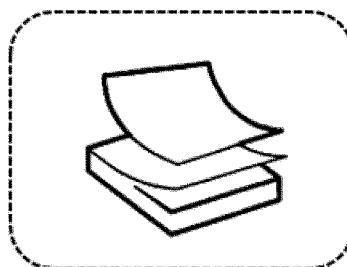


FIG. 2

Title: Animated Icon

Description: Figure 1 is a front view showing a first image in a sequence for an animated icon showing a new design. Figure 2 is a second image thereof. The appearance of the animated image sequentially transitions between the images shown in Figs. 1–2. The process or period on which one image transitions to another image forms no part of the claimed design. The broken lines showing a portion of a computer display screen form no part of the claimed design.

Claim: The ornamental design for an animated icon as shown and described.

As presented, the title and claim should be objected to under 37 CFR 1.153(a) for failing to designate a particular article of manufacture. However, as presented, the claimed design in this example does comply with 35 U.S.C. 171 because:

(1) the USPTO considers a computer icon or a GUI on a display panel to be an integral and active component in the operation of a programmed computer

displaying the design and more than a displayed picture; and

(2) the application fully discloses the design as embodied in an article of manufacture, as the drawing depicts the design embodied in a computer display screen in broken lines and the description (*i.e.*, the broken line statement) describes a portion of a computer display screen.

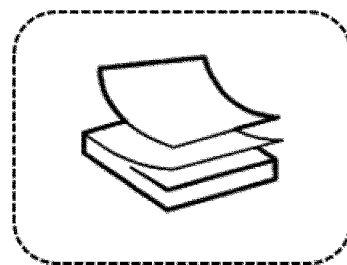
To address the objections to the title and claim, the application could be amended as follows:

Title: Computer display screen with A animated icon

Claim: The ornamental design for a computer display screen with an animated icon as shown and described.

The objections should be maintained until the title and the claim are appropriately amended.

Example 3



Title: Virtual paper stack

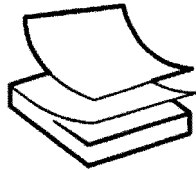
Description: The figure is a front view of a computer display screen with a virtual paper stack showing the new design. The broken lines showing a portion of the computer display screen form no part of the claimed design.

Claim: The ornamental design for a virtual paper stack as shown and described.

As presented, the claimed design in this example does not comply with 35 U.S.C. 171. The image is merely a picture displayed on a computer display

screen. Because the original disclosure does not provide support for amending the claim to include a computer icon, the claim is fatally defective under 35 U.S.C. 171 and should be rejected under 35 U.S.C. 171, as set forth in MPEP section 1504.01(a), subsection (I)(B). In addition, the title and claim should be objected to under 37 CFR 1.153(a) for failing to designate a particular article of manufacture.

Example 4



Title: Paper stack icon for use on a mobile device screen.

Description: The figure is a front view of a paper stack icon showing the new design.

Claim: The ornamental design for a paper stack icon for use on a mobile device screen as shown and described

As presented, the claimed design in this example would not comply with 35 U.S.C. 171 because the drawing does not depict an article of manufacture (e.g., a display panel) in either solid or broken lines. Therefore, the claim should be rejected under 35 U.S.C. 171, as set forth in MPEP section 1504.01(a), subsection (I)(B). In addition, the title and claim should be objected to under 37 CFR 1.153(a) for failing to designate a particular article of manufacture. Specifically, the language “for use on a mobile device screen” does not adequately designate a particular article of manufacture. However, because the original disclosure provides support for a mobile device screen, the application could be amended as follows:

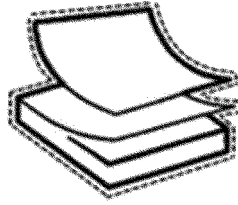
Title: Mobile device screen with a paper Paper stack icon for use on mobile device.

Claim: The ornamental design for a mobile device screen with a paper stack icon for use on a mobile device as shown and described.

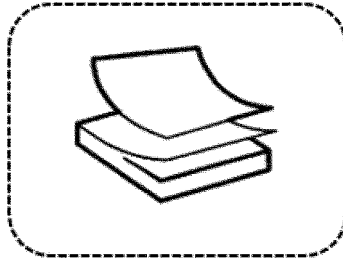
Description: The figure is a front view of a mobile device with a virtual paper stack icon showing the new design. The broken lines showing a portion of the mobile device screen form no part of the claimed design.

Note that a replacement figure showing the portion of a mobile device screen in either solid or broken lines must not introduce new matter. The replacement figure shown represents a best practice for applicants as it is the most likely amendment to be supported by the original disclosure.

Replacement Figure:



Example 5



Title: Icon for computer display screen

Description: The figure is a front view of a computer display screen with icon, showing the new design. The broken lines showing a portion of the computer display screen form no part of the claimed design.

Claim: The ornamental design for an icon for computer display screen as shown and described

As presented, the title and claim should be objected to under 37 CFR 1.153(a) for failing to designate a particular article of manufacture. In particular, the language “for computer display screen” does not adequately designate a particular article of manufacture.

However, as presented, the claimed design in this example complies with 35 U.S.C. 171 because:

(1) the USPTO considers a computer icon or a GUI on a display panel to be an integral and active component in the operation of a programmed computer displaying the design and more than a displayed picture; and

(2) the application fully discloses the design as embodied in an article of manufacture, as the description and drawing depict the design embodied in a computer display screen in broken lines and the description (i.e., the broken line statement) describes a portion of a computer display screen.

To address the objections to the title and claim, the application could be amended as follows:

Title: Icon for computer Computer display screen with Icon

Katherine Kelly Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2023-25473 Filed 11-16-23; 8:45 am]

BILLING CODE 3510-16-P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Deletions from the Procurement List.

SUMMARY: The Committee is proposing to delete product(s) and service(s) from the Procurement List that were furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: Comments must be received on or before: December 17, 2023.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 355 E Street SW, Suite 325, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: For further information or to submit comments contact: Michael R. Jurkowski, Telephone: (703) 785-6404, or email CMTEFedReg@AbilityOne.gov.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51-2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Deletions

The following product(s) and service(s) are proposed for deletion from the Procurement List:

Product(s)

NSN(s)—Product Name(s):

7530-01-463-2324—Folder, File, 1/3 Cut

Tab, Classification, Pressboard, 2

Dividers, 6 Part, Earth Red, Legal

7530-01-463-2326—Folder, File, 1/3 Cut

Tab, Classification, Pressboard, 2

Dividers, 6 Part, Blue, Legal

7530-01-463-2330—Folder, File, 1/3 Cut

Tab Classification, Pressboard, 1 Divider,

4 Part, Light Green, Letter

7530-01-517-1781—Folder, File, 1/3 Cut

Tab, Classification, Pressboard, 2

Dividers, 6 Part, Green, Legal

7530-01-523-4594—Folder, File, 1/3 Cut

Tab, Classification, Pressboard, 1

Divider, 4 Part, Earth Red, Letter

Contracting Activity: GSA/FAS ADMIN SVCS ACQUISITION BR(2, NEW YORK, NY

NSN(s)—Product Name(s):

8455-00-NIB-0139—Name Tape,

Embroidered, USAF, Tigerstripe

8455-00-NIB-0140—Service Tape,

Embroidered, USAF, Tigerstripe

Mandatory Source of Supply: LIONS INDUSTRIES FOR THE BLIND, INC, Kinston, NC

Contracting Activity: FA3016 502 CONS CL JB SA, FORT SAM HOUSTON, TX

Service(s)

Service Type: Switchboard Operation
Mandatory for: US Air Force, Telephone Operator Consolidated Call Center; 180 Benedict Avenue: Joint Base Langley-Eustis, VA

Mandatory Source of Supply: VersAbility Resources, Inc., Hampton, VA
Contracting Activity: DEPT OF THE AIR FORCE, FA4890 ACC AMIC

Service Type: Janitorial/Custodial
Mandatory for: Hannibal Federal Building, 801 Broadway, Hannibal, MO
Contracting Activity: PUBLIC BUILDINGS SERVICE, GSA/PUBLIC BUILDINGS SERVICE

Service Type: Laundry/Dry Cleaning
Mandatory for: US Air Force, 911th Airlift Wing, Pittsburg International Airport ARS, Coraopolis, PA; 2375 Defense Avenue; Coraopolis, PA
Mandatory Source of Supply: Hancock County Sheltered Workshop, Inc., Weirton, WV
Contracting Activity: DEPT OF THE AIR FORCE, FA6712 911 AW LGC

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2023-25418 Filed 11-16-23; 8:45 am]

BILLING CODE 6353-01-P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Agency Information Collection Activities; Proposals, Submissions, and Approvals

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Committee for Purchase From People Who Are Blind or Severely Disabled operates as the U.S. AbilityOne Commission (Commission). This notice announces the Commission's intent to submit the Information Collection Request ("ICR") described below to the Office of Management and Budget (OMB) for approval under applicable provisions of the Paperwork Reduction Act. This notice provides an opportunity to interested members of the public and affected agencies to comment on a proposed Participating Employee Eligibility form.

DATES: Submit comments on or before January 16, 2024.

ADDRESSES: Submit comments to policy@abilityone.gov.

FOR FURTHER INFORMATION CONTACT: Christopher Stewart, Compliance and Enforcement Attorney, Office of General Counsel, U.S. AbilityOne Commission, 355 E Street SW, Suite 325, Washington,

DC 20024; telephone: (703) 254-6172; email: cstewart@abilityone.gov. If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7-1-1.

SUPPLEMENTARY INFORMATION:

Overview of ICR: This notice pertains to an ICR the Commission intends to submit to OMB to approve the form that an AbilityOne-participating nonprofit agency employer will fill out to document its determination of an individual's eligibility to be a participating employee in the AbilityOne Program. The form is an updated and modified version of the Commission's Individual Eligibility Evaluation (IEE) form (OMB Control # 3037-0012). The purpose of the IEE was to determine and document an individual's eligibility to participate in the AbilityOne Program by identifying the individual's barriers to employment as well as the job supports the individual needs to perform their job.

This ICR is consistent with OMB regulations at 5 CFR part 1320, which implement provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) These regulations require the Commission to provide an opportunity to interested members of the public and affected agencies to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)) such as those proposed to be implemented through this form.

The Commission is responsible for implementing the Javits-Wagner-O'Day (JWOD) Act, 41 U.S.C. 8501-8506. In doing so, the Commission oversees the AbilityOne Program, an employment program in which individuals who are blind or have significant disabilities provide products and services to Federal agencies, thereby creating employment opportunities. The Commission maintains a Procurement List of mandatory source products and services provided by approximately 450 qualified nonprofit agencies (NPAs). The individuals who are blind or have significant disabilities working on AbilityOne contracts are called "participating employees."

The Commission collects certain data from qualified NPAs regarding participating employees in order to ensure the integrity of the AbilityOne Program. Providing effective program stewardship requires collection of information to protect participating employees and ensure that positions intended for individuals who are blind or have significant disabilities are, in fact, filled by those individuals.

The proposed data collection form in this ICR is consistent with the

Commission's responsibilities and ensures that the Commission will collect the most pertinent data to inform its oversight and decision making.

The form described in this ICR is the first of two forms intended to modernize the existing IEE form and align it with the Commission's strategic plan and updated approach to determining eligibility for participating employees. The Commission has outlined the criteria for eligibility for participating employees in its Policy 51.403, which will be published in final form on November 17, 2023, and will be effective on January 1, 2024.

As outlined in Policy 51.403, and reflected in the proposed form, a significant change in the Commission's approach to determining a prospective employee's eligibility for the AbilityOne Program is the Commission's acceptance of other governmental agency determinations of disability. For example, individuals deemed eligible for Social Security disability benefits are now automatically eligible to participate in the AbilityOne Program. The proposed form described in this ICR enables NPAs to certify that an individual has a determination of disability from a governmental agency, and in so doing, streamlines the process to qualify individuals for employment in the AbilityOne Program.

A draft version of the form NPAs will complete is available at www.abilityone.gov (see News and Events column on the homepage). For individuals who meet the eligibility requirements under either Part A or Part B of the proposed form, the Commission estimates that completing the form will take approximately 5 minutes. For individuals who meet the eligibility requirements under Part C or Part D of the proposed form, the Commission estimates that completing the form will take approximately 30 minutes. NPAs completing Part C or Part D of the form will need to complete Part E, as well, which is included in the estimated 30 minutes.

In accordance with these and other changes reflected in Policy 51.403, the Commission estimates that the time and financial burden to the NPAs in completing the proposed form will be significantly lower than required by the corresponding sections of the existing IEE form. Over time, this form will further substantially reduce the burden on NPAs because, in most cases, it will be filled out only once per employee—*i.e.*, when an employee is onboarded—and not on an annual basis as required by the existing IEE form. For employees with a non-permanent disability, the form will be completed on a recurring,

seven-year basis. The Commission estimates that approximately 10% of AbilityOne employees have non-permanent disabilities.

To calculate the burden for completion of the proposed form, the Commission considered an estimate from the Society for Human Resource Management that the average annual turnover across all industries is approximately 18 percent. Using this number, the Commission estimated that

NPAs may need to complete this form for approximately 18 percent of their total employees each year. However, AbilityOne employers may experience lower turnover than employer in the general economy. The Commission acknowledges that net AbilityOne job growth may result in NPAs completing additional forms.

The table below shows the Commission's estimate for the average amount of time per employee for whom

the NPAs complete a form, both in the first year of implementation ("Year 1") and in the following years of implementation ("Years 2+"). The Commission recognizes that NPAs vary widely in total number of employees. Therefore, an NPA can apply this analysis based on their individual employment totals.

Number of employees for whom NPA must complete form	Annual turnover/entry rate of 18%	Maximum responses for this form	Annual form burden (hours/employee)	Total time burden for all employees (hours)	Annual form cost burden (dollars)
36,377 (Year 1)	6,548	42,925	0.5	21,462.5	662,762
520 (Years 2+)	6,548	7,068	0.5	3,534	109,130

NPAs can calculate their overall time burden (in hours) by multiplying the number of participating employees they have by 0.5. The cost burden is based upon national average pay data from the U.S. Bureau of Labor Statistics, using the May 2022 National Occupational Employment and Wage Estimate of \$30.88 as the median hourly wage for a Human Resources Specialist (OC 13–1070). (https://www.bls.gov/oes/current/oes_nat.htm#11-0000)

With respect to this collection of information via the proposed form, the Commission welcomes comments on the following:

- The necessity to collect this information to support the Commission's mission and oversight responsibilities;
- Methodology to improve the accuracy of the estimated time burden; *i.e.*, specific year-over-year employee turnover rates for NPAs or number of additional employee hires above turnovers, expressed as a percentage of the NPAs' total number of participating employees;
- Methodology to determine the percentage of participating employees who have non-permanent disabilities;
- Suggestions or methods to minimize the burdens associated with collecting the information described in this ICR.

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2023–25499 Filed 11–16–23; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Deletions from the Procurement List.

SUMMARY: This action deletes service(s) from the Procurement List that were furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Date added to and deleted from the Procurement List:* December 17, 2023.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 355 E Street SW, Suite 325, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: For further information or to submit comments contact: Michael R. Jurkowski, Telephone: (703) 785–6404, or email CMTEFedReg@AbilityOne.gov.

SUPPLEMENTARY INFORMATION:

Deletions

On 10/13/2023, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List. This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3.

After consideration of the relevant matter presented, the Committee has determined that the service(s) listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.
2. The action may result in authorizing small entities to furnish the service(s) to the Government.
3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the service(s) deleted from the Procurement List.

End of Certification

Accordingly, the following service(s) are deleted from the Procurement List:

Service(s)

Service Type: Grounds Maintenance

Mandatory for: NOAA, National Weather Service Forecast Office, Charleston, WV; 400 Parkway Road; Charleston, WV

Designated Source of Supply: Goodwill Industries of Kanawha Valley, Charleston, WV

Contracting Activity: NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPT OF COMMERCE NOAA

Service Type: Laundry Service

Mandatory for: US Air Force, Youngstown Municipal Airport, 910th Airlift Wing, Youngstown Air Reserve Station, 3976 King Graves Road; Vienna, OH

Mandatory Source of Supply: Hancock County Sheltered Workshop, Inc., Weirton, WV

Contracting Activity: DEPT OF THE AIR
FORCE, FA6656 910 AW LGC
YNGSTN WRN ARPT

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2023–25417 Filed 11–16–23; 8:45 am]

BILLING CODE 6353–01–P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection

Activities: Notice of Intent To Extend Collection 3038–0026, Gross Collection of Exchange-Set Margins for Omnibus Accounts

AGENCY: Commodity Futures Trading
Commission.

ACTION: Notice.

SUMMARY: The Commodity Futures Trading Commission (CFTC) is announcing an opportunity for public comment on the proposed renewal of a collection of certain information by the agency. Under the Paperwork Reduction Act (PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment. This notice solicits comments on requirements relating to Gross Collection of Exchange-Set Margins for Omnibus Accounts.

DATES: Comments must be submitted on or before January 16, 2024.

ADDRESSES: You may submit comments, identified by OMB Control Number 3038–0026, by any of the following methods:

- The Agency's website, at <https://comments.cftc.gov>. Follow the instructions for submitting comments through the website.

- *Mail:* Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

- *Hand Delivery/Courier:* Same as Mail above.

Please submit your comments using only one method. All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <https://www.cftc.gov>.

FOR FURTHER INFORMATION CONTACT:

Andrew Pai, Attorney Advisor, Market Participants Division, Commodity Futures Trading Commission, (646) 746–9893; email: apai@cftc.gov.

SUPPLEMENTARY INFORMATION: Under the PRA, 44 U.S.C. 3501 *et seq.*, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. “Collection of Information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA, 44 U.S.C. 3506(c)(2)(A), requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the CFTC is publishing notice of the proposed collection of information listed below. 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.

Title: Gross Collection of Exchange-Set Margins for Omnibus Accounts (OMB Control Number 3038–0026). This is a request for extension of a currently approved information collection.

Abstract: Commission Regulation 1.58 requires that FCMs margin omnibus accounts on a gross, rather than a net, basis. The regulation provides that the carrying FCM need not collect margin for positions traded by a person through an omnibus account in excess of the amount that would be required if the same person, instead of trading through an omnibus account, maintained its own account with the carrying FCM. To prevent abuse of this exception to the regulation, a carrying FCM must maintain a written representation from the originating FCM or foreign broker that the particular positions held in the omnibus account are part of a hedge or spread transaction. This rule is promulgated pursuant to the Commission's rulemaking authority contained in Sections 4c, 4d, 4f, 4g and 8a of the Commodity Exchange Act, 7 U.S.C. 6c, 6d, 6f, 6g and 12a (2000).

With respect to the following collection of information, the CFTC invites comments on:

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
- The accuracy of the Commission's estimate of the burden of the proposed collection of information, including the

validity of the methodology and assumptions used;

- Ways to enhance the quality, usefulness, and clarity of the information to be collected; and
- Ways to minimize the burden of 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.

You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in Section 145.9 of the Commission's regulations.¹

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <https://www.cftc.gov> that it any deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the ICR will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

Burden Statement: The Commission is revising its estimate of the burden due to the reduced number of futures commission merchants in the industry. The respondent burden for this collection is estimated to be as follows:

- *Estimated number of respondents:* 52.
- *Total annual responses:* 208.
- *Estimated Total Annual Burden Hours:* 17.
- *Frequency of Collection:* On occasion.

There are no capital costs or operating and maintenance costs associated with this collection.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: November 14, 2023.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2023–25424 Filed 11–16–23; 8:45 am]

BILLING CODE 6351–01–P

¹ 17 CFR 145.9.

CONSUMER FINANCIAL PROTECTION BUREAU**Academic Research Council Meeting**

AGENCY: Consumer Financial Protection Bureau.

ACTION: Notice of public meeting.

SUMMARY: Under the Federal Advisory Committee Act (FACA), this notice sets forth the announcement of a public meeting of the Academic Research Council (ARC or Council) of the Consumer Financial Protection Bureau (CFPB or Bureau). The notice also describes the functions of the Council.

DATES: The meeting date is Friday, December 1, 2023, from approximately 1 p.m. to 3:15 p.m., eastern daylight time. This meeting will be held virtually and is open to the general public. Members of the public will receive the agenda and dial-in information when they RSVP.

FOR FURTHER INFORMATION CONTACT: Kim George, Outreach and Engagement Associate, Advisory Board and Councils, External Affairs Division, at 202-450-8617, or email: CFPB_CABandCouncilsEvents@cfpb.gov. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION:**I. Background**

Section 2 of the of the ARC Charter provides that pursuant to the executive and administrative powers conferred on the CFPB by section 1012 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), the Director of the CFPB renews the discretionary Academic Research Council under agency authority in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. 10.

Section 3 of the ARC Charter states: "The committee will (1) provide the CFPB with advice about its strategic research planning process and research agenda, including views on the research that the CFPB should conduct relating to consumer financial products or services, consumer behavior, cost-benefit analysis, or other topics to enable the agency to further its statutory purposes and objectives; and (2) provide the Office of Research with technical advice and feedback on research methodologies, data collection strategies, and methods of analysis, including methodologies and strategies for quantifying the costs and benefits of regulatory actions; and, (3) serve as peer reviewers of policy-determinative research conducted by the CFPB."

II. Agenda

The ARC will discuss broad policy matters related to the Bureau's Research Agenda and general scope of authority.

If you require any additional reasonable accommodations(s) in order to attend this event, please contact the Reasonable Accommodations team at CFPB_ReasonableAccommodations@cfpb.gov 48 hours prior to the start of this event.

Written comments will be accepted from interested members of the public and should be sent to CFPB_CABandCouncilsEvents@cfpb.gov, a minimum of seven (7) days in advance of the meeting. The comments will be provided to the ARC members for consideration. Individuals who wish to attend this meeting must RSVP via this link https://surveys.consumerfinance.gov/jfe/form/SV_238NYmU9JdKV74a.

III. Availability

The Council's agenda will be made available to the public on Friday, November 17, 2023, via [consumerfinance.gov](https://www.consumerfinance.gov).

A recording and summary of this meeting will be available after the meeting on the Bureau's website [consumerfinance.gov](https://www.consumerfinance.gov).

Jocelyn Sutton,

Deputy Chief of Staff, Consumer Financial Protection Bureau.

[FR Doc. 2023-23894 Filed 11-16-23; 8:45 am]

BILLING CODE 4810-AM-P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE**Agency Information Collection Activities; Comment Request; Package for AmeriCorps VISTA Application and Reporting Forms**

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 to revise an information collection.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by January 16, 2024.

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 Kelly Daly, 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](https://www.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:

Kelly Daly, 202-606-6849, or by email at kdaly@americorps.gov.

SUPPLEMENTARY INFORMATION:

Title of Collection: AmeriCorps VISTA Application and Reporting Forms.

OMB Control Number: 3045-0038
Type of Review: Revision.

Respondents/Affected Public: Businesses and Organizations AND/OR State, Local or Tribal Governments.

Total Estimated Number of Annual Responses: 750.

Total Estimated Number of Annual Burden Hours: 17,500.

Abstract: AmeriCorps VISTA is revising its application and reporting package to reflect changes in the Support Grant budget instructions that allow for first-year Support Grant sponsors and to simplify instructions in both the Support and Program Grant budget instructions. The Concept Paper and Application Instructions are being revised to add information about the Unique Entity ID registration process on [SAM.gov](https://sam.gov). The VISTA Progress Report and Progress Report Supplement were not revised. AmeriCorps also seeks to continue using the currently approved information collection until the revised information collection is approved by OMB. Once the revised information is approved by OMB, VISTA plans to use the revised forms through the remainder

of Fiscal Year 2024 and until the launch of the new project and grant application system. The currently approved information collection is due to expire on March 31, 2024.

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](https://www.regulations.gov).

Carly Bruder,

Acting Director, AmeriCorps VISTA.

[FR Doc. 2023-25405 Filed 11-16-23; 8:45 am]

BILLING CODE 6050-28-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS-2023-0046; OMB Control Number 0704-0525; Req No. DARS-2024-00014-FR]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement; Prohibition of Foreign Commercial Satellite Services From Certain Foreign Entities-Representations

AGENCY: Defense Acquisition Regulations System; Department of Defense (DoD).

ACTION: Notice and request for comments regarding a proposed extension of an approved information collection requirement.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, DoD announces the proposed extension of a public information collection requirement and seeks public comment on the provisions thereof. DoD invites comments on: whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; the accuracy of DoD's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. The Office of Management and Budget (OMB) has approved this information collection for use under Control Number 0704-0525 through March 31, 2024. DoD proposes that OMB approve an extension of the information collection requirement, to expire three years after the approval date.

DATES: DoD will consider all comments received by January 16, 2024.

ADDRESSES: You may submit comments, identified by OMB Control Number 0704-0525, using either of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* osd.dfars@mail.mil. Include OMB Control Number 0704-0525 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly Bass, at 703-717-3446.

SUPPLEMENTARY INFORMATION:

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS), Prohibition on Acquisition of Commercial Satellite Services from Certain Foreign Entities-Representations; OMB Control Number 0704-0525.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Respondent's Obligation: Required to obtain or retain benefits.

Frequency: On occasion.

Number of Respondents: 235.

Responses Per Respondent: 1.

Annual Responses: 235.

Average Burden Per Response: 0.25 hour.

Annual Burden Hours: 58.

Needs and Uses: DFARS solicitation provision 252.225-7049, Prohibition on Acquisition of Commercial Satellite Services from Certain Foreign Entities-Representations, is used by contracting officers to determine whether the offeror is subject to the statutory prohibition on award of contracts for commercial satellite services to certain foreign entities. The provision is included in solicitations for the acquisition of foreign commercial satellite services and requires the offeror to represent whether it is or is not a foreign entity subject to the prohibitions of the statute, or is or is not offering foreign commercial satellite services provided by such a foreign entity. If the offeror responds affirmatively to any of the representations, then the offeror must provide further information.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

[FR Doc. 2023-25373 Filed 11-16-23; 8:45 am]

BILLING CODE 6820-FR-P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Prepare a Supplement to the September 2018 Final Atlantic Fleet Training and Testing Environmental Impact Statement/Overseas Environmental Impact Statement for Continuation of Navy Atlantic Fleet Training and Testing Activities

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

ACTION: Notice.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA) of 1969, and regulations implemented by the Council on Environmental Quality, the Department of the Navy (DoN)

(including both the U.S. Navy and the U.S. Marine Corps) in cooperation with the U.S. Coast Guard announces its intent to prepare a supplement to the 2018 Atlantic Fleet Training and Testing (AFTT) Environmental Impact Statement (EIS)/Overseas Environmental Impact Statement (OEIS). New information includes an updated acoustic effects analysis, updated marine mammal density data, and evolving and emergent best available science. Proposed activities and study area are consistent with those analyzed in the 2018 AFTT EIS/OEIS.

DATES: The 30-day public scoping period begins on November 17, 2023 and extends to December 16, 2023. Comments must be postmarked or submitted electronically via the website no later than 11:59 p.m. Eastern Time on December 16, 2023 for consideration in the Draft Supplemental EIS/OEIS.

ADDRESSES: The DoN invites all interested parties to submit scoping comments on the Supplemental EIS/OEIS to the physical address listed below and electronically through the project website at <http://www.nepa.navy.mil/aftteis>.

Comments can be mailed to: Naval Facilities Engineering Systems Command, Atlantic, 6506 Hampton Boulevard, Building A, Norfolk, Virginia, 23508-1278, ATTN: EV22, AFTT SEIS Project Manager.

FOR FURTHER INFORMATION CONTACT: U.S. Fleet Forces Command, 1562 Mitscher Avenue Suite 250, Norfolk, VA 23551-2487, Attn: Mr. Theodore Brown, Installations and Environment Public Affairs Officer, 757-836-4427, or visit the project website: <http://www.nepa.navy.mil/aftteis>.

SUPPLEMENTARY INFORMATION: The DoN's lead action proponent is U.S. Fleet Forces Command. Additional Navy action proponents include the Office of Naval Research, Naval Sea Systems Command, Naval Air Systems Command, the U.S. Marine Corps, The U.S. Coast Guard, as a joint lead agency is also an action proponent (hereinafter collectively referred to as the "Action Proponents").

The Action Proponents will assess the potential environmental effects associated with ongoing and future at-sea military readiness activities conducted within the AFTT EIS/OEIS Study Area (hereafter known as the "Study Area") beyond 2025. Military readiness activities include training and research, development, testing, and evaluation (hereafter known as "testing"). The Supplemental EIS/OEIS will include an analysis of training and testing activities using new information

that became available after the release of the 2018 Final EIS/OEIS. New information includes an updated acoustic effects analysis, updated marine mammal density data, and evolving and emergent best available science. Proposed activities are consistent with those analyzed in the 2018 Final EIS/OEIS and are representative of training and testing activities the Action Proponents have been conducting in the Study Area for decades. The Study Area remains consistent with the 2018 Final EIS/OEIS with the addition of some inland waters within the Gulf of Mexico coast. The Study Area is comprised of operating areas (sea space) and warning areas (airspace) located in the Atlantic Ocean along the eastern coast of North America, the Gulf of Mexico, and portions of the Caribbean Sea, at select Navy pierside locations, within port transit channels, and some inland waters.

The purpose of the Proposed Action is to maintain a ready force, which is needed to ensure the peacetime promotion of the national security interests and prosperity of the United States and for prompt and sustained combat incident to operations at sea and to meet the needs of war, consistent with Title 10, section 8062, of the United States Code.

The Proposed Action is to conduct at-sea training and testing activities within the Study Area. Activities include the use of active sonar and explosives while employing marine species protective mitigation measures. The Proposed Action does not alter the original purpose and need as discussed in the 2018 Final EIS/OEIS.

Proposed training and testing activities are consistent with those analyzed in the 2018 Final EIS/OEIS. In the Supplemental EIS/OEIS, the DoN will analyze the proposed changes to the types and tempo of training and testing activities, accounting for the introduction of new technologies, the evolving nature of international events, advances in warfighting doctrine and procedures, and changes in the organization of vessels, aircraft, weapons systems, and personnel. In the AFTT Supplemental EIS/OEIS, the Action Proponents will reflect the compilation of training and testing activities required to fulfill the Action Proponent's military readiness requirements beyond 2025, and therefore includes the analysis of newly proposed activities and changes to previously analyzed activities.

The Supplemental EIS/OEIS will consider a No Action Alternative and two Action Alternatives that account for

the types and tempo of training and testing activities that are necessary to meet future military readiness requirements (beginning in November 2025).

The Supplemental EIS will evaluate the expected social, economic and environmental effects resulting from implementing the action alternatives and the No Action Alternative. Resource areas that will be addressed include, but are not limited to: biological resources (including marine mammals and other protected species), sediments and water quality, air quality, noise, cultural resources, socioeconomic resources, and public health and safety.

As part of this process, the Action Proponents will seek the issuance of Federal regulatory permits and authorizations under the Marine Mammal Protection Act and Endangered Species Act to support on-going and future at-sea military readiness activities within the Study Area beyond 2025.

Pursuant to 40 CFR 1501.8, the Navy invited the National Marine Fisheries Service (NMFS) to be a cooperating agency in preparation of the Supplemental EIS/OEIS, in a letter dated August 18, 2022. NMFS has agreed to be a cooperating agency on the Supplemental EIS/OEIS to support and expedite the NEPA and consultation processes.

To ensure that the full range of issues related to the proposed action are addressed and all potential issues are identified, DoN invites comments and suggestions from all interested parties regarding potential alternatives, information, studies or analyses of any kind concerning impacts affecting the quality of the human environment relevant to the proposed action on behalf of all the Action Proponents. Comments may be submitted according to the instructions in the following Public Scoping Process section.

The scoping process is used to identify the full range of issues including public concerns and local issues to be considered during the development of the Draft Supplemental EIS/OEIS. Federal agencies, State agencies, local agencies, the public, and interested persons are encouraged to provide substantive comments to the DoN on environmental resources and areas of concern that the commenter believes the DoN should consider.

After the scoping period DoN will coordinate with participating and cooperating agencies to develop a Draft Supplemental EIS/OEIS. The Draft Supplemental EIS/OEIS is anticipated to be issued in the Fall of 2024. The Final Supplemental EIS/OEIS is anticipated to

be issued in the Fall of 2025, within 24 months of the publication of this NOI.

Dated: November 7, 2023.

J.E. Koningisor,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2023–24947 Filed 11–16–23; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Fiscal Year 2023 Performance Review Board Membership

AGENCY: Department of the Navy, Department of Defense.

ACTION: Notice.

SUMMARY: The Department of the Navy (DON) announces the appointment of members to the DON Senior Executive Service (SES), Senior Level (SL), and Scientific and Professional (ST) Fiscal Year 2023 Performance Review Board (PRB). The purpose of the PRB is to provide fair and impartial review of the annual SES performance appraisal prepared by the senior executive's immediate and second level supervisor; to make recommendations to appointing officials regarding acceptance or modification of the performance rating; and to make recommendations for performance-based bonuses and performance-based pay increases.

FOR FURTHER INFORMATION CONTACT: For further information, contact Danielle Dutton, Director, Executive Management Program Office, Manpower and Reserve Affairs at (703) 697–0640 or danielle.a.dutton.civ@us.navy.mil.

SUPPLEMENTARY INFORMATION: Composition of the specific PRB is provided below:

Ms. Mary Tompa
Mr. Frederick Stefany
Mr. Andrew Haeuptle
Ms. Leila Gardner
Ms. E. Anne Sandel
Mr. Thomas Rudowsky
Ms. Giao Phan
Mr. John Pope
Ms. Deline Reardon
Ms. Catherine Kessmeier
Mr. Mark Romano (HLR)
Mr. Timothy Bridges (HLR)
Mr. Robert Hogue (Chair)
(Authority: 5 U.S.C. 4314(c)(4))

Dated: November 14, 2023.

J.E. Koningisor,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2023–25453 Filed 11–16–23; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0163]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Annual Performance Report for Titles III, V, and VII Grants

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

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

DATES: Interested persons are invited to submit comments on or before December 18, 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 Jason Cottell, 202–453–7530.

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: Annual Performance Report for Titles III, V, and VII Grants.

OMB Control Number: 1840–0766.

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

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

Total Estimated Number of Annual Responses: 1,400.

Total Estimated Number of Annual Burden Hours: 28,000.

Abstract: Titles III, V, and VII of the Higher Education Act of 1965, as amended (HEA), provide discretionary and formula grant programs that make competitive awards to eligible institutions of higher education and organizations (Title III, Part E) to assist these institutions with expanding their capacity to serve minority and low-income students. Grantees annually submit a performance report to demonstrate that substantial progress is being made towards meeting the objectives of their project. A Final Performance Report will be completed after the grantee completes their final performance period.

Dated: November 14, 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. 2023–25480 Filed 11–16–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0159]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; State and EIS Record Keeping and Reporting Requirements Under Part C

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), 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 December 18, 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 Diana Yu, 202–245–6371.

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: State and EIS Record Keeping and Reporting Requirements under Part C.

OMB Control Number: 1820–0682.

Type of Review: An extension without change of a currently approved ICR.

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

Total Estimated Number of Annual Responses: 56.

Total Estimated Number of Annual Burden Hours: 4,268.

Abstract: The Office of Special Education and Rehabilitative Services needs to extend its Office of Management and Budget (OMB) Information Collection (IC): 1820–0682 State and Early Intervention Services (EIS) Record Keeping under Part C

which is set to expire on 11/30/2023. These record-keeping requirements are not new and do not require reporting to the Secretary. The record keeping requirements outlined in this IC were created to reflect the requirements in Part C of the Individuals with Disabilities Education Act (IDEA) in 20 U.S.C. 1431–1443 and the final Part C regulations. These regulations require the 56 State lead agencies (LAs) that receive IDEA Part C funds to collect and maintain information or data and, in some cases, report information or data to other public agencies or to the public. This Information Collection was created to ensure that all IDEA Part C information responsibilities are documented and have been submitted for OMB review.

Dated: November 14, 2023.

Juliana Pearson,

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

[FR Doc. 2023–25449 Filed 11–16–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Electric Vehicle Working Group

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: The Department of Energy hereby publishes a notice of open meeting of the Electric Vehicle Working Group (EVWG). The Federal Advisory Committee Act requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Tuesday, December 12, 2023; 1:00 p.m. to 4:30 p.m. Eastern Time and Wednesday, December 13, 2023; 9:00 a.m. to 4:30 p.m. Eastern Time. Start and end times may change slightly. Please visit <https://driveelectric.gov/ev-working-group> for the most up to date agenda.

ADDRESSES: The meeting will be held for members of the EVWG at U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Members of the public who would like to participate may do so virtually and must register at: <https://driveelectric.gov/ev-working-group>.

FOR FURTHER INFORMATION CONTACT: Dr. Rachael Nealer, Designated Federal Officer, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585; email: evwg@ee.doe.gov; telephone: (202) 586–3916.

SUPPLEMENTARY INFORMATION:

Background: The Electric Vehicle Working Group (EVWG) was formed by the Joint Office of Energy and Transportation to make recommendations to the Secretaries of Energy and Transportation regarding the development, adoption, and integration of light-, medium-, and heavy-duty electric vehicles (EVs) into the U.S. transportation and energy systems.

Purpose of the Meeting: This is the first in-person meeting of the EVWG.

Tentative Agenda: The meeting will start at 1:00 p.m. Eastern Time on Tuesday, December 12, 2023. The tentative meeting agenda includes: opening remarks by the Secretaries of Energy and Transportation, a discussion on the first report to be drafted by the EVWG, and a discussion on future report topics and subcommittees. Meeting materials and a link to registration can be found here: <https://driveelectric.gov/ev-working-group>.

Public Participation: The meeting will be held in-person for members of the EVWG. Members of the public who would like to participate may do so virtually and must register at: <https://driveelectric.gov/ev-working-group>.

Individuals and representatives of organizations who would like to offer comments and suggestions may do so during the public comment portion of the meeting. Approximately 30 minutes will be reserved for public comments near the end of the meeting on December 13th. Time allotted per speaker will depend on the number who wish to speak but will not exceed three minutes. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Those wishing to speak during the public comment period should indicate so within their registration.

Those not able to attend the meeting or who have insufficient time to address the committee are invited to send a written statement to Dr. Rachael Nealer, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585, or email: evwg@ee.doe.gov.

Minutes: The minutes of the meeting will be available on <https://driveelectric.gov/ev-working-group> or by contacting Dr. Nealer. She may be reached at the above postal address or email address.

Signed in Washington, DC, on November 14, 2023.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2023–25455 Filed 11–16–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY**[GDO Docket No. PP-481-3]****Application To Amend Presidential Permit; CHPE LLC****AGENCY:** Grid Deployment Office, Department of Energy.**ACTION:** Notice of application.

SUMMARY: CHPE LLC (the Applicant) has filed an application to amend Presidential Permit No. PP-481-2. CHPE LLC is requesting the amendment to allow for a singular modification to the previously permitted route.

DATES: Comments, protests, or motions to intervene must be submitted on or before December 4, 2023.

ADDRESSES: Comments, protests, or motions to intervene should be addressed to Christina Gomer, electricity.exports@hq.doe.gov.

FOR FURTHER INFORMATION CONTACT: Christina Gomer, Grid Deployment Office (GD-20), U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585, by phone at (240) 474-2403, or by email at electricity.exports@hq.doe.gov.

SUPPLEMENTARY INFORMATION: The construction, operation, maintenance, and connection of facilities at the international border of the United States for the transmission of electric energy between the United States and a foreign country is prohibited in the absence of a Presidential permit issued by the Secretary of Energy pursuant to Executive Order (E.O.) 10485, as amended by E.O. 12038. On April 10, 2023, the authority to issue such permits was delegated to the DOE's Grid Deployment Office by Delegation Order No. S1-DEL-S3-2023 and Redelegation Order No. S3-DEL-GD1-2023.

On October 6, 2014, the Department of Energy (DOE) issued Presidential Permit No. PP-362, authorizing Champlain Hudson Power Express, Inc. (CHPEI) to construct, operate, maintain, and connect the Champlain Hudson Power Express Project (Project). As described in PP-362, the Project is a 1,000-megawatt (MW), high-voltage direct current (HVDC), underground and underwater merchant transmission system that will cross the United States-Canada international border underwater near the Town of Champlain, New York, extend approximately 336 miles south through New York State, and interconnect to facilities located in Queens County, New York, owned by the Consolidated Edison Company of New York. The aquatic segments of the transmission line will primarily be buried in sediments of Lake Champlain

and the Hudson, Harlem, and East rivers. The terrestrial portions of the transmission line will primarily be buried within existing road and railroad rights-of-way.

On July 21, 2020, DOE issued Presidential Permit PP-481 transferring the facilities authorized in PP-362 to CHPE LLC at the request of CHPEI and CHPE LLC.

On April 30, 2021, DOE issued Presidential Permit No. PP-481-1, amending CHPE LLC's permit to incorporate proposed revisions to the Project route and authorizing the increase in the Project's capacity from 1,000 MW to 1,250 MW.

On March 22, 2022, DOE issued Presidential Permit No. PP-481-2, amending CHPE LLC's permit to further clarify the maximum non-simultaneous rate of transmission to account for anticipated line losses.

On November 8, 2023, CHPE LLC filed an application (Application or App.) with the Grid Deployment Office (GDO) of the DOE, as required by regulations at 10 CFR 205.320 *et seq.*, requesting that DOE amend Presidential Permit No. PP-481-2 to allow for a singular change in the route previously permitted. The proposed route modification would occur in the area referred to as the "Harlem Rail Yard Alternative." App. at 4. CHPE LLC indicates that "[e]xtensive geotechnical investigations have revealed two critical geological formations that make the current [horizontal directional drill] launch area location infeasible." *Id.* at 5. Therefore, CHPE LLC has identified alternate horizontal directional drill (HDD) entry and exit points, as well as a temporary staging area. The newly proposed route is "approximately 1,000 feet away from the existing launch site in an area along the northern border of Randall's Island adjacent to the Bronx Kill and existing route (Proposed HDD Site) as depicted in Figure 2 [of the App.]" *Id.* at 6.

In issuing the amendments in PP-481-1, DOE previously considered a route modification in the Harlem Rail Yard area, among others. Notice of the amendment application associated with PP-481-1 was published in the **Federal Register** on October 5, 2020 (85 FR 62721) with a 30-day comment period. DOE received no comments in response to this notice.

Given the relatively small size of the singular modification, the analysis conducted by DOE in the subject area in its prior assessments, and the previous opportunities given to the public to comment on that analysis in response to proposed changes to the permit, DOE has determined that a 15-day comment

period is appropriate for this Application.

Procedural Matters: Any person may comment on this application by filing such comment at electricity.exports@hq.doe.gov. Any person seeking to become a party to this proceeding must file a motion to intervene at electricity.exports@hq.doe.gov, in accordance with Rule 214 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure (18 CFR 385.214). Each comment or motion to intervene should be filed with DOE on or before the date listed above, should be clearly marked with Docket No. PP-481-3, and addressed to electricity.exports@hq.doe.gov. Additional copies are to be provided directly to Mr. Jay T. Ryan, Baker Botts LLP, 700 K Street NW, Washington, DC 20001, jay.ryan@bakerbotts.com.

Before a Presidential permit may be issued or amended, DOE must determine that the proposed action is in the public interest. In making that determination, DOE will consider the environmental impacts of the proposed action (*i.e.*, granting the Presidential permit or amendment, with any conditions and limitations, or denying the permit), determine the proposed project's impact on electric reliability by ascertaining whether the proposed project would adversely affect the operation of the U.S. electric power supply system under normal and contingency conditions, and weigh any other factors that DOE may also consider relevant to the public interest. DOE also must obtain the favorable recommendation of the Secretary of State and the Secretary of Defense before taking final action on a Presidential permit application.

This application may be reviewed or downloaded electronically at www.energy.gov/gdo/pending-applications-0.

Signing Authority: This document of the Department of Energy was signed on November 13, 2023, by Maria 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 November 14, 2023.

Treena V. Garrett,
Federal Register Liaison Officer, U.S.
Department of Energy.

[FR Doc. 2023-25433 Filed 11-16-23; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 4639-033]

Ampersand Christine Falls Hydro, LLC; Notice of Intent To Prepare an Environmental Assessment

On September 29, 2021, Ampersand Christine Falls Hydro, LLC filed an application for a subsequent minor license for the 850-kilowatt Christine Falls Hydroelectric Project (Christine Falls Project or project; FERC No. 4639). The Christine Falls Project is located on the Sacandaga River near the Village of Speculator, Hamilton County, New York.

In accordance with the Commission's regulations, on August 16, 2023, Commission staff issued a notice that the project was ready for environmental analysis (REA notice). Based on the information in the record, including comments filed on the REA notice, staff does not anticipate that licensing the project would constitute a major federal action significantly affecting the quality of the human environment. Therefore, staff intends to prepare an Environmental Assessment (EA) on the application to license the Christine Falls Project.

The EA will be issued and circulated for review by all interested parties. All comments filed on the EA will be analyzed by staff and considered in the Commission's final licensing decision.

The 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.

The application will be processed according to the following schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Commission issues EA.	July 2024 ¹
Comments on EA	August 2024

¹ The Council on Environmental Quality's (CEQ) regulations under 40 CFR 1501.10(b)(1) (2022) require that EAs be completed within 1 year of the federal action agency's decision to prepare an EA. See National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, as amended by section 107(g)(1)(B)(iii) of the Fiscal Responsibility Act of 2023, Public Law 118-5, 4336a, 137 Stat. 42.

Any questions regarding this notice may be directed to Andy Bernick at (202) 502-8660 or andrew.bernick@ferc.gov.

Dated: November 9, 2023.

Kimberly D. Bose,
Secretary.

[FR Doc. 2023-25396 Filed 11-16-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2639-028]

Northern States Power Company- Wisconsin; Notice of Intent To Prepare an Environmental Assessment

On November 30, 2021, Northern States Power Company-Wisconsin filed an application for a new major license to continue operating the existing, licensed, 30.75-megawatt Cornell Hydroelectric Project No. 2639 (Cornell Project). The project is located on the Lower Chippewa River, in the township of Cornell, in Chippewa County, Wisconsin. The project does not occupy Federal land.

In accordance with the Commission's regulations, on July 14, 2023, Commission staff issued a notice that the project was ready for environmental analysis (REA notice). Based on the information in the record staff does not anticipate that licensing the project would constitute a major Federal action significantly affecting the quality of the human environment. Therefore, staff intends to prepare an Environmental Assessment (EA) on the application to license the Cornell Project.

The EA will be issued and circulated for review by all interested parties. All comments filed on the EA will be analyzed by staff and considered in the Commission's final licensing decision.

The application will be processed according to the following schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Commission issues EA.	April 2024 ¹
Comments on EA	May 2024.

¹ The Council on Environmental Quality's (CEQ) regulations under 40 CFR 1501.10(b)(1) require that EAs be completed within 1 year of the Federal action agency's decision to prepare an EA. This notice establishes the Commission's intent to prepare an EA for the Cornell Project. Therefore, in accordance with CEQ's regulations, the EA must be issued within 1 year of the issuance date of this notice.

Any questions regarding this notice may be directed to Michael Davis at Michael.davis@ferc.gov or call at 202-502-8339.

Dated: November 9, 2023.

Kimberly D. Bose,
Secretary.

[FR Doc. 2023-25398 Filed 11-16-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2221-041]

Empire District Electric Company; Notice of Application Accepted for Filing, Soliciting Motions To Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Preliminary Terms and Conditions, and Preliminary Fishway Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 2221-041.

c. *Date filed:* February 28, 2020 and amended on August 28, 2020.

d. *Applicant:* Empire District Electric Company (Empire District).

e. *Name of Project:* Ozark Beach Hydroelectric Project (Ozark Beach Project).

f. *Location:* On the White River near the Town of Forsyth, in Taney County, Missouri. The project occupies 5.1 acres of United States lands administered by the U.S. Army Corps of Engineers (Corps).

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Randy Richardson, Plant Manager, Empire District Electric Company, 2537 Fir Road, Sarcosie, MO 64862, (417) 625-

6138 or RRichardson@empiredistrict.com.

i. *FERC Contact:* Colleen Corballis at colleen.corballis@ferc.gov or (202) 502–8598.

j. *Deadline for filing comments, recommendations, terms and conditions, and prescriptions:* 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file motions to intervene, protests, comments, recommendations, preliminary terms and conditions, and preliminary fishway prescriptions using the Commission's eFiling system at <https://ferconline.ferc.gov/FEROnline.aspx>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <https://ferconline.ferc.gov/QuickComment.aspx>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at FEROnlineSupport@ferc.gov, (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper request.

Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. All filings must clearly identify the project name and docket number on the first page: Ozark Beach Hydroelectric Project (P–2221–041).

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted for filing and is now ready for environmental analysis.

The Council on Environmental Quality (CEQ) issued a final rule on April 20, 2022, revising the regulations under 40 CFR parts 1502, 1507, and 1508 that federal agencies use to implement the National Environmental Policy Act (NEPA) (see National Environmental Policy Act Implementing

Regulations Revisions, 87 FR 23,453–70). The final rule became effective on May 20, 2022. Commission staff intends to conduct its NEPA review in accordance with CEQ's new regulations.

The Ozark Beach Project consists of the following existing facilities: (1) a 2,312-acre reservoir (Lake Taneycomo) with a gross storage capacity of 24,640 acre-feet and a usable storage capacity of 2,840 acre-feet at a water surface elevation of 701.35 feet National Geodetic Vertical Datum of 1929 (NGVD29); (2) a 1,301-foot-long dam consisting of, from west to east: (a) a 420-foot-long earth fill embankment with a concrete core wall, (b) an 18-foot-long concrete overflow spillway topped with a sharp-crested steel weir having a compound section, (c) a 575-foot-long, 57-foot-high, concrete overflow spillway topped with 32 4-foot-high Obermeyer gates, (d) an 18-foot-long concrete non-overflow section, (e) an integral 220-foot-long reinforced concrete powerhouse, and (f) a 50-foot-long concrete non-overflow section; (3) a 220-foot-long, 88-foot-wide, 92-foot-high reinforced concrete integral powerhouse with an operating head of 48 feet; (4) trash racks at the entrance to the intakes; (5) two 7,500 horsepower (5.625 megawatt (MW)) and two 7,200 horsepower (5.400 MW) vertical-shaft Francis-type turbines with a total capacity of 29,400 horsepower (22.050 MW), each coupled to a 4.0 MW generator with a total nameplate rating of 16.0 MW; (6) a 445-foot-long, 4,600-volt overhead transmission line connected to a three-phase, 4,600 to 161,000 volt step-up transformer with a rating of 22,400-kilovolt ampere that connects to Empire District's 161,000-volt transmission system; and (7) appurtenant facilities.

The Ozark Beach Project is situated between two multipurpose projects owned by the Corps. The Corps' Table Rock Project, which is located approximately 22 miles upstream of the Ozark Beach Project, is operated in a peaking mode based on regional electrical demand requirements. The Ozark Beach Project discharges directly into the Corps' Bull Shoals Project reservoir, which is located immediately downstream. Using the storage in Lake Taneycomo, the Ozark Beach Project is currently operated based on various conditions including closely matching the releases of the Corps' upstream Table Rock Project, market pricing, Lake Taneycomo water level, the water level of the Corps' downstream Bull Shoals Project, and rainfall. The project currently operates to maintain water surface elevations between 701.35 and 700.00 feet NGVD29 in Lake

Taneycomo. The Ozark Beach Project currently has an estimated annual energy production of about 50,768 megawatt-hours (MWh).

In its amended application, Empire District proposes to replace the existing 4-foot-high Obermeyer gates with new 5.15-foot-high Obermeyer gates. As proposed, the water surface elevation of Lake Taneycomo would be raised from 701.35 to 702.5 feet NGVD29 when the 5.15-foot gates are fully raised. At a water surface elevation of 702.5 feet NGVD29, Lake Taneycomo would increase from 2,312 to 2,398 acres, its gross storage capacity would increase from 24,640 to 25,790 acre-feet, and its usable storage capacity would increase from 2,840 to 3,990 acre-feet. As amended, the project would operate between 702.5 and 700.0 feet NGVD29, the total generating capacity would remain 16.0 MW, and the estimated annual energy production would increase from 50,768 to 51,980 MWh.

The current project boundary for the project encompasses approximately 8,271 acres of water and land. Empire District proposes to modify the current project boundary by removing 5,959 acres for a proposed project boundary that encompasses 2,475 acres. Empire District's proposal would increase the existing area of federal land occupied by the project from 5.1 acres to 5.47 acres.

m. A copy of the application can be viewed on the Commission's website at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at FEROnlineSupport@ferc.gov or call toll free, (866) 208–3676 or TTY (202) 502–8659.

You may also register online at <http://www.ferc.gov/docs-filing/esubscription.asp> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

All filings must (1) bear in all capital letters the title "PROTEST", "MOTION

TO INTERVENE”, “COMMENTS,” “REPLY COMMENTS,” “RECOMMENDATIONS,” “PRELIMINARY TERMS AND CONDITIONS,” or “PRELIMINARY FISHWAY PRESCRIPTIONS;” (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4)

otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular

application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

o. *Procedural schedule:* The application will be processed according to the following schedule. Revisions to the schedule will be made as appropriate.

Milestone	Target date
Deadline for Filing Protest, Motion to Intervene, Comments, Recommendations, Preliminary Terms and Conditions, and Preliminary Fishway Prescriptions.	January 2024
Deadline for Filing Reply Comments	February 2024

p. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of this notice.

q. The license applicant must file no later than 60 days following the date of issuance of this notice: (1) a copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification. Please note that the certification request must comply with 40 CFR 121.5(b), including documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request. Please note that the certification request must be sent to the certifying authority and to the Commission concurrently.

r. 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: November 9, 2023.

Kimberly D. Bose,
Secretary.

[FR Doc. 2023-25397 Filed 11-16-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 7920-006]

Tridam Energy LLC, Madko Hydro LLC; Notice of Transfer of Exemption

1. On October 13, 2023, Tridam Energy LLC filed a notification of the transfer for the 150-kilowatt Waterloom Falls Hydroelectric Project No. 7920 from Tridam Energy LLC to Madko Hydro LLC. The exemption from licensing was originally issued on March 11, 1985.¹ The project is located on the Merrimack River, Hillsboro County, New Hampshire. The transfer of an exemption does not require Commission approval.

2. Madko Hydro LLC is now the exemptee of the Waterloom Falls Hydroelectric Project No. 7920. All correspondence must be forwarded to Jacob Komar, Madko Hydro LLC, 94 River Road, New Ipswich, NH 03071, Phone: 860-214-3219, Email: *jacobkomar@me.com*.

Dated: November 9, 2023.

Kimberly D. Bose,
Secretary.

[FR Doc. 2023-25401 Filed 11-16-23; 8:45 am]

BILLING CODE 6717-01-P

¹ Alden T. Greenwood (Environmental Assessment 1985). Subsequently, on June 6, 2014, the project was transferred to Tridam Energy LLC.

DEPARTMENT OF ENERGY

Western Area Power Administration

Extension of Public Comment Period for Central Valley Project Power, Transmission, and Ancillary Services; and the California-Oregon Transmission Project Transmission Service—Rate Order No. WAPA-207

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of extension of public comment period for power, transmission, and ancillary services formula rates.

SUMMARY: The Sierra Nevada Region (SN) of the Western Area Power Administration (WAPA) is extending the public comment period for 30 days on its proposed formula rates for Central Valley Project (CVP) power, transmission, and ancillary services; and California-Oregon Transmission Project (COTP) transmission service under Rate Order No. WAPA-207. **DATES:** The consultation and comment period for the proposed formula rates under Rate Order No. WAPA-207 is extended from November 28, 2023, to December 28, 2023.

FOR FURTHER INFORMATION CONTACT: Autumn Wolfe, Rates Manager, Sierra Nevada Region, Western Area Power Administration, (916) 353-4686 or email: *SNR-RateCase@wapa.gov*.

SUPPLEMENTARY INFORMATION: On August 30, 2023, SN published a notice in the **Federal Register** (88 FR 59909) announcing proposed formula rates for Central Valley Project power, transmission, and ancillary services; and California-Oregon Transmission Project transmission service under Rate Order No. WAPA-207. In that notice, the consultation and comment period was reported to close November 28,

2023. SN is extending the consultation and comment period to December 28, 2023, to provide interested parties additional time to comment on the proposed formula rates under Rate Order No. WAPA-207.

Signing Authority: This document of the Department of Energy was signed on November 6, 2023, by Tracey A. LeBeau, Administrator, Western Area Power Administration, pursuant to delegated authority from the Secretary of Energy. That delegation authority 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 this document in electronic format for publication, as an official document of the DOE. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on November 14, 2023.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2023-25432 Filed 11-16-23; 8:45 am]

BILLING CODE 6450-01-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPPT-2023-0061; FRL-10581-10-OCSPP]

Certain New Chemicals; Receipt and Status Information for October 2023

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is required under the Toxic Substances Control Act (TSCA), as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act, to make information publicly available and to publish information in the **Federal Register** pertaining to submissions under TSCA section 5, including notice of receipt of a Premanufacture notice (PMN), Significant New Use Notice (SNUN) or Microbial Commercial Activity Notice (MCAN), including an amended notice or test information; an exemption application (Biotech exemption); an application for a test marketing exemption (TME), both pending and/or concluded; a notice of commencement (NOC) of manufacture (including import) for new chemical substances; and a periodic status report on new

chemical substances that are currently under EPA review or have recently concluded review. This document covers the period from 10/01/2023 to 10/31/2023.

DATES: Comments identified by the specific case number provided in this document must be received on or before December 18, 2023.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA-HQ-OPPT-2023-0061, through the *Federal eRulemaking Portal* at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at <https://www.epa.gov/>.

FOR FURTHER INFORMATION CONTACT: For technical information contact: Jim Rahai, Project Management and Operations Division (MC 7407M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (202) 564-8593; email address: rahai.jim@epa.gov.

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

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. What action is the Agency taking?

This document provides the receipt and status reports for the period from 10/01/2023 to 10/31/2023. The Agency is providing notice of receipt of PMNs, SNUNs, and MCANs (including amended notices and test information); an exemption application under 40 CFR part 725 (Biotech exemption); TMEs, both pending and/or concluded; NOCs to manufacture a new chemical substance; and a periodic status report on new chemical substances that are currently under EPA review or have recently concluded review.

EPA is also providing information on its website about cases reviewed under the amended TSCA, including the section 5 PMN/SNUN/MCAN and exemption notices received, the date of receipt, the final EPA determination on the notice, and the effective date of EPA's determination for PMN/SNUN/MCAN notices on its website at: [https://](https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/status-pre-manufacture-notices)

www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/status-pre-manufacture-notices. This information is updated on a weekly basis.

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

Under the Toxic Substances Control Act (TSCA), 15 U.S.C. 2601 *et seq.*, a chemical substance may be either an "existing" chemical substance or a "new" chemical substance. Any chemical substance that is not on EPA's TSCA Inventory of Chemical Substances (TSCA Inventory) is classified as a "new chemical substance," while a chemical substance that is listed on the TSCA Inventory is classified as an "existing chemical substance." (See TSCA section 3(11).) For more information about the TSCA Inventory please go to: <https://www.epa.gov/tsca-inventory>.

Any person who intends to manufacture (including import) a new chemical substance for a non-exempt commercial purpose, or to manufacture or process a chemical substance in a non-exempt manner for a use that EPA has determined is a significant new use, is required by TSCA section 5 to provide EPA with a PMN, MCAN, or SNUN, as appropriate, before initiating the activity. EPA will review the notice, make a risk determination on the chemical substance or significant new use, and take appropriate action as described in TSCA section 5(a)(3).

TSCA section 5(h)(1) authorizes EPA to allow persons, upon application and under appropriate restrictions, to manufacture or process a new chemical substance, or a chemical substance subject to a significant new use rule (SNUR) issued under TSCA section 5(a)(2), for "test marketing" purposes, upon a showing that the manufacture, processing, distribution in commerce, use, and disposal of the chemical will not present an unreasonable risk of injury to health or the environment. This is referred to as a test marketing exemption, or TME. For more information about the requirements applicable to a new chemical go to: <https://www.epa.gov/chemicals-under-tsca>.

Under TSCA sections 5 and 8 and EPA regulations, EPA is required to publish in the **Federal Register** certain information, including notice of receipt of a PMN/SNUN/MCAN (including amended notices and test information); an exemption application under 40 CFR part 725 (biotech exemption); an application for a TME, both pending and concluded; NOCs to manufacture a new chemical substance; and a periodic status report on the new chemical

substances that are currently under EPA review or have recently concluded review.

C. Does this action apply to me?

This action provides information that is directed to the public in general.

D. Does this action have any incremental economic impacts or paperwork burdens?

No.

E. What should I consider as I prepare my comments for EPA?

1. *Submitting confidential business information (CBI).* Do not submit this information to EPA through [regulations.gov](https://www.regulations.gov) or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at <https://www.epa.gov/dockets/commenting-epa-dockets>.

II. Status Reports

In the past, EPA has published individual notices reflecting the status of TSCA section 5 filings received, pending, or concluded. In 1995, the Agency modified its approach and streamlined the information published in the **Federal Register** after providing notice of such changes to the public and an opportunity to comment (see the **Federal Register** of May 12, 1995 (60 FR 25798) (FRL-4942-7)). Since the passage of the Lautenberg amendments to TSCA in 2016, public interest in information on the status of section 5 cases under EPA review and, in particular, the final determination of such cases, has increased. In an effort to be responsive to the regulated community, the users of this information, and the general public, to comply with the requirements of TSCA, to conserve EPA resources and to streamline the process and make it more timely, EPA is providing information on its website about cases reviewed under the amended TSCA, including the section 5 PMN/SNUN/MCAN and exemption notices received, the date of receipt, the final EPA determination on the notice, and the effective date of EPA's determination for PMN/SNUN/MCAN notices on its website at: <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/status-pre-manufacture-notices>. This information is updated on a weekly basis.

III. Receipt Reports

For the PMN/SNUN/MCANs that have passed an initial screening by EPA

during this period, Table I provides the following information (to the extent that such information is not subject to a CBI claim) on the notices screened by EPA during this period: The EPA case number assigned to the notice that indicates whether the submission is an initial submission, or an amendment, a notation of which version was received, the date the notice was received by EPA, the submitting manufacturer (*i.e.*, domestic producer or importer), the potential uses identified by the manufacturer in the notice, and the chemical substance identity.

As used in each of the tables in this unit, (S) indicates that the information in the table is the specific information provided by the submitter, and (G) indicates that this information in the table is generic information because the specific information provided by the submitter was claimed as CBI. Submissions which are initial submissions will not have a letter following the case number. Submissions which are amendments to previous submissions will have a case number followed by the letter "A" (*e.g.* P-18-1234A). The version column designates submissions in sequence as "1", "2", "3", etc. Note that in some cases, an initial submission is not numbered as version 1; this is because earlier version(s) were rejected as incomplete or invalid submissions. Note also that future versions of the following tables may adjust slightly as the Agency works to automate population of the data in the tables.

TABLE I—PMN/SNUN/MCANs APPROVED* FROM 10/01/2023 TO 10/31/2023

Case No.	Version	Received date	Manufacturer	Use	Chemical substance
P-21-0165A	3	10/23/2023	Colonial Chemical, Inc.	(S) Anionic surfactant in cleaning products.	(S) D-Glucopyranose, oligomeric, C10-16-alkyl glycosides, 3-(3,4-dicarboxy-3-hydroxy-1-oxobutoxy)-2-hydroxypropyl ethers, sodium salts.
P-22-0023A	2	09/28/2023	CBI	(G) Catalyst system component.	(G) Alkyldioic acid, bis(alkylalkyl)-, polyalkyl ester.
P-22-0023A	3	10/13/2023	CBI	(G) Catalyst system component.	(G) Alkyldioic acid, bis(alkylalkyl)-, polyalkyl ester.
P-22-0040A	4	10/16/2023	CBI	(G) Component used in manufacture of high-performance batteries.	(S) Manganate(4-), hexakis(cyano-.kappa.C)-, manganese (2+) sodium, (OC-6-11)-.
P-22-0041A	4	10/16/2023	CBI	(G) A component used in the manufacture of batteries.	(S) Ferrate (-4), hexakis(cyano-.kappa.C)-, iron(3+) manganese(2+) sodium, (OC-6-11)-.
P-22-0168A	4	10/11/2023	Colonial Chemical, Inc.	(S) The product is used as a reaction intermediate to make surfactant end-products. It is not sold commercially or used outside of our manufacturing facility..	(G) Amides, alkyl, N-[3-(dimethylamino)propyl].

TABLE I—PMN/SNUN/MCANS APPROVED* FROM 10/01/2023 TO 10/31/2023—Continued

Case No.	Version	Received date	Manufacturer	Use	Chemical substance
P-23-0134A	4	10/11/2023	CBI	(G) Photoinitiator for UV curing of monomeric and oligomeric acrylate-based printing inks.	(S) Poly[oxy(methyl-1,2-ethanediyl)], alpha-hydro-omega-{{2-[(1-chloro-9-oxo-9H-thioxanthen-4-yl)oxy]acetyl}oxy}-, ether with 2,2-bis(hydroxymethyl)-1,3-propanediol (4:1).
P-23-0154A	4	10/04/2023	RWDC Industries	(G) The primary application areas for PHA are for food packaging and other uses where its biodegradable properties provide nontraditional end-of-use options.	(G) Vegetable oils, genetically modified Cupriavidus-fermented, polyhydroxyalkanoate copolymer.
P-23-0165A	4	09/29/2023	CBI	(G) Production aide for the manufacturing of polymers.	(G) 2,3,3,3-tetrafluoro-2-[(polyfluoroalken-1-yl)oxy]-propanoic acid homopolymer.
P-23-0168A	3	10/13/2023	Central Glass International, Inc.	(G) Battery production	(G) Sulfamoyl halide fluorophosphate salt.
P-23-0192	1	09/27/2023	Colonial Chemical, Inc.	(S) Metal working applications.	(G) Amides, fatty acid, N,N-bis(2-hydroxypropyl).
P-23-0193	1	09/27/2023	CBI	(G) Component of lenses used in electronic applications.	(G) Substituted carbopolycyclic dicarboxylic acid dialkyl ester, polymer with alkanediol, carbopolycyclic bis(substituted carbopolycycle)bis[alkanol] and carbopolycyclic bis(substituted carbomonocycle)bis[alkanol].
P-23-0194	1	09/29/2023	CBI	(G) Lubricant additive	(G) Amines, alkyl and alkenyl, 2-ethylhexyl phosphates.
P-24-0004	1	10/05/2023	CBI	(G) Plastic production aid ...	(G) Benzoylated amino acid salt.
P-24-0005	3	10/24/2023	CBI	(G) Plastic article production.	(G) Polycarbomonocyclic diol reaction products with cycloalkylcarbomonocycle and polysubstituted heteromonocycle.
P-24-0005A	4	10/25/2023	CBI	(G) Plastic article production.	(G) Polycarbomonocyclic diol reaction products with cycloalkylcarbomonocycle and polysubstituted heteromonocycle.
P-24-0005A	5	10/25/2023	CBI	(G) Plastic article production.	(G) Polycarbomonocyclic diol reaction products with cycloalkylcarbomonocycle and polysubstituted heteromonocycle.
P-24-0009	1	10/19/2023	Chevron Phillips Chemical Company, LP.	(S) Heat transfer agent for direct, immersive liquid cooling of electronic components; (S) Synthetic base oil for use in lubricants; (S) Lubricity additive for drilling fluids.	(S) Eicosane, branched and linear.
P-24-0011	1	10/24/2023	High Plains Bio-energy, LLC.	(S) Used as a component of fuels (e.g., gasoline, E85) to increase the vapor pressure; (S) Chemical intermediate use (e.g., petrochemical feedstock).	(S) Alkanes, C5-11-branched and linear.
P-24-0013	1	10/26/2023	Momentive Performance Materials.	(S) Resin/binder in paint formulations for industrial coatings.	(G) Siloxanes and Silicones, di-Me, hydroxy-terminated, polymers with 3-[[3-alkoxy-1-(alkoxycarbonyl)-3-oxoalkyl]heteroatom]propyl Me silsesquioxanes, alkoxy-terminated.

TABLE I—PMN/SNUN/MCANS APPROVED* FROM 10/01/2023 TO 10/31/2023—Continued

Case No.	Version	Received date	Manufacturer	Use	Chemical substance
SN-21-0006A	3	10/30/2023	Carbice	(S) For heat transfer, heat storage, thermal emission, and general temperature management in heat-generating systems such as electronics; (S) To improve mechanical properties or electrical conduciveness of other materials or products; (S) For light absorption properties; (S) Gap filling or sealing of opposing interfaces.	(S) Multiwalled carbon nanotubes grown perpendicularly on an aluminum foil substrate using Fe catalyst.

In Table II of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the NOCs that have passed an initial screening by EPA during this period: The EPA case number assigned

to the NOC including whether the submission was an initial or amended submission, the date the NOC was received by EPA, the date of commencement provided by the submitter in the NOC, a notation of the

type of amendment (*e.g.*, amendment to generic name, specific name, technical contact information, etc.) and chemical substance identity.

TABLE II—NOCs APPROVED* FROM 10/01/2023 TO 10/31/2023

Case No.	Received date	Commencement date	If amendment, type of amendment	Chemical substance
P-13-0355	10/10/2023	08/31/2023	N	(S) Phenol, 2,6-dimethyl-, homopolymer, ether with 2,2", 3,3", 5,5"-hexamethyl [1,1'-biphenol]-4, 4"-diol (2:1).
P-22-0057	10/30/2023	10/13/2023	N	(G) Polysaccharide, polymer with 2-propenoic acid, sodium salt.

In Table III of this unit, EPA provides the following information (to the extent such information is not subject to a CBI claim) on the test information that has

been received during this time period: The EPA case number assigned to the test information; the date the test information was received by EPA, the

type of test information submitted, and chemical substance identity.

TABLE III—TEST INFORMATION RECEIVED FROM 10/01/2023 TO 10/31/2023.

Case No.	Received date	Type of test information	Chemical substance
P-14-0712	10/12/2023	Polychlorinated Dibenzodioxins and Polychlorinated dibenzofurans Testing.	(S) Waste plastics, pyrolyzed, C5-55 fraction
P-18-0304	10/04/2023	PAG 2A Direct Photolysis Study Report., PAG 3A Direct Photolysis Study Report., PAG 5 Direct Photolysis Study Report.	(G) Sulfonium, bis(dihalocarbomonocycle) carbomonocycle, salt with substituted heteropolycycle dihalo sulfoalkanoate (1:1).
P-19-0079, P-19-0111, P-19-0112, P-19-0114, P-19-0133.	10/06/2023	PAG 2A Direct Photolysis Study Report., PAG 3A Direct Photolysis Study Report., PAG 5 Direct Photolysis Study Report.	(G) Substituted heterocyclic onium compound, salt with 2,2,2-trifluoro-1-(sulfomethyl)-1-(trifluoromethyl)ethyl 3-[(2-methyl-1-oxo-2-propen-1-yl)oxy]tricyclo[3.3.1.1 ^{3,7}]decane-1-carboxylate (1:1), polymer with ace-naphthylene, 1-ethenyl-4-[[1-(1-methylethyl)cyclopentyl]oxy]benzene and 4-ethenylphenol, di-me 2,2'-(1,2-diazenediyl)bis[2-methylpropanoate]-initiated.

TABLE III—TEST INFORMATION RECEIVED FROM 10/01/2023 TO 10/31/2023.—Continued

Case No.	Received date	Type of test information	Chemical substance
P-20-0122, P-20-0139, P-20-0140, P-20-0141, P-20-0142.	10/6/2023	PAG 2A Direct Photolysis Study Report., PAG 3A Direct Photolysis Study Report., PAG 5 Direct Photolysis Study Report.	(S) 1-(4-tert-butylphenyl)tetrahydro[2- ¹⁴ C]thiophen-1-ium nonaflate; (S) (4-hydroxy[U- ¹⁴ C]phenyl)-diphenyl-sulfonium trifluoromethanesulfonate; (S) tris(4-tert-butyl[mono-U- ¹⁴ C]phenyl)sulfonium nonaflate.
P-20-0145, P-20-0147, P-20-0152, P-20-0155, P-20-0159.	10/6/2023	PAG 2A Direct Photolysis Study Report., PAG 3A Direct Photolysis Study Report., PAG 5 Direct Photolysis Study Report.	(S) 1-(4-tert-butylphenyl)tetrahydro[2- ¹⁴ C]thiophen-1-ium nonaflate; (S) (4-hydroxy[U- ¹⁴ C]phenyl)-diphenyl-sulfonium trifluoromethanesulfonate; (S) tris(4-tert-butyl[mono-U- ¹⁴ C]phenyl)sulfonium nonaflate.
P-17-0178, P-18-0013, P-18-0014, P-18-0037, P-19-0078.	10/6/2023	PAG 2A Direct Photolysis Study Report., PAG 3A Direct Photolysis Study Report., PAG 5 Direct Photolysis Study Report.	(S) 1-(4-tert-butylphenyl)tetrahydro[2- ¹⁴ C]thiophen-1-ium nonaflate; (S) (4-hydroxy[U- ¹⁴ C]phenyl)-diphenyl-sulfonium trifluoromethanesulfonate; (S) tris(4-tert-butyl[mono-U- ¹⁴ C]phenyl)sulfonium nonaflate.
P-22-0129, P-23-0050	10/6/2023	PAG 2A Direct Photolysis Study Report., PAG 3A Direct Photolysis Study Report., PAG 5 Direct Photolysis Study Report.	(S) 1-(4-tert-butylphenyl)tetrahydro[2- ¹⁴ C]thiophen-1-ium nonaflate; (S) (4-hydroxy[U- ¹⁴ C]phenyl)-diphenyl-sulfonium trifluoromethanesulfonate; (S) tris(4-tert-butyl[mono-U- ¹⁴ C]phenyl)sulfonium nonaflate.
P-19-0079, P-19-0111, P-19-0112, P-19-0114, P-19-0133.	10/27/2023	PAG 2 Direct Photolysis Study Report.	(S) tri[mono-U- ¹⁴ C]phenylsulfonium 2-(adamantane-1- carbonyloxy)-1,1-difluoro-ethanesulfonate.
P-20-0122, P-20-0139, P-20-0140, P-20-0141, P-20-0142.	10/27/2023	PAG 2 Direct Photolysis Study Report.	(S) tri[mono-U- ¹⁴ C]phenylsulfonium 2-(adamantane-1- carbonyloxy)-1,1-difluoro-ethanesulfonate
P-20-0145, P-20-0147, P-20-0152, P-20-0155, P-20-0159.	10/27/2023	PAG 2A Direct Photolysis Study Report.	(S) tri[mono-U- ¹⁴ C]phenylsulfonium 2-(adamantane-1- carbonyloxy)-1,1-difluoro-ethanesulfonate.
P-22-0129, P-23-0050	10/27/2023	PAG 2 Direct Photolysis Study Report.	(S) tri[mono-U- ¹⁴ C]phenylsulfonium 2-(adamantane-1- carbonyloxy)-1,1-difluoro-ethanesulfonate
P-17-0178, P-18-0013, P-18-0014, P-18-0037, P-19-0078.	10/27/2023	PAG 2 Direct Photolysis Study Report.	(S) tri[mono-U- ¹⁴ C]phenylsulfonium 2-(adamantane-1- carbonyloxy)-1,1-difluoro-ethanesulfonate.
P-11-0557	10/31/2023	Annual reporting of Certificate of Analysis test data and import volumes.	(G) 2-Propenoic acid, 2-methyl-, 2-hydroxyethyl ester, telomers with C18–26-alkyl acrylate, 1-dodecanethiol, N-(hydroxymethyl)-2-methyl-2-propenamide, polyfluorooctyl methacrylate and vinylidene chloride, 2,2'-[1 ,2-diazenediylbis(1-methylethylidene)bis[4,5-dihydro-1 H-imidazole] hydrochloride (1 :2)-initiated.

If you are interested in information that is not included in these tables, you may contact EPA's technical information contact or general information contact as described under **FOR FURTHER INFORMATION CONTACT** to access additional non-CBI information that may be available.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: November 13, 2023.

Pamela Myrick,

Director, Project Management and Operations Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2023–25437 Filed 11–16–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL OP–OFA–095]

Notice of Adoption of a Bureau of Indian Affairs Categorical Exclusion Under the National Environmental Policy Act

AGENCY: Environmental Protection Agency.

ACTION: Notice of adoption of categorical exclusion.

SUMMARY: The Environmental Protection Agency (EPA) has adopted a Bureau of Indian Affairs' (BIA) categorical exclusion (CE) for waste management activities involving remediation of

hazardous waste sites under the National Environmental Policy Act (NEPA) for use by the EPA's Contaminated Alaska Native Claims Settlement Act (ANCSA) Lands Assistance Program. This notice describes the categories of proposed actions for which EPA intends to use BIA's CE and describes the consultation between the agencies.

DATES: This action is effective upon publication.

FOR FURTHER INFORMATION CONTACT: Melissa Winters, Manager, Pollution Prevention and Communities Branch, Land, Chemicals, and Redevelopment Division, EPA Region 10, by phone at

206–553–5180, or by email at winters.melissa@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

NEPA and CEs

The National Environmental Policy Act, as amended at, 42 U.S.C. 4321–4347 (NEPA), requires all Federal agencies to assess the environmental impact of their actions. Congress enacted NEPA in order to encourage productive and enjoyable harmony between humans and the environment, recognizing the profound impact of human activity and the critical importance of restoring and maintaining environmental quality to the overall welfare of humankind. 42 U.S.C. 4321, 4331. NEPA's twin aims are to ensure agencies consider the environmental effects of their proposed actions in their decision-making processes and inform and involve the public in that process. 42 U.S.C. 4331. NEPA created the Council on Environmental Quality (CEQ), which promulgated NEPA implementing regulations, 40 CFR parts 1500 through 1508 (CEQ regulations).

To comply with NEPA, agencies determine the appropriate level of review—an environmental impact statement (EIS), environmental assessment (EA), or CE. 42 U.S.C. 4336. If a proposed action is likely to have significant environmental effects, the agency must prepare an EIS and document its decision in a record of decision. 42 U.S.C. 4336. If the proposed action is not likely to have significant environmental effects or the effects are unknown, the agency may instead prepare an EA, which involves a more concise analysis and process than an EIS. 42 U.S.C. 4336. Following the EA, the agency may conclude the process with a finding of no significant impact if the analysis shows that the action will have no significant effects. If the analysis in the EA finds that the action is likely to have significant effects, however, then an EIS is required.

Under NEPA and the CEQ regulations, a Federal agency also can establish CEs—categories of actions that the agency has determined normally do not significantly affect the quality of the human environment—in their agency NEPA procedures. 42 U.S.C. 4336(e)(1); 40 CFR 1501.4, 1507.3(e)(2)(ii), 1508.1(d). If an agency determines that a CE covers a proposed action, it then evaluates the proposed action for extraordinary circumstances in which a normally excluded action may have a significant effect. 40 CFR 1501.4(b). If no extraordinary circumstances are

present or if further analysis determines that the extraordinary circumstances do not involve the potential for significant environmental impacts, the agency may apply the CE to the proposed action without preparing an EA or EIS. 42 U.S.C. 4336(a)(2), 40 CFR 1501.4. If the extraordinary circumstances have the potential to result in significant effects, the agency is required to prepare an EA or EIS.

Section 109 of NEPA, enacted as part of the Fiscal Responsibility Act of 2023, allows a Federal agency to “adopt” or use another agency's CEs for a category of proposed agency actions. 42 U.S.C. 4336(c). To use another agency's CEs under section 109, an agency must identify the relevant CEs listed in another agency's (“establishing agency”) NEPA procedures that cover its category of proposed actions or related actions; consult with the establishing agency to ensure that the proposed adoption of the CE to a category of actions is appropriate; identify to the public the CE that the agency plans to use for its proposed actions; and document adoption of the CE. *Id.* This notice describes EPA's adoption of BIA's CE under section 109 of NEPA to use in EPA's program and funding opportunities administered by EPA.

EPA's Program

The Alaska Native Claims Settlement Act (ANCSA) was enacted in 1971 to settle aboriginal claims to public lands through the conveyance of 46 million acres of land to Alaska Native regional and village corporations and the transfer of one billion dollars from the state and federal governments as compensation for remaining claims. Some of the lands promised and conveyed to corporations pursuant to the settlement in ANCSA were contaminated. The contaminants on some of these lands—which include arsenic, asbestos, lead, mercury, pesticides, polychlorinated biphenyls, and petroleum products—pose health and other concerns to Indigenous Alaskans and communities and are present in quantities above state and federal clean-up levels, negatively impacting subsistence resources and hampering cultural, social, and economic activities.

In the fiscal year 2023 omnibus bill, Congress appropriated \$20 million for EPA to establish and implement a grant program to assist Alaska tribal entities with addressing contamination on ANCSA lands that were contaminated at the time of conveyance. EPA has initiated a new Contaminated ANCSA Lands Assistance Program to assist Alaska tribal and Alaska Native

Corporation entities with addressing contamination on ANCSA lands.

The Contaminated ANCSA Lands Assistance Program addresses contamination left by Federal departments and agencies on land that was subsequently conveyed to Alaska Native Corporations under the ANCSA. The activities to be funded involve remediation of hazardous materials sites in compliance with applicable Federal laws. Eligible entities include federally recognized Indian Tribal Governments (Tribes) in Alaska, Alaska Native Regional Corporations, Alaskan Native Village Corporations, Alaska Native Nonprofit Organizations, Alaska Native Nonprofit Associations, and Intertribal consortia. The objectives of the EPA program are to provide funding to eligible entities to carry out cleanup activities at ANCSA sites that were contaminated at the time of conveyance.

II. BIA Categorical Exclusion

EPA has identified the following BIA CE listed in the Department of the Interior's Departmental Manual (516 DM 10.5(K)(2)).

K. Waste Management.

(2) Activities involving remediation of hazardous waste sites if done in compliance with applicable federal laws, such as the Resource Conservation and Recovery Act (Pub. L. 94–580), Comprehensive Environmental Response, Compensation, and Liability Act (Pub. L. 96–516) or Toxic Substances Control Act (Pub. L. 94–469).

EPA intends to apply this CE for EPA's grants awarded under its Contaminated ANCSA Lands Assistance Program when applicable.

III. Consultation With BIA and Determination of Appropriateness

EPA consulted with BIA on the appropriateness of EPA's adoption of the CE in September 2023. EPA and BIA's consultation included a review of BIA's experience developing and applying the CE, as well as the types of actions for which EPA plans to utilize the CE. The EPA actions under the Contaminated ANCSA Lands Assistance Program are very similar to the type of projects that BIA funds and therefore the impacts of EPA projects will be very similar to the impacts of BIA projects, which are not significant, absent the existence of extraordinary circumstances that could involve potentially significant impacts. Therefore, EPA has determined that its proposed use of the CE as described in this notice is appropriate.

IV. Consideration of Extraordinary Circumstances

When applying this CE, EPA will consider whether the proposed action has the potential to result in significant effects as described in EPA's extraordinary circumstances listed at 40 CFR 6.204(b). EPA defines extraordinary circumstances as circumstances that may cause a significant environmental effect such that a proposed action that otherwise meets the requirements of a CE may not be categorically excluded. 40 CFR 6.102(b)(6). In addition, in consultation with BIA, the EPA determined that it will also apply two applicable Department of the Interior extraordinary circumstances regarding Indian sacred sites and invasive species (43 CFR. 46.215(k) and (l)) when evaluating a proposed action.

V. Notice to the Public and Documentation of Adoption

This notice serves to identify to the public and document EPA's adoption of BIA's CE. The notice identifies the types of actions to which EPA will apply the CE, as well as the considerations that EPA will use in determining whether an action is within the scope of the CE.

Dated: November 14, 2023.

Timothy Hamlin,

Director, Land, Chemicals, and Redevelopment Division, EPA Region 10.

[FR Doc. 2023-25505 Filed 11-16-23; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL OP-OFA-096]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202-564-5632 or <https://www.epa.gov/nepa>. Weekly receipt of Environmental Impact Statements (EIS) Filed November 3, 2023 10 a.m. EST Through November 13, 2023 10 a.m. EST

Pursuant to 40 CFR 1506.9.

Notice: Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: <https://cdxapps.epa.gov/cdx-enepa-II/public/action/eis/search>.

EIS No. 20230160, Draft, USFWS, OR, Draft Environmental Impact Statement for the Barred Owl Management Strategy, Comment Period Ends: 01/16/2024, Contact: Robin Bown 503-231-6923.

EIS No. 20230161, Final, NMFS, WA, The Makah Tribe Request to Hunt Gray Whales, Review Period Ends: 12/18/2023, Contact: Grace Ferrara 206-526-6172.

Amended Notice

EIS No. 20230153, Final, USDA, WA, ADOPTION—Odessa Subarea Special Study Columbia Basin Project To Replace Groundwater Currently Used for Irrigation Grant Adams Walla Walla and Franklin Counties WA, Review Period Ends: 12/04/2023, Contact: Jules Riley 539-323-2941.

Revision to FR Notice Published 11/3/2023; Correction to Review Period Due Date from December 11, 2023 to December 4, 2023.

Dated: November 13, 2023.

Julie Smith,

Acting Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2023-25454 Filed 11-16-23; 8:45 am]

BILLING CODE 6560-50-P

EXPORT-IMPORT BANK

[Public Notice: EIB-2023-0018]

Application for Final Commitment for a Long-Term Loan or Financial Guarantee in Excess of \$100 million: AP089502XX

AGENCY: Export-Import Bank of the United States.

ACTION: Notice.

SUMMARY: This Notice is to inform the public the Export-Import Bank of the United States ("EXIM") has received an application for final commitment for a long-term loan or financial guarantee in excess of \$100 million. Comments received within the comment period specified below will be presented to the EXIM Board of Directors prior to final action on this Transaction.

DATES: Comments must be received on or before December 12, 2023 to be assured of consideration before final consideration of the transaction by the Board of Directors of EXIM.

ADDRESSES: Comments may be submitted through [Regulations.gov](https://www.regulations.gov) at www.regulations.gov. To submit a comment, enter EIB-2023-0018 under the heading "Enter Keyword or ID" and select Search. Follow the instructions provided at the Submit a Comment screen. Please include your name, company name (if any) and EIB-2023-0018 on any attached document.

SUPPLEMENTARY INFORMATION:

Reference: AP089502XX.

Purpose and Use:

Brief description of the purpose of the transaction: To support the export of U.S.-manufactured locomotives to Ukraine.

Brief non-proprietary description of the anticipated use of the items being exported: To be used for rail freight and passenger transport services in Ukraine and between Ukraine and other countries.

To the extent that EXIM is reasonably aware, the items being exported are not expected to produce exports or provide services in competition with the exportation of goods or provision of services by a United States industry.

Parties:

Principal Supplier: Wabtec Corporation.

Obligor: Joint Stock Company "Ukrainian Railways".

Guarantor(s): Government of Ukraine.

Description of Items Being Exported: Locomotives.

Information on Decision: Information on the final decision for this transaction will be available in the "Summary Minutes of Meetings of Board of Directors" on <https://www.exim.gov/news/meeting-minutes>.

Confidential Information: Please note that this notice does not include confidential or proprietary business information; information which, if disclosed, would violate the Trade Secrets Act; or information which would jeopardize jobs in the United States by supplying information that competitors could use to compete with companies in the United States.

Authority: Section 3(c)(10) of the Export-Import Bank Act of 1945, as amended (12 U.S.C. 635a(c)(10)).

Joyce B. Stone,

Assistant Corporate Secretary.

[FR Doc. 2023-25481 Filed 11-16-23; 8:45 am]

BILLING CODE 6690-01-P

FEDERAL HOUSING FINANCE AGENCY

[No. 2023-N-14]

Privacy Act of 1974; System of Records

AGENCY: Federal Housing Finance Agency.

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, (Privacy Act), the Federal Housing Finance Agency (FHFA or Agency) is proposing to modify the current FHFA system of records titled, "FHFA-15, Payroll, Retirement, Time

and Attendance, and Leave Records” (System). The system of records allows FHFA to manage human resources and payroll functions for the Agency. This modification is to: update the categories of records collected to include information related to work agreements; update the service provider used to maintain the payroll, retirement, and leave records contained in the system; correct and update the authority for maintaining the system; expand the system’s purpose for the records collection; add new record source categories to be compatible with the new categories of records collected; revise and modify the routine uses to be consistent with FHFA’s standard routine uses and those specific to this collection; and make other minor corrections and administrative updates to the remaining sections in the notice in accordance with OMB Circular A–108.

DATES: In accordance with 5 U.S.C. 552a(e)(4) and (11), this modified system of records will go into effect without further notice on November 17, 2023, unless otherwise revised pursuant to comments received. Comments must be received on or before December 18, 2023. FHFA will publish a new notice if the effective date is delayed in order for the Agency to review the comments or if changes are made based on comments received.

ADDRESSES: Submit comments to FHFA, identified by “No. 2023–N–14,” using any one of the following methods:

- **Agency Website:** www.fhfa.gov/open-for-comment-or-input.
- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. If you submit your comments to the Federal eRulemaking Portal, please also send it by email to FHFA at RegComments@fhfa.gov to ensure timely receipt by FHFA. Please include “Comments/No. 2023–N–14” in the subject line of the message.

- **Hand Delivered/Courier:** The hand delivery address is: Clinton Jones, General Counsel, Attention: Comments/No. 2023–N–14, Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. The package should be delivered to the Seventh Street entrance Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m., EST.

- **U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:** The mailing address for comments is: Clinton Jones, General Counsel, Attention: Comments/No. 2023–N–14, Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC

20219. *Please note that all mail sent to FHFA via the U.S. Postal Service is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks. For any time-sensitive correspondence, please plan accordingly.*

See **SUPPLEMENTARY INFORMATION** for additional information on submission and posting of comments.

FOR FURTHER INFORMATION CONTACT:

Stacy Easter, Privacy Act Officer, privacy@fhfa.gov or (202) 649–3803; or Tasha Cooper, Senior Agency Official for Privacy, privacy@fhfa.gov or (202) 649–3091 (not toll-free numbers), Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. For TTY/TRS users with hearing and speech disabilities, dial 711 and ask to be connected to any of the contact numbers above.

SUPPLEMENTARY INFORMATION:

I. Comments

FHFA seeks public comments on the revisions to the system of records and will take all comments into consideration. See 5 U.S.C. 552a(e)(4) and (11). In addition to referencing “Comments/No. 2023–N–14,” please reference “FHFA–15, Payroll, Retirement, Time and Attendance, and Leave Records.”

FHFA will make all comments timely received available for examination by the public through the electronic comment docket for this notice, which is located on the FHFA website at <https://www.fhfa.gov>. All comments received will be posted without change and will include any personal information you provide, such as name, address (mailing and email), telephone numbers, and any other information you provide.

II. Introduction

This notice informs the public of FHFA’s proposed revisions to an existing system of records. This notice satisfies the Privacy Act requirement that an agency publishes a system of records notice in the **Federal Register** when there is an addition or change to an agency’s system of records. Congress has recognized that application of all requirements of the Privacy Act to certain categories of records may have an undesirable and often unacceptable effect upon agencies in the conduct of necessary public business. Consequently, Congress established general exemptions and specific exemptions that could be used to exempt records from provisions of the Privacy Act. Congress also required that exempting records from provisions of

the Privacy Act would require the head of an agency to publish a determination to exempt a record from the Privacy Act as a rule in accordance with the Administrative Procedure Act. Records and information in this system of records are not exempt from the requirements of the Privacy Act.

As required by the Privacy Act, 5 U.S.C. 552a(r), and pursuant to section 7 of Office of Management and Budget (OMB) Circular No. A–108, “*Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act*,” prior to publication of this notice, FHFA submitted a report describing the system of records covered by this notice to the OMB, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate.

III. Revised System of Records

The revised system of records notice is set out in its entirety and described in detail below. The proposed modification to the System makes the following substantive and non-substantive changes:

(1) Adds new categories of records collected in the system to allow FHFA to collect and maintain information related to employee work agreements.

(2) Updates the service provider used to maintain the payroll, retirement, and leave records system from the National Finance Center to the Interior Business Center.

(3) Adds a new authority, Telework Enhancement Act of 2010 (5 U.S.C. 6501–6506), to allow for the collection and maintenance of the new proposed category, and corrects other authorities listed.

(4) Expands the system’s purpose for collecting the information to include the collection of employee work agreements.

(5) Expands the system’s record source categories to include employee work agreements.

(6) Revises the existing routine uses to be consistent with FHFA’s standard routine uses and those specific to this collection. Routine use 1 has been revised but remains in the same numerical position; a new routine use 2 has been added and the former routine use 2 has been revised and is now routine use 3; former routine use 3 has been revised and is now routine use 4; former routine uses 4–6 have been deleted; new routine uses 6, 8–9 have been added; routine use 7 has been revised but remains in the same numerical position; former routine use 8 has been deleted; former routine use 9

has been revised and is now routine use 5; former routine uses 10–14 have been deleted; and former routine uses 15–24 remain unchanged in text but are now numerically routine uses 10–19.

(7) Makes minor corrections and other administrative updates to the remaining sections of the notice in accordance with OMB Circular A–108.

SYSTEM NAME AND NUMBER:

Payroll, Retirement, Time and Attendance, and Leave Records, FHFA–15.

SECURITY CLASSIFICATION:

Sensitive but unclassified.

SYSTEM LOCATION:

Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219, and any alternate work site utilized by employees of FHFA, including contractors assisting agency employees, and Department of the Interior, Interior Business Center, 7301 W Mansfield Avenue, Lakewood, CO 80235.

SYSTEM MANAGER(S):

Office of Human Resources Management, 400 Seventh Street SW, Washington, DC 20219, and any alternate work site utilized by employees of FHFA, including contractors assisting agency employees; General Counsel, Office of General Counsel, (202) 649–3065, Federal Housing Finance Agency; and Department of the Interior, Interior Business Center, 7301 W Mansfield Avenue, Lakewood, CO 80235.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; Telework Enhancement Act of 2010 (5 U.S.C. 6501–6506); The Federal Home Loan Bank Act (12 U.S.C. 1421–1449) and Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501, *et seq.*), as amended by the Housing and Economic Recovery Act of 2008, Public Law 110–289, 122 Stat. 2654.

PURPOSE(S) OF THE SYSTEM:

The purpose of the system of records is for FHFA's operations for payroll, time and attendance, leave, insurance, tax, retirement, qualifications, and benefits; to prepare related reports to other federal agencies including the Department of Treasury and the Office of Personnel Management; and to locate FHFA employees and determine such matters as their position, period of service, type of leave, qualifications, benefits, pay, work history, and work agreements.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The system contains records on current and former employees, detailees, interns, fellows, political appointees, and other persons who work at FHFA under the Intergovernmental Personnel Act. This system may also include limited information regarding employees' spouses, dependents, emergency contacts, beneficiaries, or estate trustees who meet the definition of "individual" as defined in the Privacy Act.

CATEGORIES OF RECORDS IN THE SYSTEM:

The records in the system include the individual's name; home address and alternate work location; telephone numbers; Social Security number; organization code; pay rate; salary; grade; length of service; pay and leave records; source documents for posting time and leave attendance; deductions for Medicare; Old-Age, Survivors, and Disability Insurance (OASDI, also known as Social Security); bonds; Federal Employee Group Life Insurance; union dues; taxes; allotments; retirement; charities; Federal and commercial health benefits; Flexible Spending Account; Long Term Care Insurance; Thrift Savings Plan contributions; 401k plan contributions; award; shift schedules; pay differential; tax lien data; wage garnishments; work agreements, locations, and schedules; and any other information pertaining to payroll, retirement, time and attendance, and leave. The payroll, retirement, and leave records described in this notice form a part of the information contained in the Federal Personnel and Payroll System (FPPS) in the Interior Business Center (IBC). Personnel and payroll records contained in IBC are covered under the government-wide system of records notices published by the Office of Personnel Management (OPM/GOVT–1 and OPM/GOVT–5).

RECORD SOURCE CATEGORIES:

Records source is from individuals on whom the records are maintained, official personnel and payroll records of individuals on whom the records are maintained, work agreements, time and attendance records, withholding certificates, third-party benefit providers, and other pay-related records prepared by the individual or the Office of Human Resources. Records and information covered by this SORN are obtained directly from the individual and the individual's supervisor.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records and information contained therein may specifically be disclosed outside of FHFA as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows, to the extent such disclosures are compatible with the purposes for which the information was collected:

(1) To appropriate agencies, entities, and persons when—(a) FHFA suspects or has confirmed that there has been a breach of the system of records; (b) FHFA has determined that as a result of a suspected or confirmed breach there is a risk of harm to individuals, FHFA (including its information systems, programs, and operations), the Federal Government, or national security; and (c) the disclosure made to such agencies, entities, and persons as reasonably necessary to assist with FHFA's efforts to (i) respond to a suspected or confirmed breach or (ii) prevent, minimize, or remedy harm caused by such breach.

(2) To a federal agency or federal entity, when FHFA determines information from this system of records is reasonably necessary to assist the recipient agency or entity in: (a) responding to a suspected or confirmed breach or; (b) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or to national security, resulting from a suspected or confirmed breach.

(3) When there is an indication of a violation or potential violation of law (whether civil, criminal, or regulatory in nature, and whether arising by general statute or particular program statute or by regulation, rule, or order issued pursuant thereto), the relevant records in the system of records may be referred, as a routine use, to the appropriate agency (*e.g.*, federal, state, local, tribal, foreign, or a financial regulatory organization) charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing a statute, rule, regulation, or order issued pursuant thereto.

(4) To any individual during the course of any inquiry or investigation conducted by FHFA, or in connection with civil litigation, if FHFA has reason to believe the individual to whom the record is disclosed may have further information about the matters related thereto, and those matters appeared to

be relevant and necessary at the time to the subject matter of the inquiry.

(5) To any contractor, agent, or other authorized individual performing work on a contract, service, cooperative agreement, job, or other activity on behalf of FHFA who has a need to access the information in the performance of their official duties or activities.

(6) To appropriate third parties contracted by FHFA to facilitate mediation or other dispute resolution procedures or programs.

(7) To outside counsel contracted by FHFA, the U.S. Department of Justice (DOJ) (including United States Attorney Offices), or other federal agencies conducting litigation or in proceedings before any court, or adjudicative or administrative body, when it is relevant and necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

- a. FHFA;
- b. Any employee of FHFA in his/her official capacity;
- c. Any employee of FHFA in his/her individual capacity where DOJ or FHFA has agreed to represent the employee; or
- d. The United States or any agency thereof that is a party to the litigation or has an interest in such litigation, and FHFA determines that the records are both relevant and necessary to the litigation.

(8) To the National Archives and Records Administration or other federal agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

(9) To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is relevant and necessary to such audit or oversight functions.

(10) To the Department of the Treasury, Bureau of the Public Debt to provide financial management services and systems, including local and temporary duty travel, involving FHFA employees.

(11) To the Internal Revenue Service and appropriate State and local taxing authorities.

(12) To appropriate Federal agencies to effect salary or administrative offsets, or for other purposes connected with the collection of debts owed to the United States.

(13) To the Office of Child Support Enforcement, Administration for Children and Families, Department of Health and Human Services for

purposes of locating individuals to establish paternity and establish and modify orders of child support enforcement actions as required by the Personal Responsibility and Work Opportunity Reconciliation Act, the Federal Parent Locator System, and the Federal Tax Offset System.

(14) To the Office of Child Support Enforcement for release to the Social Security Administration for verifying Social Security numbers in connection with the operation of the Federal Parent Locator System by the Office of Child Support Enforcement.

(15) To the Office of Child Support Enforcement for release to the Department of Treasury for purposes of administering the Earned Income Tax Credit Program and verifying a claim with respect to employment in a tax return.

(16) To commercial benefit providers, carriers, vendors, contractor personnel, and agents to process claims and provide related administrative services involving FHFA employees.

(17) To any Federal, state, or local government agency compiling tax withholding, retirement contributions, or allotments to charities, labor unions, wage garnishments, and other authorized recipients.

(18) To any member of the public for employment verification at an employee's written request.

(19) To any judgment creditor for the purpose of wage garnishment.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

The records are maintained in electronic format. Electronic records are stored in computerized databases on FHFA's secured network. All paper and magnetic disk or tape records previously collected in the system have been moved offsite to Federal Records Centers.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

The records are retrieved by the individual's name, Social Security number, birthdate, or some other personal identifier.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

The records are retained and managed in accordance with FHFA's Comprehensive Records Schedule (CRS) Item 1.3a—Administrative Policies for 30 years and the National Archives and Records Administration's General Records Schedule (GRS) 2.4—Employee Compensation and Benefits Records. Records are destroyed or deleted

according to the retention schedule associated with the GRS Item, but longer retention is authorized for business use.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The electronic records are safeguarded in a secured environment and protected by controlled access procedures through the use of access codes and other information technology security measures. Buildings where records and computerized systems are stored have security cameras and 24-hour security guard service. Access to records is restricted to only FHFA staff (and FHFA contractors assisting such staff) in the performance of official duties related to the purposes for which the system is maintained. The System Owner controls access to this System and limits access in accordance with the above.

RECORD ACCESS PROCEDURES:

Individuals seeking access to and/or amendment of records about themselves contained in this System should follow the "Notification Procedures" below.

CONTESTING RECORD PROCEDURES:

Individuals seeking access to and/or amendment of records about themselves contained in this System should follow the "Notification Procedures" below.

NOTIFICATION PROCEDURES:

Individuals seeking notification of any records about themselves contained in this System should address their inquiry to the Privacy Act Officer via email to privacy@fhfa.gov, by mail to the Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219, or in accordance with the procedures set forth in 12 CFR part 1204. *Please note that all mail sent to FHFA via the U.S. Postal Service is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks. For any time-sensitive correspondence, please plan accordingly.*

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

The system of records was last published in full in the **Federal Register** at 77 FR 499 (Jan. 5, 2012), revised at 80 FR 60900 (Oct. 8, 2015).

Clinton Jones,

General Counsel, Federal Housing Finance Agency.

[FR Doc. 2023-25371 Filed 11-16-23; 8:45 am]

BILLING CODE 8070-01-P

FEDERAL RESERVE SYSTEM**Formations of, Acquisitions by, and Mergers of Bank Holding Companies**

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551-0001, not later than December 18, 2023.

A. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) One Memorial Drive, Kansas City, Missouri, 64198. Comments can also be sent electronically to: KCApplicationcomments@kc.frb.org.

1. *WDCO Ventures LLC, Oklahoma City, Oklahoma*; to become a bank holding company by acquiring 26 percent of the voting shares of Town & Country Bancshares, Inc., Edmond, Oklahoma, and thereby indirectly acquiring voting shares of Prism Bank, Guthrie, Oklahoma.

2. *Bern Bancshares, Inc., Bern, Kansas*; to acquire up to 6.83 percent of the voting shares of UBT Bancshares, Inc., and thereby indirectly acquire voting shares of United Bank & Trust, both of Marysville, Kansas.

B. Federal Reserve Bank of San Francisco (Joseph Cuenco, Assistant Vice President, Formations, Transactions & Enforcement) 101 Market Street, San Francisco, California

94105. Comments can also be sent electronically to:

sf.fisc.comments.applications@sf.frb.org.

1. *PCB Financial, Inc., Costa Mesa, California*; to become a bank holding company by acquiring Northern California Bancorp, Inc., and thereby indirectly acquiring Monterey County Bank, both of Monterey, California.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023-25462 Filed 11-16-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Centers for Disease Control and Prevention****Advisory Board on Radiation and Worker Health, National Institute for Occupational Safety and Health**

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting.

SUMMARY: In accordance with regulatory provisions, the Centers for Disease Control and Prevention (CDC) announces a meeting of the Advisory Board on Radiation and Worker Health (ABRWH or the Advisory Board). This meeting is open to the public, with a public comment period. The public is welcome to submit written comments in advance of the meeting, to the contact person below. Written comments received in advance of the meeting will be included in the official record of the meeting. The public is also welcomed to listen to the meeting by joining the teleconference (information below). The audio conference line has 150 ports for callers.

DATES: The meeting will be held on December 7, 2023 from 11 a.m. to 6 p.m. EST. A public comment session will be held at 5 p.m. and will conclude at 6 p.m. or following the final call for public comment, whichever comes first. Written comments must be received on or before November 30, 2023.

ADDRESSES: You may submit comments by mail to: Rashaun Roberts, National Institute for Occupational Safety and Health, 1090 Tusculum Avenue, MS C-24, Cincinnati, Ohio 45226.

Meeting Information: The USA toll-free dial-in numbers are: +1 669 254 5252 US (San Jose); +1 646 828 7666 US (New York). The Meeting ID is: 160

6763 3819 and the Passcode is:

98685439; Web conference by Zoom meeting connection: <https://cdc.zoomgov.com/j/16067633819?pwd=RUdiYXlZZHFkanpJOHZrcGJlbTlaZz09>.

FOR FURTHER INFORMATION CONTACT:

Rashaun Roberts, Ph.D., Designated Federal Officer, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, 1090 Tusculum Avenue, Mailstop C-24, Cincinnati, Ohio 45226, Telephone (513) 533-6800, Toll Free 1(800) CDC-INFO, Email: ocas@cdc.gov.

SUPPLEMENTARY INFORMATION:

Background: The Advisory Board was established under the Energy Employees Occupational Illness Compensation Program Act of 2000 to advise the President on a variety of policy and technical functions required to implement and effectively manage the new compensation program. Key functions of the Advisory Board include providing advice on the development of probability of causation guidelines which have been promulgated by the Department of Health and Human Services (HHS) as a final rule, advice on methods of dose reconstruction which have also been promulgated by HHS as a final rule, advice on the scientific validity and quality of dose estimation and reconstruction efforts being performed for purposes of the compensation program, and advice on petitions to add classes of workers to the Special Exposure Cohort (SEC). In December 2000, the President delegated responsibility for funding, staffing, and operating the Advisory Board to HHS, which subsequently delegated this authority to the Centers for Disease Control and Prevention (CDC). The National Institute for Occupational Safety and Health implements this responsibility for CDC.

The charter was issued on August 3, 2001, renewed at appropriate intervals, and rechartered under Executive Order 13889 on March 22, 2022, and will terminate on March 22, 2024.

Purpose: This Advisory Board is charged with (a) providing advice to the Secretary, HHS, on the development of guidelines under Executive Order 13179; (b) providing advice to the Secretary, HHS, on the scientific validity and quality of dose reconstruction efforts performed for this program; and (c) upon request by the Secretary, HHS, advising the Secretary on whether there is a class of employees at any Department of Energy facility who were exposed to radiation but for whom it is not feasible to estimate their radiation dose, and on whether there is

reasonable likelihood that such radiation doses may have endangered the health of members of this class.

Matters To Be Considered: The agenda will include discussions on the following: NIOSH Program Update; Department of Labor (DOL) Program Update; Department of Energy (DOE) Program Update; Special Exposure Cohort (SEC) Petitions Update; Background and Update on Subcommittee for Procedures Review Activities; Pinellas Workgroup Update, Metals and Control Workgroup Update, Dose Reconstruction Review Methods Workgroup Update, and a Board Work Session. Agenda items are subject to change as priorities dictate.

The Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2023–25460 Filed 11–16–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

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

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of closed meeting.

SUMMARY: In accordance with regulatory provisions, the Centers for Disease Control and Prevention (CDC) announces the following meeting for the Board of Scientific Counselors, National Center for Injury Prevention and Control (BSC, NCIPC or Board). This meeting is partially open to the public.

DATES: The meeting will be held on January 11, 2024. The first session of the day will be held from 10 a.m. to 12:05 p.m., EST (OPEN), and the second session will be held from 1 p.m. to 4:30 p.m., EST (CLOSED). The public comment period will be at the end of

the open session of the meeting, from 11:45 a.m. to 12:00 p.m., EST.

ADDRESSES: Webinar, Atlanta, Georgia. All participants must register by using the following link to attend the open session: <https://cdc.zoomgov.com/meeting/register/vJltf-igpjopGsXuGUhsdIIOmRCB2yx509k>.

FOR FURTHER INFORMATION CONTACT:

Christopher R. Harper, Ph.D., Designated Federal Officer, Board of Scientific Counselors, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 4770 Buford Highway NE, Mailstop S–1069, Atlanta, Georgia 30341. Telephone: (404) 718–8330; Email: ncipcbosc@cdc.gov.

SUPPLEMENTARY INFORMATION: Portions of the meeting referenced above will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5, U.S.C., and the Determination of the Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, pursuant to 5 U.S.C. 1009 (Pub. L. 92–463, as amended).

Purpose: The Board of Scientific Counselors, National Center for Injury Prevention and Control (BSC, NCIPC or Board) will: (1) conduct, encourage, cooperate with, and assist other appropriate public health authorities, scientific institutions, and scientists in the conduct of research, investigations, experiments, demonstrations, and studies relating to the causes and strategies related to the prevention of injury, overdose, and violence; (2) assist States and other entities in preventing intentional and unintentional injuries, and to promote health and well-being; and (3) make recommendations of grants and cooperative agreements for research and prevention activities related to injury, overdose, and violence. The BSC, NCIPC makes recommendations regarding policies, strategies, objectives, and priorities and reviews progress toward injury, overdose, and violence prevention. The Board also provides advice on the appropriate balance of intramural and extramural research and provides guidance on the needs, structure, progress, and performance of intramural programs. Further, the Board provides guidance on extramural scientific program matters. Additionally, the Board provides second-level scientific and programmatic review of applications for research grants, cooperative agreements, and training grants related to injury, overdose, and violence prevention, and recommends approval of projects that merit further consideration for funding

support. The Board also provides feedback and input on strategic plans, resources, and priority publications related to injury, overdose, and violence prevention.

Matters To Be Considered: The open session of the meeting will include a discussion on the updated Intimate Partner Violence Research Priorities. The closed session of the meeting will focus on the secondary peer review of extramural research grant applications received in response to one (1) Notice of Funding Opportunity: RFA–CE–24–001—“Grants for Injury Control Research Centers.” Agenda items are subject to change as priorities dictate.

The Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2023–25456 Filed 11–16–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–4807]

General Hospital and Personal Use Devices Panel of the Medical Devices Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments—506J Device List

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 General Hospital and Personal Use Devices Panel of the Medical Devices Advisory Committee (the Committee). The general function of the Committee is to provide advice and recommendations to FDA on regulatory issues. 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 February 6, 2024, from 9 a.m. to 5 p.m. Eastern Time.

ADDRESSES: Holiday Inn Gaithersburg, Two Montgomery Village Ave., Gaithersburg, MD 20879. The hotel's telephone number is 301-948-8900. The hotel's link can be found at: <https://www.ihg.com/holidayinn/hotels/us/en/gaithersburg/wasrv/hoteldetail>.

Answers to commonly asked questions about FDA advisory committee meetings may be accessed at: <https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm>.

FDA is establishing a docket for public comment on this meeting. The docket number is FDA-2023-N-4807. The docket will close on March 6, 2024. 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 March 6, 2024. 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 January 16, 2024, will be provided to the Committee. Comments received after that date 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-4807 for "General Hospital and Personal Use Devices Panel of the Medical Devices Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments." 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:

Jarrod Collier, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5214, Silver Spring, MD 20993-0002, Jarrod.Collier@fda.hhs.gov, 240-672-5763, 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 the 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: On February 6, 2024, the Committee will discuss and make recommendations on medical device supply chain resiliency and shortage issues, including the "506J Device List" which has been developed as a requirement of the Consolidated Appropriations Act, 2023. Specifically, section 2514(c) of the Consolidated Appropriations Act, 2023 (Pub. L. 117-328) directs FDA to publish a list of devices by FDA product code subject to mandatory notifications under section 506J of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 356j). Manufacturers of the devices on the 506J Device List will be required to notify FDA during, or in advance of, a public health emergency about a permanent discontinuance in the manufacture or an interruption in the manufacture of devices included on this list. The Committee will also discuss how the 506J Device List relates to medical devices used in pandemic preparedness and response to satisfy, in part, a requirement under section 3302 of the Food and Drug Omnibus Reform Act of 2022 (FDORA).

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 and at the location of the advisory committee meeting, and the background material will be posted on FDA's website after the meeting. Background material will be available at <https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm>. Scroll down to the appropriate advisory committee meeting link.

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 January 16, 2024, will be provided to the Committee. Oral presentations from the public will be scheduled on February 6, 2024, between approximately 1 p.m. and 2 p.m. Eastern Time. 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, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before January 5, 2024. 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 January 8, 2024.

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 Artair Mallett at Artair.Mallett@fda.hhs.gov or 301-796-9638 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.*).

Dated: November 14, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023-25459 Filed 11-16-23; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2019-N-3926]

Request for Nominations for Voting Members on Public Advisory Panels or Committees; Device Good Manufacturing Practice Advisory Committee and the Medical Devices Advisory Committee

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting nominations for voting members to serve on the Device Good Manufacturing Practice Advisory Committee (DGMPAC) and the Medical Devices Advisory Committee (MDAC)

device panels in the Center for Devices and Radiological Health. This annual notice is also in accordance with the 21st Century Cures Act, which requires the Secretary of Health and Human Services (the Secretary) to provide an annual opportunity for patients, representatives of patients, and sponsors of medical devices that may be specifically the subject of a review by a classification panel to provide recommendations for individuals with appropriate expertise to fill voting member positions on classification panels. FDA seeks to include the views of women and men, members of all racial and ethnic groups, and individuals with and without disabilities on its advisory committees, and therefore, encourages nominations of appropriately qualified candidates from these groups.

DATES: Nominations received on or before January 16, 2024, will be given first consideration for membership on the DGMPAC and Panels of the MDAC. Nominations received after January 16, 2024, will be considered for nomination to the committee as later vacancies occur.

ADDRESSES: All nominations for membership should be submitted electronically by logging into the FDA Advisory Nomination Portal at <https://www.accessdata.fda.gov/scripts/FACTRSportal/FACTRS/index.cfm> or by mail to Advisory Committee Oversight and Management Staff, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5103, Silver Spring, MD 20993-0002. Information about becoming a member on an FDA advisory committee can also be obtained by visiting FDA's website at <https://www.fda.gov/AdvisoryCommittees/default.htm>.

FOR FURTHER INFORMATION CONTACT: *Regarding all nomination questions for membership, contact the following persons listed in table 1:*

TABLE 1—PRIMARY CONTACT AND PANEL

Primary contact person	Committee or panel
Joannie Adams-White, Office of the Center Director, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5561, Silver Spring, MD 20993, 301-796-5421, Joannie.Adams-White@fda.hhs.gov .	Medical Devices Dispute Resolution Panel.
James P. Swink, Office of Management, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5211, Silver Spring, MD 20993, 301-796-6313, James.Swink@fda.hhs.gov .	Circulatory System Devices Panel, Ophthalmic Devices Panel.
Akinola Awojope, Office of Management, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5216, Silver Spring, MD 20993, 301-636-0512, Akinola.Awojope@fda.hhs.gov .	Dental Products Panel, Neurological Devices Panel, Obstetrics and Gynecology Devices Panel, Orthopaedic and Rehabilitation Devices Panel.

TABLE 1—PRIMARY CONTACT AND PANEL—Continued

Primary contact person	Committee or panel
Jarrold Collier, Office of Management, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5216, Silver Spring, MD 20993, 240–672–5763, Jarrod.Collier@fda.hhs.gov .	DGMPAC, General Hospital and Personal Use Devices Panel, Hematology and Pathology Devices Panel, Molecular and Clinical Genetics Panel.
Candace Nalls, Office of Management, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5214, Silver Spring, MD 20993, 301–636–0510, Candace.Nalls@fda.hhs.gov .	Anesthesiology and Respiratory Therapy Devices Panel; Ear, Nose, and Throat Devices Panel; Gastroenterology and Urology Devices Panel.

SUPPLEMENTARY INFORMATION: FDA is requesting nominations for voting members for vacancies listed in table 2:

TABLE 2—EXPERTISE NEEDED, VACANCIES, AND APPROXIMATE DATE NEEDED

Expertise needed	Vacancies	Approximate date needed
<i>Device Good Manufacturing Practice Advisory Committee</i> —Experts in medical device quality management system requirements/current good manufacturing practices, with experience in both part 820 (21 CFR part 820) and International Organization for Standardization (ISO) 13485, are needed to provide cross-cutting scientific or clinical expertise concerning the particular issue in dispute. Vacancies include representatives of the interests of the general public and government.	1 2	Immediately. June 1, 2024.
<i>Anesthesiology and Respiratory Therapy Devices Panel of the Medical Devices Advisory Committee</i> —Anesthesiologists, pulmonary medicine specialists, or other experts who have specialized interests in ventilator support, sleep medicine, pharmacology, physiology, or the effects and complications of anesthesia. FDA is also seeking applicants with pediatric expertise in these areas.	1	December 1, 2024.
<i>Circulatory System Devices Panel of the Medical Devices Advisory Committee</i> —Interventional cardiologists, electrophysiologists, invasive (vascular) radiologists, vascular and cardiothoracic surgeons, and cardiologists with special interest in congestive heart failure.	3	July 1, 2024.
<i>Dental Products Panel of the Medical Devices Advisory Committee</i> —Dentists, engineers and scientists who have expertise in the areas of dental implants, dental materials, oral and maxillo-facial surgery, endodontics, periodontology, tissue engineering, snoring/sleep therapy, and dental anatomy.	7	Immediately.
<i>Ear, Nose, and Throat Devices Panel of the Medical Devices Advisory Committee</i> —Otolologists, neurotologists, and audiologists.	7	Immediately.
<i>Gastroenterology and Urology Devices Panel of the Medical Devices Advisory Committee</i> —Gastroenterologists, urologists, and nephrologists.	2	January 1, 2024.
<i>General Hospital and Personal Use Devices Panel of the Medical Devices Advisory Committee</i> —Internists, pediatricians, neonatologists, endocrinologists, gerontologists, nurses, biomedical engineers, human factors experts, or microbiologists/infection control practitioners or experts.	1 2	Immediately. January 1, 2024.
<i>Hematology and Pathology Devices Panel of the Medical Devices Advisory Committee</i> —Hematologists (benign and/or malignant hematology), hematopathologists (general and special hematology, coagulation and hemostasis, and hematological oncology), gynecologists with special interests in gynecological oncology, cytopathologists, and molecular pathologists with special interests in development of predictive and prognostic biomarkers, molecular oncology, cancer screening, cancer risk, digital pathology, whole slide imaging; devices utilizing artificial intelligence/machine learning.	4	Immediately.
<i>Medical Devices Dispute Resolution Panel of the Medical Devices Advisory Committee</i> —Experts with cross-cutting scientific, clinical, analytical or mediation skills.	1	Immediately.
<i>Molecular and Clinical Genetics Panel of the Medical Devices Advisory Committee</i> —Experts in human genetics, molecular diagnostics, and in the clinical management of patients with genetic disorders, and (e.g., pediatricians, obstetricians, neonatologists). Individuals with training in in-born errors of metabolism, biochemical and/or molecular genetics, population genetics, epidemiology and related statistical training, bioinformatics, computational genetics/genomics, variant classification, cancer genetics/genomics, molecular oncology, radiation biology, and clinical molecular genetics testing, (e.g., sequencing, whole exome sequencing, whole genome sequencing, non-invasive prenatal testing, cancer screening, circulating cell free/circulating tumor nucleic acid testing, digital polymerase chain reaction, genotyping, array comparative genomic hybridization, etc.). Individuals with experience in genetics counseling, medical ethics are also desired, and individuals with experience in ancillary fields of study will be considered.	1 1 2	October 1, 2024. Immediately.
<i>Neurological Devices Panel of the Medical Devices Advisory Committee</i> —Neurosurgeons (cerebrovascular and pediatric), neurologists (stroke, pediatric, pain management, and movement disorders), interventional neuroradiologists, psychiatrists, and biostatisticians.	2 2	Immediately. December 1, 2023.

TABLE 2—EXPERTISE NEEDED, VACANCIES, AND APPROXIMATE DATE NEEDED—Continued

Expertise needed	Vacancies	Approximate date needed
<i>Obstetrics and Gynecology Devices Panel of the Medical Devices Advisory Committee</i> —Experts in perinatology, embryology, reproductive endocrinology, pediatric gynecology, gynecological oncology, operative hysteroscopy, pelviscopy, electrosurgery, laser surgery, assisted reproductive technologies, contraception, postoperative adhesions, and cervical cancer and colposcopy; biostatisticians and engineers with experience in obstetrics/gynecology devices; urogynecologists; experts in breast care; experts in gynecology in the older patient; experts in diagnostic (optical) spectroscopy; experts in midwifery; labor and delivery nursing.	2	February 1, 2024.
<i>Ophthalmic Devices Panel of the Medical Devices Advisory Committee</i> —Ophthalmologists with expertise in corneal-external disease, vitreo-retinal surgery, glaucoma, ocular immunology, ocular pathology; optometrists; vision scientists; and ophthalmic professionals with expertise in clinical trial design, quality of life assessment, electrophysiology, low vision rehabilitation, and biostatistics.	3	November 1, 2024.
<i>Orthopaedic and Rehabilitation Devices Panel of the Medical Devices Advisory Committee</i> —Orthopaedic surgeons (joint, spine, trauma, reconstruction, sports medicine, hand, foot and ankle, and pediatric orthopaedic surgeons); rheumatologists; engineers (biomedical, biomaterials, and biomechanical); experts in rehabilitation medicine, and musculoskeletal engineering; radiologists specializing in musculoskeletal imaging and analyses and biostatisticians.	1 2	Immediately. September 1, 2024.

I. General Description of the Committees Duties

A. DGMPAC

The DGMPAC reviews regulations proposed for promulgation regarding good manufacturing practices governing the methods used in, and the facilities and controls used for, the manufacture, packing, storage and installation of devices, and makes recommendations to the Commissioner of Food and Drugs (the Commissioner) regarding the feasibility and reasonableness of those proposed regulations. The DGMPAC also advises the Commissioner on any petition submitted by a manufacturer for an exemption or variance from good manufacturing practice regulations that is referred to the committee.

B. Panels of MDAC

The MDAC reviews and evaluates data on the safety and effectiveness of marketed and investigational devices and makes recommendations for their regulation. The panels engage in many activities to fulfill the functions the Federal Food, Drug, and Cosmetic Act (FD&C Act) envisions for device advisory panels. With the exception of the Medical Devices Dispute Resolution Panel, each panel, according to its specialty area, performs the following duties: (1) advises the Commissioner regarding recommended classification or reclassification of devices into one of three regulatory categories, (2) advises on any possible risks to health associated with the use of devices, (3) advises on formulation of product development protocols, (4) reviews premarket approval applications for medical devices, (5) reviews guidelines and guidance documents, (6) recommends exemption of certain devices from the application of portions

of the FD&C Act, (7) advises on the necessity to ban a device, and (8) responds to requests from the Agency to review and make recommendations on specific issues or problems concerning the safety and effectiveness of devices. With the exception of the Medical Devices Dispute Resolution Panel, each panel, according to its specialty area, may also make appropriate recommendations to the Commissioner on issues relating to the design of clinical studies regarding the safety and effectiveness of marketed and investigational devices.

The Dental Products Panel also functions at times as a dental drug panel. The functions of the dental drug panel are to evaluate and recommend whether various prescription drug products should be changed to over-the-counter status and to evaluate data and make recommendations concerning the approval of new dental drug products for human use.

The Medical Devices Dispute Resolution Panel provides advice to the Commissioner on complex or contested scientific issues between FDA and medical device sponsors, applicants, or manufacturers relating to specific products, marketing applications, regulatory decisions and actions by FDA, and Agency guidance and policies. The panel makes recommendations on issues that are lacking resolution, are highly complex in nature, or result from challenges to regular advisory panel proceedings or Agency decisions or actions.

II. Criteria for Voting Members

A. DGMPAC

The DGMPAC consists of a core of nine members including the Chair. Members and the Chair are selected by the Secretary. Persons nominated for

membership as a health professional or officer or employee of any Federal, State, or local government should have knowledge of or expertise in any one or more of the following areas: quality assurance concerning the design, manufacture, and use of medical devices in accordance with part 820 and/or ISO 13485. To be eligible for selection as a representative of the general public, nominees should possess appropriate qualifications to understand and contribute to the DGMPAC's work. Three of the members shall be officers or employees of any State or local government or of the Federal Government; two shall be representative of the interests of the device manufacturing industry; two shall be representatives of the interests of physicians and other health professionals; and two shall be representatives of the interests of the general public. FDA is publishing a separate document announcing the Request for Nominations Notification for Non-Voting Representatives of the interests of the device manufacturing industry. Almost all non-Federal members of this committee serve as Special Government Employees. Members are invited to serve for overlapping terms of 4 years. The current needs for the DGMPAC are listed in table 2.

B. Panels of the MDAC

The MDAC with its 18 panels shall consist of a maximum of 159 standing members. Members are selected by the Commissioner or designee from among authorities in clinical and administrative medicine, engineering, biological and physical sciences, and other related professions. Almost all non-Federal members of this committee serve as Special Government

Employees. A maximum of 122 members shall be standing voting members and 37 shall be nonvoting members who serve as representatives of consumer interests and of industry interests. FDA is publishing separate documents announcing the Request for Nominations Notification for Nonvoting Representatives on certain panels of the MDAC. Persons nominated for membership on the panels should have adequately diversified experience appropriate to the work of the panel in such fields as clinical and administrative medicine, engineering, biological and physical sciences, statistics, and other related professions. The nature of specialized training and experience necessary to qualify the nominee as an expert suitable for appointment may include experience in medical practice, teaching, and/or research relevant to the field of activity of the panel. The current needs for each panel are listed in table 2. Members will be invited to serve for terms of up to 4 years.

III. Nomination Procedures

Any interested person may nominate one or more qualified individuals for membership on one or more of the advisory panels or advisory committees. Self-nominations are also accepted. Nominations must include a current, complete résumé or curriculum vitae for each nominee, including current business address, telephone number, and email address if available and a signed copy of the Acknowledgement and Consent form available at the FDA Advisory Nomination Portal (see **ADDRESSES**). Nominations must also specify the advisory committees or panel(s) for which the nominee is recommended. Nominations must also acknowledge that the nominee is aware of the nomination unless self-nominated. FDA will ask potential candidates to provide detailed information concerning such matters related to financial holdings, employment, and research grants and/or contracts to permit evaluation of possible sources of conflict of interest.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: November 6, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–25367 Filed 11–16–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–D–0053]

Notifying the Food and Drug Administration of a Permanent Discontinuance or Interruption in Manufacturing of a Device Under Section 506J of the Federal Food, Drug, and Cosmetic Act; Final Guidance for Industry and Food and Drug Administration Staff; and Select Updates for the 506J Guidance: 506J Device List and Additional Notifications; Draft Guidance 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 the final guidance entitled “Notifying FDA of a Permanent Discontinuance or Interruption in Manufacturing of a Device Under Section 506J of the FD&C Act” and the draft guidance entitled “Select Updates for the 506J Guidance: 506J Device List and Additional Notifications.” The Federal Food, Drug, and Cosmetic Act (FD&C Act) requires manufacturers to notify FDA of a permanent discontinuance or an interruption in the manufacture of certain devices that is likely to lead to a meaningful disruption in supply of that device in the United States during or in advance of a public health emergency (PHE). This final guidance is intended to assist manufacturers in providing timely, informative notifications about changes in the production of certain medical device products that will help prevent or mitigate shortages of such devices. FDA is concurrently issuing a draft guidance to propose select updates to the final guidance “Notifying FDA of a Permanent Discontinuance or Interruption in Manufacturing of a Device Under Section 506J of the FD&C Act.” This draft guidance proposes a list of device product codes for which a manufacturer of such devices is required to notify FDA in accordance with the FD&C Act (hereafter referred to as the “506J Device List”) and clarifies that manufacturers may submit voluntary notifications regarding supply chain issues at any time, unrelated to the declaration or potential declaration of a PHE. This draft guidance is not final nor is it for implementation at this time.

DATES: Submit either electronic or written comments on the draft guidance by February 15, 2024 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket No. FDA–2022–D–0053 for “Notifying FDA of a Permanent Discontinuance or Interruption in Manufacturing of a Device Under Section 506J of the FD&C Act” or “Select Updates for the 506J Guidance: 506J Device List and Additional Notifications.” 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 final guidance document entitled “Notifying FDA of a Permanent Discontinuation or Interruption in Manufacturing of a Device Under Section 506J of the FD&C Act” or draft guidance document entitled “Select Updates for the 506J Guidance: 506J Device List and Additional Notifications” 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; or to Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT:

Tammy Beckham, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5550, Silver Spring, MD 20993–0002, 301–796–9081; or Anne Taylor, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was signed into law. Section 3121 of the CARES Act amends the FD&C Act by adding section 506J to the statute. Section 506J of the FD&C Act (21 U.S.C. 356j) provides FDA with new authorities intended to help prevent or mitigate device shortages “during, or in advance of, a public health emergency” declared under section 319 of the Public Health Service Act (PHS Act) (42 U.S.C. 247d). Additionally, on December 29, 2022, the Prepare for and Respond to Existing Viruses, Emerging New Threats, and Pandemics Act (“PREVENT Pandemics Act”) was signed into law as part of the Consolidated Appropriations Act, 2023, Pub. L. 117–328 (hereafter referred to as the “FY 2023 Omnibus”). Section 2514(c) of the FY 2023 Omnibus directed FDA to issue or revise guidance regarding requirements under section 506J and include a list of each device product code for which a manufacturer of such device is required to notify FDA in accordance with section 506J. Section 2514 the FY 2023 Omnibus amended section 506J to add section 506J(h), “Additional Notifications” and directed FDA to issue guidance “to facilitate voluntary notifications.”

FDA is issuing this final guidance, “Notifying FDA of a Permanent Discontinuation or Interruption in Manufacturing of a Device Under Section 506J of the FD&C Act” (hereafter referred to as the “506J Guidance”) to assist stakeholders in the Agency’s

implementation of section 506J. This guidance serves as the baseline for information about notifications under section 506J during or in advance of any PHE. FDA provides additional clarification on who is required to notify FDA, when such notifications are required, what information FDA expects manufacturers to include in such notifications, and how to submit notifications. Additionally, FDA describes how FDA determines that a device is in shortage and additional actions FDA may take to help prevent or mitigate a potential device shortage.

In the draft guidance “Select Updates for the 506J Guidance: 506J Device List and Additional Notifications,” FDA proposes updates to the 506J Guidance. Specifically, FDA has developed a list of devices, by FDA product code, for which a manufacturer of such devices is required to notify FDA in accordance with section 506J (hereafter referred to as the “506J Device List”). The 506J Device List is based on the requirements under section 506J(a). In section 2514 of the FY 2023 Omnibus, Congress directed FDA to issue guidance on the requirements under section 506J and to include “a list of each device product code for which a manufacturer of such device is required to notify the Secretary in accordance with section 506J.” Thus, manufacturers of a device on the 506J Device List must notify FDA in accordance with 506J for each such device. For more information, manufacturers should see the 506J Device List web page, available at <https://www.fda.gov/medical-devices/medical-device-supply-chain-and-shortages/506j-device-list>. Additionally, consistent with section 506J(h), FDA is proposing to clarify for stakeholders that manufacturers may submit, and FDA may receive, voluntary notifications regarding supply chain issues at any time, unrelated to the declaration or potential declaration of a PHE. The Agency invites comments on both the 506J Device List and the clarification for stakeholders on voluntary notifications.

A notice of availability of the draft guidance, “Notifying FDA of a Permanent Discontinuation or Interruption in Manufacturing of a Device Under Section 506J of the FD&C Act,” appeared in the **Federal Register** of January 11, 2022 (87 FR 1417). FDA considered comments received and revised the guidance as appropriate in response to the comments, including providing additional clarifications such as when manufacturers should notify FDA of changes in status and when manufacturers should provide 506J notification updates, and what information is required by section 506J

and what additional information is helpful to FDA. Additionally, FDA provided additional transparency regarding how FDA uses information from 506J notifications.

These guidances are being issued consistent with FDA’s good guidance practices regulation (21 CFR 10.115). The draft guidance, “Select Updates for the 506J Guidance: 506J Device List and Additional Notifications,” when finalized, will represent the current thinking of FDA on “Notifying FDA of a Permanent Discontinuance or Interruption in Manufacturing of a Device Under Section 506J of the FD&C Act.” These guidances do not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by downloading an electronic copy 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-regulatory-assistance/guidance-documents-medical-devices-and-radiation-emitting-products>. This guidance document is 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 “Notifying FDA of a Permanent Discontinuance or Interruption in Manufacturing of a

Device Under Section 506J of the FD&C Act” or “Select Updates for the 506J Guidance: 506J Device List and Additional Notifications” may send an email request to CDRH-Guidance@fda.hhs.gov to receive an electronic copy of the document. Please use the document number GUI00021003 and complete title to identify the guidance you are requesting.

III. Paperwork Reduction Act of 1995

While this guidance contains no new collection of information, it does 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:

Guidance	Topic	OMB control No.
“Notifying FDA of a Permanent Discontinuance or Interruption in Manufacturing of a Device Under Section 506J of the FD&C Act”.	Shortages Data Collection	0910–0491

Dated: November 14, 2023.
Lauren K. Roth,
Associate Commissioner for Policy.
[FR Doc. 2023–25458 Filed 11–16–23; 8:45 am]
BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration
[Docket No. FDA–2023–N–4916]

Anesthesiology and Respiratory Therapy Devices Panel of the Medical Devices Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments—Pulse Oximeters

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 Anesthesiology and Respiratory Therapy Devices Panel of the Medical Devices Advisory Committee (the Committee). The general function of the Committee is to provide advice and recommendations to FDA on regulatory issues. The Committee will discuss an approach to improve the quality of premarket studies and associated methods used to evaluate the

performance of pulse oximeters submitted for premarket review, taking into consideration a patient’s skin pigmentation, and patient-reported race and ethnicity. 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 February 2, 2024, from 9 a.m. to 6:30 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>.

FDA is establishing a docket for public comment on this meeting. The docket number is FDA–2023–N–4916. The docket will close on March 4, 2024. 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 March 4, 2024. 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 January 19, 2024, will be provided to the Committee. Comments received after that date will be taken into consideration by FDA. In the event that the meeting is canceled, 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-4916 for “Anesthesiology and Respiratory Therapy Devices Panel of the Medical Devices Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments.” 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 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:

Candace Nalls, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5216, Silver Spring, MD 20993-0002, 301-636-0510, Candace.Nalls@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 February 2, 2024, the Committee will discuss ongoing concerns that pulse oximeters may be less accurate in individuals with darker skin pigmentation. The Committee will discuss an approach to improve the quality of premarket studies and associated methods used to evaluate the performance of pulse oximeters submitted for premarket review, taking into consideration a patient’s skin pigmentation, and patient-reported race and ethnicity. The Committee will discuss the type and amount of data that should be provided by manufacturers to FDA to evaluate the performance of pulse oximeters submitted for premarket review, including prescription and over-the-counter indications, and labeling considerations.

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 January 19, 2024, will be provided to the Committee. Oral presentations from the public will be scheduled between approximately 1:30 p.m. and 3:30 p.m. Eastern Time. 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, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before January 16, 2024. 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 January 17, 2024.

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 Ann Marie Williams, at Annmarie.Williams@fda.hhs.gov or 301-796-5966 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 the ends of justice will be served by allowing for this modification to FDA's advisory committee meeting procedures.

Dated: November 14, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023-25475 Filed 11-16-23; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2021-D-0980]

Assessing the Credibility of Computational Modeling and Simulation in Medical Device Submissions; Guidance 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 a final guidance entitled "Assessing the Credibility of Computational Modeling and Simulation in Medical Device Submissions; Guidance for Industry and Food and Drug Administration Staff." Computational modeling and simulation (CM&S) can be used in a variety of ways in medical device applications, including to perform "in silico" device testing or as part of software embedded in a device. This guidance provides a risk-informed framework for credibility assessment of CM&S used in medical

device regulatory submissions. The guidance is intended to promote consistency and facilitate efficient review of medical device submissions, to increase confidence in the use of CM&S in regulatory submissions, and to facilitate improved interpretation of CM&S credibility evidence submitted in regulatory submissions.

DATES: The announcement of the guidance is published in the **Federal Register** on November 17, 2023.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2021-D-0980 for "Assessing the Credibility of Computational Modeling

and Simulation in Medical Device Submissions." 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 guidance document entitled "Assessing the Credibility of Computational Modeling and Simulation in Medical Device

Submissions” 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: Pras Pathmanathan, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 62, Rm 1133, Silver Spring, MD 20993–0002, at 301–796–3490.

SUPPLEMENTARY INFORMATION:

I. Background

CM&S can be used in a variety of ways in medical device applications, including to perform “in silico” (virtual) device testing or to influence algorithms within software embedded in a device. This guidance provides a general risk-informed framework that can be used in the credibility assessment of CM&S used in medical device regulatory submissions. For the purposes of this guidance, CM&S refers to first principles-based (e.g., physics-based or mechanistic) computational models, and not statistical or data-driven (e.g., machine learning or artificial intelligence-based) models. This guidance is intended to help improve the consistency and transparency of the review of CM&S, to increase confidence in the use of CM&S in regulatory submissions, and to facilitate improved

interpretation of CM&S credibility evidence submitted in regulatory submissions

A notice of availability of the draft guidance appeared in the **Federal Register** of December 23, 2021 (86 FR 72969). FDA considered comments received and revised the guidance as appropriate in response to the comments, including revising the categorization of credibility evidence defined in the guidance, clarifying the scope of the guidance, and clarifying how the recommendations in the guidance relate to the framework described in the FDA-recognized standard American Society of Mechanical Engineers V&V 40, “Assessing Credibility of Computational Modeling through Verification and Validation: Application to Medical Devices.”

This guidance is being issued consistent with FDA’s good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on “Assessing the Credibility of Computational Modeling and Simulation in Medical Device Submissions.” It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by

downloading an electronic copy 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-regulatory-assistance/guidance-documents-medical-devices-and-radiation-emitting-products>. This guidance document is also available at <https://www.regulations.gov> and at <https://www.fda.gov/regulatory-information/search-fda-guidance-documents>. Persons unable to download an electronic copy of “Assessing the Credibility of Computational Modeling and Simulation in Medical Device Submissions” may send an email request to CDRH-Guidance@fda.hhs.gov to receive an electronic copy of the document. Please use the document number GUI01500056 and complete title to identify the guidance you are requesting.

III. Paperwork Reduction Act of 1995

While this guidance contains no new collection of information, it does 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; or guidance	Topic	OMB control No.
807, subpart E	Premarket notification	0910–0120
814, subparts A through E	Premarket approval	0910–0231
814, subpart H	Humanitarian Device Exemption	0910–0332
812	Investigational Device Exemption	0910–0078
860, subpart D	De Novo classification process	0910–0844
“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

Dated: November 14, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–25470 Filed 11–16–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2007–D–0369]

Product-Specific Guidances; Draft and Revised Draft Guidances for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of additional draft and revised draft

product-specific guidances. The guidances provide product-specific recommendations on, among other things, the design of bioequivalence (BE) studies to support abbreviated new drug applications (ANDAs). In the **Federal Register** of June 11, 2010, FDA announced the availability of a guidance for industry entitled “Bioequivalence Recommendations for Specific Products” that explained the process that would be used to make product-specific guidances available to the public on FDA’s website. The guidances identified in this notice were developed using the process described in that guidance.

DATES: Submit either electronic or written comments on the draft guidance by January 16, 2024 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- Mail/Hand delivery/Courier (for written/paper submissions): Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2007-D-0369 for "Product-Specific Guidances; Draft and Revised Draft Guidances for Industry." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT:

Christine Le, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 4714, Silver Spring,

MD 20993-0002, 301-796-2398, PSG-Questions@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of June 11, 2010 (75 FR 33311), FDA announced the availability of a guidance for industry entitled "Bioequivalence Recommendations for Specific Products" that explained the process that would be used to make product-specific guidances available to the public on FDA's website at <https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs>.

As described in that guidance, FDA adopted this process as a means to develop and disseminate product-specific guidances and provide a meaningful opportunity for the public to consider and comment on those guidances. Under that process, draft guidances are posted on FDA's website and announced periodically in the **Federal Register**. The public is encouraged to submit comments on those recommendations within 60 days of their announcement in the **Federal Register**. FDA considers any comments received and either publishes final guidances or publishes revised draft guidances for comment. Guidances were last announced in the **Federal Register** on August 22, 2023 (88 FR 57116). This notice announces draft product-specific guidances, either new or revised, that are posted on FDA's website.

II. Drug Products for Which New Draft Product-Specific Guidances Are Available

FDA is announcing the availability of new draft product-specific guidances for industry for drug products containing the following active ingredients:

TABLE 1—NEW DRAFT PRODUCT-SPECIFIC GUIDANCES FOR DRUG PRODUCTS

Active ingredient(s)
Azacitidine
Chlorhexidine gluconate
Cimetidine
Citalopram hydrobromide
Deucravacitinib
Deutetrabenazine
Dextroamphetamine
Edaravone
Ferric pyrophosphate citrate (multiple reference listed drugs)
Fingolimod lauryl sulfate
Furosemide
Futibatinib
Ganaxalone
Glycopyrrolate; Neostigmine methylsulfate
Halobetasol propionate; Tazarotene

TABLE 1—NEW DRAFT PRODUCT-SPECIFIC GUIDANCES FOR DRUG PRODUCTS—Continued

Active ingredient(s)
Latanoprost
Omidenepag isopropyl
Risperidone
Semaglutide
Tapinarof

III. Drug Products for Which Revised Draft Product-Specific Guidances Are Available

FDA is announcing the availability of revised draft product-specific guidances for industry for drug products containing the following active ingredients:

TABLE 2—REVISED DRAFT PRODUCT-SPECIFIC GUIDANCES FOR DRUG PRODUCTS

Active ingredient(s)
Albuterol sulfate
Betamethasone acetate; Betamethasone sodium phosphate
Budesonide; Formoterol fumarate dihydrate
Emtricitabine; Tenofovir alafenamide fumarate
Ferumoxylol
Fluticasone propionate
Fluticasone propionate; Salmeterol xinafoate
Fulvestrant
Gabapentin
Glatiramer acetate
Levalbuterol tartrate
Mometasone furoate
Naltrexone
Primidone
Semaglutide
Sotorasib
Soybean oil
Tiotropium bromide

For a complete history of previously published **Federal Register** notices related to product-specific guidances, go to <https://www.regulations.gov> and enter Docket No. FDA-2007-D-0369.

These draft guidances are being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). These draft guidances, when finalized, will represent the current thinking of FDA on, among other things, the product-specific design of BE studies to support ANDAs. They 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.

IV. Paperwork Reduction Act of 1995

FDA tentatively concludes that these draft guidances contain no collection of information. Therefore, clearance by the

Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

V. Electronic Access

Persons with access to the internet may obtain the draft guidance at <https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs>, <https://www.fda.gov/regulatory-information/search-fda-guidance-documents>, or <https://www.regulations.gov>.

Dated: November 14, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023-25485 Filed 11-16-23; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA-2020-E-2333; FDA-2020-E-2334; FDA-2020-E-2336; and FDA-2020-E-2337]

Determination of Regulatory Review Period for Purposes of Patent Extension; ROZLYTREK INJECTION; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a notice that appeared in the **Federal Register** of July 8, 2022. The document announced the determination of the regulatory review period for ROZLYTREK INJECTION (entrectinib) for purposes of patent extension. The document was published with an incorrect dosage form. This notice corrects the dosage form of the drug product.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301-796-3600.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of July 8, 2022 (87 FR 40849), the dosage form for the human drug product ROZLYTREK (entrectinib), NDA 212726, is corrected from "INJECTION" to "CAPSULES" for all instances mentioned in the notice. Specifically, the drug product dosage form is corrected from "INJECTION" to "CAPSULES" in the following locations:

1. On page 40849, the following corrections are made:

- In the second column, the title of the document is corrected to read: "Determination of Regulatory Review Period for Purposes of Patent Extension; ROZLYTREK CAPSULES."

- In the second column, the first sentence under the **SUMMARY** section is corrected to read: "The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for ROZLYTREK CAPSULES and is publishing this notice of that determination as required by law."

- In the third column, the first sentence under the section *Instructions* is corrected to read: "All submissions received must include the Docket Nos. FDA-2020-E-2333; FDA-2020-E-2334; FDA-2020-E-2336; and FDA-2020-E-2337 for 'Determination of Regulatory Review Period for Purposes of Patent Extension; ROZLYTREK CAPSULES.'"

2. On page 40850, the following corrections are made:

- In the second column, under section I. Background of the **SUPPLEMENTARY INFORMATION** section, the third paragraph introduction is corrected to read: "FDA has approved for marketing the human drug product, ROZLYTREK CAPSULES (entrectinib), NDA 212726, indicated for the treatment of:"

- In the second and third columns, under section I. Background of the **SUPPLEMENTARY INFORMATION** section, the last paragraph is corrected to read: "Subsequent to this approval, the USPTO received patent term restoration applications for ROZLYTREK CAPSULES (U.S. Patent Nos. 8,299,057; 8,673,893; 9,029,356; and 9,085,565) from Genentech, Inc., and the USPTO requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated March 1, 2021, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of ROZLYTREK CAPSULES represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period."

- In the third column, under II. Determination of Regulatory Review Period, the first sentence of the introductory paragraph is corrected to read: "FDA has determined that the applicable regulatory review period for ROZLYTREK CAPSULES is 1,968 days."

- In the third column, under II. Determination of Regulatory Review Period, the second sentence of the third paragraph is corrected to read: "FDA

has verified the applicant's claims that the new drug application (NDA) for ROZLYTREK CAPSULES (NDA 212726) was initially submitted on December 18, 2018."

Dated: November 14, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023-25489 Filed 11-16-23; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; Information Collection Request Title: Scientific Registry of Transplant Recipients Information Collection Effort for Potential Donors for Living Organ Donation, OMB No. 0906-0034—Extension

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR should be received no later than January 16, 2024.

ADDRESSES: Submit your comments to paperwork@hrsa.gov or mail the HRSA Information Collection Clearance Officer, Room 14N39, 5600 Fishers Lane, Rockville, Maryland 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of

the data collection plans and draft instruments, email paperwork@hrsa.gov or call Joella Roland, the HRSA Information Collection Clearance Officer, at (301) 945-0232.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the ICR title for reference.

Information Collection Request Title: Scientific Registry of Transplant Recipients Information Collection Effort for Potential Donors for Living Organ Donation, OMB No. 0906-0034—Extension.

Abstract: The Scientific Registry of Transplant Recipients (SRTR) is administered under contract with HRSA, an agency within HHS. HHS is authorized to establish and maintain mechanisms to evaluate the long-term effects associated with living organ donations (42 U.S.C. 273a) and is required to submit to Congress an annual report on the long-term health effects of living donation (42 U.S.C. 273b). In 2018, the SRTR contractor implemented a pilot living donor registry in which transplant programs registered all potential living organ donors who provided informed consent to participate in the pilot registry. The Organ Procurement and Transplantation Network final rule, 42 CFR part 121, requires organ procurement organizations and transplant hospitals, "as specified from time to time by the Secretary," to submit to the SRTR, as appropriate, information regarding "donors of organs" and "other information that the Secretary deems appropriate." 42 CFR 121.11(b)(2).

In 2018, a pilot living donor registry was implemented by the SRTR, and each participating transplant program registered all potential candidates for living donation who provided informed consent to enroll. In 2019, an updated version of the data collection instrument was approved, followed by the latest data collection forms which were approved on February 26, 2021. These data collection modifications were intended to improve the quality of the data and reduce the administrative

burden for respondents. This **Federal Register** notice requests an extension of the last approved data collection forms (February 2021) with no changes to the total estimated annualized burden hours.

Need and Proposed Use of the Information: The transplant programs submit health information collected at the time of donation evaluation through a secure web-based data collection tool developed by the SRTR contractor. The SRTR contractor maintains contact with registry participants and collects data on long-term health outcomes through surveys. The data collection includes outcomes of evaluation, including reasons for non-donation. The living donor registry is an ongoing effort, and the goal is to continue to collect data on living organ donor transplant programs in the United States over time. Monitoring and reporting of long-term health outcomes of living organ donors post-donation will continue to provide useful information to transplant programs for their future donor selection process and to aid potential living organ donors in their decision to pursue living donation.

Likely Respondents: Potential and actual living donors, transplant programs, medical and scientific organizations, and public organizations, including patient advocacy groups.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Average number of responses per respondent	Total number of responses	Average burden per response (in minutes)	Total burden hours
Potential Living Donor Registration form	^a 16	112	1,792	0.27	484
Potential Living Donor Follow-up form	^b 754	1	754	0.50	377
Reasons Did not Donate form (liver or kidney)	^a 16	106	1,696	0.23	390

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Form name	Number of respondents	Average number of responses per respondent	Total number of responses	Average burden per response (in minutes)	Total burden hours
Total	786		4,242		1,251

^a Number of respondents is based on the current number of transplant programs and is likely to increase as additional programs decide to participate.

^b Number of living organ donor candidates submitting follow-up forms in 2019.

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. 2023–25368 Filed 11–16–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Announcement of Intent To Establish Federal Advisory Committee on Long COVID

AGENCY: Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services announces the intent to establish an Advisory Committee on Long COVID and invites nominations for the Committee.

DATES: Nominations must be submitted by 11:59 p.m. eastern time on January 16, 2024.

ADDRESSES: Nominations may be submitted by email to LongCOVID@hhs.gov and addressed to Allison O'Donnell. 202–690–7694.

FOR FURTHER INFORMATION CONTACT: Allison O'Donnell at 202–690–7694 or LongCOVID@hhs.gov.

SUPPLEMENTARY INFORMATION: The Committee is authorized under 42 U.S.C. 217a, section 222 of the Public Health Service Act, as amended. The Committee is governed by the provisions of the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C. chapter 10), which sets forth standards for the formation and use of advisory committees.

The April 5, 2022, Memorandum (<https://www.whitehouse.gov/briefing-room/presidential-actions/2022/04/05/memorandum-on-addressing-the-long-term-effects-of-covid-19/>) on Addressing the Long-term Effects of COVID–19 charged the Secretary of Health and Human Services (Secretary) with coordinating a Government-wide response to the longer-term effects of COVID–19. The Secretary named the Assistant Secretary for Health to coordinate the U.S. Government response to Long COVID. The Memorandum specified development and publication of two reports that were published August 3, 2022. One of the reports, the National Research Action Plan on Long COVID (<https://www.covid.gov/assets/files/National-Research-Action-Plan-on-Long-COVID-08012022.pdf>), called for the establishment of a Secretary's Advisory Committee on Long COVID. The Committee will bring perspectives from outside the Government to help inform action of the Executive Branch on Long COVID and associated conditions, with a focus on health equity. Numerous entities across the U.S. Government fund and conduct research and use external advisory bodies. This Federal Advisory Committee does not replace or supersede the ongoing work of these advisory bodies.

Structure: The Committee will consist of up to 20 members, including any Chair, Vice Chair, or Co-Chairs. Factors to be considered in selecting individuals to serve on the Committee include expertise in the issues to be examined by the Committee, as well as statutory obligations under FACA and desire for a balanced and diverse membership. To the extent possible, composition of the Committee will reflect the experience of an inclusive and diverse cross-section of persons with Long COVID and multidisciplinary expertise of those supporting and caring for those affected as well as specific clinical, medical, public health, behavioral health, human services, employment, data science, and research expertise. The membership of the Committee will reflect diverse individuals or organizations including

underserved populations, with a focus on health equity.

The following areas of expertise will be considered in selecting the voting members with the goal of achieving a balanced membership in terms of points of view, expertise, and groups represented and functions to be performed by the Committee.

Long COVID and related groups: Representation from individuals living with Long COVID and organizations directly engaged in supporting people living with Long COVID.

Professional Associations: Representation from medical professional, behavioral health and human services associations representing practitioners caring for people with Long COVID, including those representing the primary healthcare system.

Disability and Chronic Illness Groups: Representation from associations, researchers, or organizations focused on disability and chronic illness, and their possible interplay with Long COVID.

Public Health and related groups: Representation from public health groups supporting communities in addressing the impacts of Long COVID.

Healthcare and Social Care Providers: Clinical care settings and health systems involved in providing care for patients with Long COVID, including in underserved areas, such as rural communities and communities disproportionately impacted by Long COVID.

Employee and Employer Related Groups: Representation from employee and employer experts, attorneys, or organizations involved in addressing the impacts of Long COVID in the workplace, including discrimination.

Research: Researchers and research institutions involved in Long COVID and associated conditions research.

Non-voting Industry Representatives: Those involved in, or representing those involved in, Long COVID research and development, including prevention, diagnostics, and treatment will be designated to represent the interests of this sector.

Non-voting Federal Liaisons, without limit, may be solicited, as needed, as ex officio members.

Equal opportunity practices regarding membership appointments to the Committee will be aligned with HHS policies. To the extent possible, HHS will ensure the Committee membership is balanced in expertise, experience, education, and institutional affiliation.

Members of the Committee will be classified as Special Government Employees (SGE) during their term of appointment and, as such, are subject to the ethical standards of conduct for federal employees. Upon entering the position and annually throughout the term of appointment, members of the Committee will be required to complete and submit a report of their financial holdings.

Nominations and Appointments for Memberships: Nominees, including self-nominees, will be considered for appointment as members of the Committee. Only complete nomination packages submitted on time will be considered. To be considered for an appointment, submission of the following information for each nominee is required: (1) a cover letter that clearly states the name and place of work of the nominee, the rationale for the nomination, and a statement that the nominee would be willing to serve as a member of the Committee, if selected; (2) the name, address, telephone number, and email address for the individual being nominated and the nominator, if applicable; and (3) a copy of the nominee's resume or curriculum vitae. Nominees with no professional affiliation may submit an optional letter of recommendation.

The curriculum vitae should include the following information: (a) education; (b) experience (current and former); (c) affiliations; (d) current memberships (expert panels, committees, or other relevant groups, including positions held); (e) any peer-reviewed publications (for past 5 years); (f) any oral presentations (for past 5 years); (g) editorials, opinion pieces, and blogs (for past 5 years); (h) grants, contracts, or research funding (for past 15 years); (i) name of any corporation, professional society, association, panel, company, firm, government agency (Federal, State, and local), research organization, educational institution, committee, or other organization or institution (government, private, and not-for-profit; domestic and foreign) in which the nominee's services have been, will be, or are expected to be provided, with or without compensation, including on a part-time or seasonal basis as an officer, medical staff, board member, owner,

trustee, director, expert advisor, consultant (paid or unpaid), official spokesperson, member of speakers bureau, or expert witness (for past 5 years and upcoming); (j) other paid travel or honoraria received, not included above (for past 5 years). If the nominee does not have anything to report for the sections, indicate "none." Web links to publications, presentations, and other materials available online are requested, when available.

Where prohibited by Federal law or regulations, nominations will not be accepted directly from HHS research and promotion boards. Self-nominations and nominations by members of research and promotion boards in their individual capacity will be considered. Federal employees should not be nominated for consideration for appointment to this Committee.

Dated: November 2, 2023.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2023-24586 Filed 11-16-23; 8:45 am]

BILLING CODE 4150-03-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute of Neurological Disorders and Stroke Special Emphasis Panel, November 27, 2023, 09:00 a.m. to November 29, 2023, 06:00 p.m., Crowne Plaza National Airport, 1480 Crystal Drive, Arlington, VA 22202 which was published in the **Federal Register** on September 25, 2023, 88 FR 67334.

This notice is being amended to change the location to Canopy by Hilton, 940 Rose Avenue, North Bethesda, MD 20852, and change the meeting times to 10:00 a.m. to 6:00 p.m. The meeting dates remains the same. The meeting is closed to the public.

Dated: November 13, 2023.

David W. Freeman,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-25403 Filed 11-16-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Amended Notice of Meeting

Notice is hereby given of an amended meeting notice of the Advisory Committee to the Director, National Institutes of Health, December 14–15, 2023, open meeting that was published in the **Federal Register** on November 13, 2023, 88 FR 77595.

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Advisory Committee to the Director, National Institutes of Health.

This will be a hybrid meeting held in-person and virtually and will be open to the public as indicated below. Members of the public are encouraged to attend virtually as space is limited.

Individuals who plan to attend as well as those who need special assistance or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The meeting can be accessed from the NIH Videocast at the following link: <https://videocast.nih.gov/> as space is limited.

Name of Committee: Advisory Committee to the Director, National Institutes of Health.

Date: December 14, 2023.

Time: 9:00 a.m. to 4:45 p.m.

Agenda: NIH Director's Report; NIH Public Access Plan; Cancer Moonshot; Addressing the Mental Health Crisis through Research; Assessing the Public Health Threat of Post-Acute Sequelae of SARS CoV-2 Infection (PASC)—NIH RECOVER Initiative; Briefing for the Advisory Committee to the Director (ACD); The Foundation for the National Institutes of Health (FNIH); Other Business of the Committee.

Date: December 15, 2023.

Time: 9:00 a.m. to 2:45 p.m.

Agenda: HeLa Genome Data Access Working Group; Data Access Requests; NIH-Wide Collaborative Initiative on Climate Change and Health; Clinical Trial Stewardship; Accessibility Update; Update from the ACD Working Group on Catalyzing the Development and Use of Novel Alternative Methods to Advance Biomedical Research; Update from the ACD Working Group on Re-envisioning NIH-Supported Postdoctoral Training; Other Business of the Committee.

Place: National Institutes of Health, Building 1, Wilson Hall, One Center Drive, Bethesda, MD 20892.

Contact Person: Cyndi Burrus-Shaw, Staff Assistant, National Institutes of Health, Office of the Director, One Center Drive, Building 1, Room 126, Bethesda, MD 20892, 301-496-2433, shawcy@od.nih.gov

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has procedures at <https://www.nih.gov/about-nih/visitor-information/campus-access-security> for entrance into on-campus and off-campus facilities. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors attending a meeting on campus or at an off-campus federal facility will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: <http://acd.od.nih.gov>, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: November 13, 2023.

David W. Freeman,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-25376 Filed 11-16-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute of Neurological Disorders and Stroke Special Emphasis Panel, November 17, 2023, 10:00 a.m. to 04:00 p.m., National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 which was published in the **Federal Register** on November 3, 2023, 88 FR 77102.

This notice is being amended to change this one-day meeting from November 17, 2023, to November 27, 2023. The meeting time remains the same. The meeting is closed to the public.

Dated: November 13, 2023.

David W. Freeman,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-25404 Filed 11-16-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Establishment of the Board of Scientific Counselors, Division of Translational Toxicology, National Institute of Environmental Health Sciences

Pursuant to the Federal Advisory Committee Act, as amended (5 U.S.C. 1001-1014), the Director, National Institutes of Health (NIH) announces the establishment of the Board of Scientific Counselors, Division of Translational Toxicology, National Institute of Environmental Health Sciences, as authorized by 42 U.S.C. 282(b)(16), section 402(b)(16) of the Public Health Service Act, as amended.

The Director, NIH, has determined that the Board of Scientific Counselors, Division of Translational Toxicology, National Institute of Environmental Health Sciences is in the public interest in connection with the performance of duties imposed on NIH by law, and that these duties can best be performed through the advice and counsel of the committee.

The committee will review and evaluate the intramural program and the work of tenured, tenure track, and staff scientists and physicians and shall also, as requested by the Director, NIH, undertake peer review of extramural funding applications as required by section 492 of the Public Health Service Act, as amended.

Inquiries may be directed to Claire Harris, Director, Office of Federal Advisory Committee Policy, Office of the Director, National Institutes of Health, 6701 Democracy Boulevard, Suite 1000, Bethesda, Maryland 20892 (Mail code 4875), Telephone (301) 496-2123, or Claire.Harris@nih.gov.

Dated: November 13, 2023.

Monica M. Bertagnolli,

Director, National Institutes of Health.

[FR Doc. 2023-25472 Filed 11-16-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences; 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 Center for Advancing Translational Sciences Special Emphasis Panel; CTSA Collaborative and Innovative Acceleration Awards.

Date: February 7, 2024.

Time: 11:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: M. Lourdes Ponce, Ph.D., Scientific Review Officer, Office of Scientific Review, National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard, Room 1068, Bethesda, MD 20892, (301) 435-0810, lourdes.ponce@nih.gov.

Name of Committee: National Center for Advancing Translational Sciences Special Emphasis Panel; Understudied Proteins Associated with Rare Diseases (R03) Review.

Date: February 29, 2024.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ming Yan, MD, Ph.D. Scientific Review Officer Scientific Review Branch Division of Extramural Activities National Center for Advancing Translational Sciences 6701 Democracy Boulevard, MSC 4874 Bethesda, MD 20892 (301) 827-4312 ming.yan@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.350, B—Cooperative Agreements; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: November 14, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–25464 Filed 11–16–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 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: Center for Scientific Review Special Emphasis Panel; Neurodegenerative Disorders and Aging.

Date: December 6, 2023.

Time: 10:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jessica Bellinger, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3158, Bethesda, MD 20892, (301) 827–4446, bellingerjd@csr.nih.gov.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 14, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–25465 Filed 11–16–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; 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 Cancer Institute Special Emphasis Panel Clinical Trials Planning Program.

Date: January 23, 2024.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W106, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Eduardo Emilio Chufan, Ph.D. Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W106, Rockville, Maryland 20850 240–276–7975, chufanee@mail.nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel, Metastasis Research Network (U01).

Date: February 1, 2024.

Time: 11:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W606, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Bruce Daniel Hissong, Ph.D. Scientific Review Officer, Resource and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W606 Rockville, Maryland 20850, 240–276–7752, bruce.hissong@nih.gov.

Name of Committee: National Cancer Institute, Special Emphasis Panel, Diet, Lipid Metabolism, and Tumor Growth and Progression.

Date: February 1, 2024.

Time: 9:30 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W248, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Shree Ram Singh, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W248, Rockville, Maryland 20850, 240–672–6175, singhshr@mail.nih.gov.

Name of Committee: National Cancer Institute, Special Emphasis, Panel SEP–4: NCI Clinical and Translational Cancer Research.

Date: February 6–7, 2024.

Time: 10:00 a.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W264, Rockville, Maryland 20850, (Virtual Meeting).

Contact Person: Ombretta Salvucci, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W264, Rockville, Maryland 20850, 240–276–7286, salvucco@mail.nih.gov.

Name of Committee: National Cancer Institute Special Emphasis, Panel SEP–1: NCI Clinical and Translational Cancer Research.

Date: February 7, 2024.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W108, Rockville, Maryland 20850, (Virtual Meeting).

Contact Person: Clifford W. Schweinfest, Ph.D., Scientific Review Officer, Special Review Branch Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W108, Rockville, Maryland 20850, 240–276–6343, schweinfestcw@mail.nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel, NCI SPORE (P50) Review SEP–I.

Date: February 15–16, 2024.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W244, Rockville, Maryland 20850, (Virtual Meeting).

Contact Person: John Paul Cairns, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W244, Rockville, Maryland 20850, 301–461–0303, paul.cairns@nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel NCI Outstanding Investigator Award (R35).

Date: February 15–16, 2024.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W104, Rockville, Maryland 20850, (Virtual Meeting).

Contact Person: David G. Ransom, Ph.D., Chief, Scientific Review Officer, Special

Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W104, Rockville, Maryland 20850, 240-276-6351, david.ransom@nih.gov.

Name of Committee: National Cancer Institute Initial Review Group, Transition to Independence Study Section (I).

Date: February 15–16, 2024.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W602 Rockville, Maryland 20850, (Virtual Meeting).

Contact Person: Delia Tang, M.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W602, Rockville, Maryland 20850, 240-276-6456. tangd@mail.nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel, SEP-10: NCI Clinical and Translational Cancer Research.

Date: February 22–23, 2024.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W606, Rockville, Maryland 20850, (Virtual Meeting).

Contact Person: Bruce Daniel Hissong, Ph.D., Scientific Review Officer, Resource and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W606 Rockville, Maryland 20850, 240-276-7752. bruce.hissong@nih.gov. (Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: November 14, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-25490 Filed 11-16-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Notice of Meeting; Correction

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice; correction.

SUMMARY: The Substance Abuse and Mental Health Services Administration

(SAMHSA) published a document in the **Federal Register** of October 17, 2023, in FR Doc. 2023-22797 announcing the meeting of the SAMHSA Center for Substance Abuse Prevention (CSAP) Drug Testing Advisory Board (DTAB) on December 5, 2023, and to request comments on editing the Authorized Drug Testing Panels for federally regulated testing. The document was revised to reflect new information under the Supplementary Section.

FOR FURTHER INFORMATION CONTACT: Lisa Davis, Division of Workplace Programs, SAMHSA/CSAP, 5600 Fishers Lane, Rockville, MD 20857, (240) 276-1440 (voice), Lisa.Davis@samhsa.hhs.gov (email).

SUPPLEMENTARY INFORMATION:

Notice of Meeting

Pursuant to Public Law 92-463, notice is hereby given that the Substance Abuse and Mental Health Services Administration's (SAMHSA) Center for Substance Abuse Prevention's (CSAP) Drug Testing Advisory Board (DTAB) will convene via web conference on December 5, 2023, from 10:00 a.m. EST to 4:30 p.m.

The board will meet in open-session December 5, 2023, from 10:00 a.m. EST to 4:30 p.m. EST to hear Federal Partner updates and presentations regarding National Laboratory Certification Program (NLCP) activities, updates to the Medical Review Officer (MRO) Guidance Manual, laboratory-created cannabinoids and other contaminants in commercially available products, and the process for adding or removing analytes from the Authorized Drug Testing Panels for federally regulated testing. The Board will discuss the Mandatory Guidelines for Federal Workplace Drug Testing Programs and revisions to the Authorized Drug Testing Panels for Urine and Oral Fluid to add fentanyl and (for urine) norfentanyl, and to remove methylenedioxymethamphetamine (MDMA) and methylenedioxyamphetamine (MDA). Additionally, the Department is asking for public comments on these recommended changes to the drug testing panel.

Section 8105 of the Fighting Opioid Abuse in Transportation Act, included in the SUPPORT for Patients and Communities Act, required the Secretary to determine whether it is justified, based on the reliability and cost-effectiveness of testing, to revise the Mandatory Guidelines for Federal Workplace Drug Testing Programs to include fentanyl. Section 8105 additionally required the Secretary to

consider whether to include any other drugs or other substances listed in Schedule I and II of Controlled Substances Act (CSA). Norfentanyl is a metabolite of fentanyl. Because it is also an immediate precursor used in the illicit manufacture of fentanyl, it is a Schedule II substance under the CSA.

Fentanyl accounts for a large proportion of overdose deaths in the United States and is therefore an important public safety concern. Furthermore, fentanyl is increasingly used as a stand-alone substance of abuse, not in conjunction with heroin and other substances. According to the National Forensic Laboratory Information System (NFLIS) 2021 report, fentanyl was the 4th most frequently identified drug and accounted for 11.61% of all drugs reported by forensic laboratories.¹ Norfentanyl is an important component of identifying fentanyl users when urine is the specimen matrix. Fentanyl has been detected in oral fluid in pain management patients, overdose cases, and driving under the influence of drugs (DUID) cases. Information provided by HHS-certified laboratories in 2023 indicated that a majority (84%) of the laboratories analyzed non-regulated workplace specimens for fentanyl and/or norfentanyl, and that all had the ability to analyze urine specimens for fentanyl with sufficiently sensitive detection limits using commercially available immunoassay kits and confirmatory test instrumentation commonly used in HHS-certified laboratories.

The Division of Workplace Programs welcomes public comment prior to the DTAB meeting regarding the possible addition of fentanyl to the Authorized Drug Testing Panels for Urine and Oral Fluid. Please see below for the process to submit comments.

Addition to HHS Drug Testing Panels as listed below:

Urine analyte	Initial test cutoff	Confirmation cutoff
Fentanyl	1 ng/mL	0.5 ng/mL.
Norfentanyl	1 ng/mL	0.5 ng/mL.

Oral fluid analyte	Initial test cutoff	Confirmation cutoff
Fentanyl	1 ng/mL	0.5 ng/mL.

Remove Methylenedioxyamphetamine (MDA) and Methylenedioxymethamphetamine (MDMA) from the Authorized Drug Testing Panel:

The Department plans to remove MDA and

methylenedioxymethamphetamine from the drug testing panel, because the number of positive specimens reported by HHS-certified laboratories does not support testing all specimens for MDA and MDMA in Federal workplace drug testing programs. Information provided to the Department through the NLCP in 2021 and 2022 shows the positivity rate for MDMA ranges from 0.001 to 0.003%, and a review of the results indicate that >25% of the positive specimens are likely agency blind samples. MDA has a lower positivity rate than MDMA and both have lower positivity rates than phencyclidine (PCP). SAMHSA also considered removing PCP but decided against this change. While PCP has an overall positivity rate nearly as low as MDMA, there are regional differences in positivity, with some areas of the country having much higher rates, so PCP remains a regulated test analyte. Because MDA and MDMA are Schedule I drugs, a Federal agency may test specimens for these analytes in accordance with Section 3.2 of the UrMG and OFMG (*i.e.*, on a case-by-case basis for reasonable suspicion or post-accident testing, or routinely with a waiver from the Secretary). The Division of Workplace Programs welcomes public comment prior to the DTAB meeting regarding the removal of MDA and MDMA from the Urine and Oral Fluid Analyte Table. Please see below for the process to submit comments.

Meeting registration information can be completed at <https://snacregister.samhsa.gov/>. Web conference and call information will be sent after completing registration. Meeting information and a roster of DTAB members may be obtained by accessing the SAMHSA Advisory Committees website, <https://www.samhsa.gov/about-us/advisory-councils/meetings>, or by contacting the Designated Federal Officer, Lisa Davis.

Committee Name: Substance Abuse and Mental Health Services Administration, Center for Substance Abuse Prevention, Drug Testing Advisory Board.

Dates/Time/Type: December 5, 2023, from 10:00 a.m. EST to 4:30 p.m. EST: OPEN

Place: Virtual.

To Submit Comments: Requests to make public comment during the public comment period of the December DTAB meeting must be made in writing at least 7 days prior to the meeting to the following email: DFWP@samhsa.hhs.gov.

Please submit written comments regarding the addition of Fentanyl and the removal of MDA and MDMA to the

analyte table to the following email: DFWP@samhsa.hhs.gov.

Comments regarding the addition of Fentanyl and the removal of MDA and MDMA to the analyte table will be accepted for review for an additional 30 days following this meeting, or no later than January 4th, 2024.

Contact: Lisa S. Davis, M.S., Social Science Analyst, Center for Substance Abuse Prevention, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone: (240) 276-1440, email: Lisa.Davis@samhsa.hhs.gov.

Endnote:

¹ National Forensic Laboratory Information System (NFLIS). (2021). *NFLIS-Drug 2021 Annual Report*. U.S. Department of Justice, Drug Enforcement Agency, Diversion Control Division. <https://www.nflis.deadiversion.usdoj.gov/>.

Dated: November 13, 2023.

Anastasia Flanagan,
Public Health Advisor, Division of Workplace Programs.

[FR Doc. 2023-25463 Filed 11-16-23; 8:45 am]

BILLING CODE 4162-20-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA-2023-0030; OMB No. 1660-0125]

Agency Information Collection Activities: Proposed Collection; Comment Request; FEMA Preparedness Grants: Homeland Security Grant Program (HSGP)

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 60-Day notice of revision and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on a revision of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning the Homeland Security Grant Program (HSGP), which includes the State Homeland Security Program (SHSP), the Urban Area Security Initiative (UASI), and Operation Stonegarden (OPSG). This revision removes the OPSG Daily Activity Report (FEMA Form FF-207-FY-21-113 (formerly 089-0-27)) from the collection.

DATES: Comments must be submitted on or before January 16, 2024.

ADDRESSES: To avoid duplicate submissions to the docket, please submit comments at www.regulations.gov under Docket ID FEMA-2023-0030. Follow the instructions for submitting comments.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at <http://www.regulations.gov>, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy and Security Notice that is available via a link on the homepage of www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Alexander Mrazik Jr., Branch Chief, FEMA's Grant Programs Directorate, Grant Operations Division, Preparedness Grants Division, Homeland Security Programs Branch, at (202) 786-9732 or Alexander.MrazikJr@fema.dhs.gov. You may contact the Information Management Division for copies of the proposed collection of information at email address: FEMA-Information-Collections-Management@fema.dhs.gov.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency's (FEMA's) Homeland Security Grant Program (HSGP) supports state and local efforts to prevent terrorism and other catastrophic events and to prepare the Nation for the threats and hazards that pose the greatest risk to the security of the United States. The HSGP provides funding to implement investments that build, sustain, and deliver the 32 core capabilities essential to achieving the National Preparedness Goal of a secure and resilient Nation. The building, sustainment, and delivery of these core capabilities are not exclusive to any single level of government, organization, or community, but rather, require the combined effort of the whole community. The HSGP supports core capabilities across the five mission areas of Prevention, Protection, Mitigation, Response, and Recovery based on allowable costs. HSGP is comprised of three grant programs: State Homeland Security Program (SHSP), Urban Area Security Initiative (UASI), and Operation Stonegarden (OPSG). Together, these grant programs fund a range of activities, including planning, organization, equipment purchase, training, exercises, and management

and administration across all core capabilities and mission areas. The authorizing authority of the HSGP is section 2002 of the Homeland Security Act of 2002 (Pub. L. 107-296) (*See* 6 U.S.C. 603-609, *as amended*).

This revision of the information collection removes the OPSG Daily Activity Report, FEMA Form FF-207-FY-21-113 (formerly 089-0-27) that was created at the behest of CBP to fulfill CBP's requirements under OPSG and is only used to collection information from the public by CBP. FEMA has previously included this instrument under this collection as a service to CBP, but including an instrument used by CBP under a collection granting FEMA the authority to collect information does not provide the proper service to CBP, FEMA or the public.

Collection of Information

Title: FEMA Preparedness Grants: Homeland Security Grant Program (HSGP).

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660-0125.

FEMA Forms: FEMA Form FF-207-FY-21-110 (formerly 089-1), Investment Justification for Homeland Security Grant Program (HSGP), State Homeland Security Program (SHSP) and Urban Area Security Initiative (UASI); FEMA Form FF-207-FY-21-111 (formerly 089-16), Operation Stonegarden (OPSG) Operations Order and Budget Template; FEMA Form FF-207-FY-21-112 (formerly 089-20), Operation Stonegarden (OPSG) Inventory of Operation Orders; FEMA Instruction FI-207-FY-24-100, Urban Area Working Group (UAWG) Overview/Structure (including Point-of-Contact (POC)); FEMA Instruction FI-207-FY-24-101, Operational Overtime Documentation; FEMA Instruction FI-207-FY-24-102, Multiyear Training and Exercise Plan; FEMA Instruction FI-207-FY-24-103, Urban Area Security Initiative (UASI) Governance Charter; FEMA Instruction FI-207-FY-24-104, Senior Advisory Committee (SAC) Charter; FEMA Instruction FI-207-FY-24-105, Urban Area Working Group (UAWG) Allocation Methodology; FEMA Instruction FI-207-FY-24-106, State Homeland Security Program (SHSP) and Urban Area Security Initiative (UASI) Pass-Through Requirements; FEMA Instruction FI-207-FY-24-107, Critical Emergency Supplies; and FEMA Instruction FI-207-FY-24-108, SAFECOM Compliance Letter.

Abstract: The Homeland Security Grant Program (HSGP) is an important tool among a comprehensive set of measures to help strengthen the Nation against risks associated with potential terrorist attacks. FEMA uses the information to evaluate applicants' familiarity with the national preparedness architecture and identify how elements of this architecture have been incorporated into planning, operations, and investments at the regional, state and local levels. The HSGP is a primary funding mechanism for building and sustaining national preparedness capabilities. The HSGP is comprised of three separate grant programs: the State Homeland Security Program (SHSP), the Urban Area Security Initiative (UASI), and Operation Stonegarden (OPSG). Together, these grants fund a range of preparedness activities, including planning, organization, equipment purchase, training, exercises, and management and administration costs.

Affected Public: State, local, or Tribal governments.

Estimated Number of Respondents: 709.

Estimated Number of Responses: 827.

Estimated Total Annual Burden Hours: 319,488.

Estimated Total Annual Respondent Cost: \$26,821,018.

Estimated Respondents' Operation and Maintenance Costs: \$0.

Estimated Respondents' Capital and Start-Up Costs: \$0.

Estimated Total Annual Cost to the Federal Government: \$1,546,239.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the Agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology,

e.g., permitting electronic submission of responses.

Millicent Brown Wilson,

Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2023-25419 Filed 11-16-23; 8:45 am]

BILLING CODE 9111-78-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA- 2023-0023; OMB No. 1660-0114]

Agency Information Collection Activities: Proposed Collection, Comment Request; FEMA Preparedness Grants: Port Security Grant Program (PSGP)

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 30-day notice of revision and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on an extension, with change, of a currently approved information collection. In accordance with the requirements of the Paperwork Reduction Act of 1995, this notice seeks comments concerning the information collection activities required to administer the Port Security Grant Program (PSGP) and an additional new form to facilitate extension requests.

DATES: Comments must be submitted on or before December 18, 2023.

ADDRESSES: To avoid duplicate submissions to the docket, please submit comments at <http://www.regulations.gov> under Docket ID FEMA-2023-0023. Follow the instructions for submitting comments.

All submissions received must include the Agency name and Docket ID. Regardless of the method used to submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at <http://www.regulations.gov>, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy and Security Notice that is

available via a link on the homepage of <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Duane Davis, Section Chief, FEMA, Grant Programs Directorate, 202–680–4060, duane.davis@fema.dhs.gov. You may contact the Information Management Division for copies of the proposed collection of information at email address: FEMA-Information-Collections-Management@fema.dhs.gov.

SUPPLEMENTARY INFORMATION: Section 102 of the Maritime Transportation Security Act of 2002, as amended (46 U.S.C. 70107), authorizes the PSGP to provide for the risk-based allocation of funds to implement Area Maritime Transportation Security Plans and facility security plans among port authorities, facility operators, and State and local government agencies required to provide port security services and to train law enforcement personnel under 46 U.S.C. 70132. Before awarding a grant under the program, the Secretary for Homeland Security shall provide for review and comment by the appropriate Federal Maritime Security Coordinators and the Maritime Administrator. In administering the grant program, the Secretary shall consider national economic, energy, and strategic defense concerns based upon the most current risk assessments available.

The PSGP is a Department of Homeland Security grant program that focuses on infrastructure protection activities. The PSGP is one tool in the comprehensive set of measures authorized by Congress and implemented by the Administration to strengthen the Nation's critical infrastructure against risks associated with potential terrorist attacks. The bulk of U.S. critical infrastructure is owned and/or operated by state, local and private sector partners. The PSGP provides funds to state, local, and private sector partners to support increased port-wide risk management and protect critical surface transportation infrastructure from acts of terrorism, major disasters, and other emergencies.

FEMA is making two changes with this revision. First, FEMA is removing the template for a Memorandum of Understanding (or Agreement) from this collection because this informal template has not been required in Fiscal Years 2022 or 2023. Second, FEMA is introducing an extension request form to help reviewers understand the nature and cause of performance delays, inform GPD of grant recipients who are failing to meet policy and legislative grant requirements, and streamline current processes.

This proposed information collection previously published in the **Federal Register** on September 6, 2023, at 88 FR 60964 with a 60-day public comment period. No comments were received. The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: FEMA Preparedness Grants: Port Security Grant Program (PSGP).

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0114.

FEMA Forms: FEMA Form FF–207–FY–23–108 (formerly 089–05), PSGP Investment Justification; FEMA Form FF–207–FY–23–109 (formerly 088–0–1), Grant Programs Directorate Performance Report (GPD–PR), and FEMA Form FF–207–FY–23–110, Grant Programs Directorate Extension Request (GPD–Extension).

Abstract: Section 102 of the Maritime Transportation Security Act of 2002, as amended (46 U.S.C. 70107), authorizes the PSGP to provide for the risk-based allocation of funds to implement Area Maritime Transportation Security Plans and facility security plans among port authorities, facility operators, and State and local government agencies required to provide port security services and to train law enforcement personnel under 46 U.S.C. 70132. Before awarding a grant under the program, the Secretary for Homeland Security shall provide for review and comment by the appropriate Federal Maritime Security Coordinators and the Maritime Administrator. In administering the grant program, the Secretary shall take into account national economic, energy, and strategic defense concerns based upon the most current risk assessments available.

Affected Public: State, Local or Tribal Government and Private Sector.

Estimated Number of Respondents: 966.

Estimated Number of Responses: 1,832.

Estimated Total Annual Burden Hours: 17,446.

Estimated Total Annual Respondent Cost: \$1,462,290.

Estimated Respondents' Operation and Maintenance Costs: \$0.

Estimated Respondents' Capital and Start-Up Costs: \$0.

Estimated Total Annual Cost to the Federal Government: \$1,853,355.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption

above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the Agency, including whether the information shall 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Millicent Brown Wilson,

Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2023–25487 Filed 11–16–23; 8:45 am]

BILLING CODE 9111–78–P

DEPARTMENT OF HOMELAND SECURITY

[Docket Number DHS–2023–0017]

Agency Information Collection Activities: USSS Citizens Academy Application, Electronic Form

AGENCY: Department of Homeland Security (DHS).

ACTION: 60-Day notice and request for comments.

SUMMARY: The Department of Homeland Security will submit the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted until January 16, 2024. This process is conducted in accordance with 5 CFR 1320.1

ADDRESSES: You may submit comments, identified by docket number Docket # DHS–2023–0017, at:

○ *Federal eRulemaking Portal:* <http://www.regulations.gov>. Please follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number Docket # DHS–2023–0017. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

SUPPLEMENTARY INFORMATION: The Agency has initiated a Citizens Academy to inform the public about its mission, focused on participation from local community leaders. The academy will take place in local Agency field offices. Prior to participating, applicants will need to provide information as their community leadership role and provide PII so that a background investigation can be conducted to check for criminal history, open warrants, etc. The application allows for the Agency to gather the information necessary for each applicant to determine if they are eligible for participation. Authority to collect the information sought on this form is derived from title 28 U.S.C. 599A, 28 CFR 0.130, and 18 U.S.C. 3056.

This will be a new collection of information. The Agency has initiated a Citizens Academy for local community members, who will need to fill out an application to express interest and to provide PII for the Agency to initiate a background investigation for the applicants prior to participating in the USSS Citizens Academy. The information will be gathered by electronic submission of the USSS Citizens Academy Application to local Agency Field Offices. Applicant information will also be used to contact any applicants placed on a wait list to join future USSS Citizens Academies.

All information collected will be via electronic submission. The applicant will receive a PDF form via email to complete and submit to the agency. All respondents are individuals, not small businesses/entities.

The collection will only occur one time per year upon initial application to the Agency requesting to participate in the USSS Citizens Academy. There would be no way to reduce the frequency or else community members would not be able to apply for the USSS Citizens Academy. There is no change in the burden as this is a new collection.

While the Agency does not provide any assurance of confidentiality, information provided by the respondents will be protected from disclosure to the extent appropriate under the applicable provisions of the Freedom of Information Act and the Privacy Act of 1974. Personally identifying information will be collected and transmitted in accordance with the Privacy Act. However, to the extent that the information collected is Sensitive Security Information (SSI) as defined in

49 CFR part 1520, Protection of Sensitive Security Information, such information is protected from public disclosure.

The application provides a Privacy Act Statement and requests signed Consent to collect the information. Further, this collection is covered under DHS/ALL-023—Department of Homeland Security Personnel Security Management, which is the baseline system for personnel security activities to ensure that all DHS components follow the same privacy rules for collecting and handling personnel security management records (74 FR 3084, January 16, 2009).

The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Analysis

Agency: Department of Homeland Security (DHS).

Title: USSS Citizens Academy Application.

OMB Number: 1620–New.

Frequency: Annually.

Affected Public: Individuals.

Number of Respondents: 80.

Estimated Time Per Respondent: 15 Minutes.

Total Burden Hours: 20 Hours.

Laura Chavez,

Deputy Division Chief, Enterprise Policy Division, Office of Strategic Planning and Policy.

[FR Doc. 2023–25446 Filed 11–16–23; 8:45 am]

BILLING CODE 9110–FL–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2761–23; DHS Docket No. USCIS–2021–0003]

RIN 1615–ZB86

Extension and Redesignation of Venezuela for Temporary Protected Status—Correction

AGENCY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS).

ACTION: Notice; correction.

SUMMARY: This document corrects a technical error that appears in the USCIS notice titled “Extension and Redesignation of Venezuela for Temporary Protected Status” that published in the **Federal Register** on October 3, 2023. This document aligns and makes consistent the date through which Temporary Protected Status (TPS) will be granted to certain beneficiaries and the validity period of their related employment authorization document (EAD). This correction only affects individuals with an initial Venezuela TPS application (Form I–821) or initial Venezuela TPS-related EAD application (Form I–765) that was pending as of October 3, 2023.

FOR FURTHER INFORMATION CONTACT:

- You may contact Rená Cutlip-Mason, Chief, Humanitarian Affairs Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by mail at 5900 Capital Gateway Drive, Camp Springs, MD 20746, or by phone at 800–375–5283.
- For more information on TPS, including guidance on the registration process and additional information on eligibility, please visit the USCIS TPS web page at <https://www.uscis.gov/tps>. You can find specific information about Venezuela's TPS designation by selecting “Venezuela” from the menu on the left side of the TPS web page.
- If you have additional questions about TPS, please visit uscis.gov/tools. Our online virtual assistant, Emma, can answer many of your questions and point you to additional information on our website. If you cannot find your answers there, you may also call our USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

• Applicants seeking information about the status of their individual cases may check Case Status Online, available on the USCIS website at uscis.gov, or

visit the USCIS Contact Center at <https://www.uscis.gov/contactcenter>.

- You also can find more information at local USCIS offices after this notice is published.

SUPPLEMENTARY INFORMATION: On October 3, 2023, DHS published a notice in the **Federal Register** at 88 FR 68130 titled “Extension and Redesignation of Venezuela for Temporary Protected Status.” This document makes a technical correction to that notice (FR Doc. 2023–21865), correcting two incorrect references in the **SUPPLEMENTARY INFORMATION** section of the notice. This document aligns the dates that appear in the **SUPPLEMENTARY INFORMATION** section with the dates that appears in the **DATES** section.

The corrections are as follows:

(1) On page 68134, under the section “Required Application Forms and Application Fees To Register or Re-Register for TPS,” USCIS is correcting the date in the third paragraph, second sentence; and

(2) On page 68135, under the section “How can TPS beneficiaries obtain an Employment Authorization Document (EAD)?” USCIS is correcting the date in the first paragraph, sixth sentence regarding the date through which the EAD will be valid if the Form I–765 is approved.

In both instances, the dates should be September 10, 2025, not April 2, 2025. The “continuous residence” date for applicants for TPS under the redesignation of Venezuela remains as July 31, 2023, and is not affected by this document.

Correction

In FR 2023–21865, **Federal Register** of October 3, 2023, USCIS is correcting the following:

1. On page 68134, third column, third paragraph, second sentence under the section “Required Application Forms and Application Fees To Register or Re-Register for TPS,” is corrected to read as follows:

If USCIS approves an individual’s Form I–821, USCIS will grant the individual TPS through September 10, 2025.

2. On page 68135, second column, fourth sentence, is corrected to read as follows:

If USCIS approves a pending TPS-related Form I–765, USCIS will issue the individual a new EAD that will be valid through September 10, 2025.

Christina E. McDonald,

Federal Register Liaison, U.S. Department of Homeland Security.

[FR Doc. 2023–25507 Filed 11–16–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–IA–2023–0170; FXIA16710900000–234–FF09A30000]

Wild Bird Conservation Act; Receipt of Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), invite the public to comment on permit applications regarding foreign bird species for which the Service has jurisdiction under the Wild Bird Conservation Act (WBCA). With some exceptions, the WBCA prohibits activities with listed species unless Federal authorization is issued that allows such activities. The WBCA also requires that we invite public comment before issuing permits for any activity it otherwise prohibits.

DATES: We must receive comments by December 18, 2023.

ADDRESSES:

Obtaining Documents: The application, application supporting materials, and any comments and other materials that we receive will be available for public inspection at <https://www.regulations.gov> in Docket No. FWS–HQ–IA–2023–0170.

Submitting Comments: When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. You may submit comments by one of the following methods:

- Internet:** <https://www.regulations.gov>. Search for and submit comments on Docket No. FWS–HQ–IA–2023–0170.

- U.S. mail:** Public Comments Processing, Attn: Docket No. FWS–HQ–IA–2023–0170; U.S. Fish and Wildlife Service Headquarters, MS: PRB/3W; 5275 Leesburg Pike; Falls Church, VA 22041–3803.

For more information, see Public Comment Procedures under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT:

Brenda Tapia, by phone at 703–358–2185 or via email at DMAFR@fws.gov. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make

international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I comment on submitted applications?

We invite the public and local, State, Tribal, and Federal agencies to comment on these applications. Before issuing any of the requested permits, we will take into consideration any information that we receive during the public comment period.

You may submit your comments and materials by one of the methods in **ADDRESSES**. We will not consider comments sent by email, or to an address not in **ADDRESSES**. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**).

When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. Provide sufficient information to allow us to authenticate any scientific or commercial data you include. The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) those that include citations to, and analyses of, the applicable laws and regulations.

B. May I review comments submitted by others?

You may view and comment on others’ public comments at <https://www.regulations.gov> unless our allowing so would violate the Privacy Act (5 U.S.C. 552a) or Freedom of Information Act (5 U.S.C. 552).

C. Who will see my comments?

If you submit a comment at <https://www.regulations.gov>, your entire comment, including any personal identifying information, will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, such as your address, phone number, or email address, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Moreover, all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 112(4) of the Wild Bird Conservation Act of 1992 (WBCA; 16 U.S.C. 4901–4916), we invite public comments on permit applications before final action is taken. With some exceptions, the WBCA prohibits certain activities with listed species unless Federal authorization is issued that allows such activities. Service regulations regarding permits for any activity otherwise prohibited by the WBCA with respect to any wild birds are available in title 50 of the Code of Federal Regulations in part 15.

III. Permit Applications

We invite comments on the following applications.

Applicant: Masashige Yoshida c/o David Garcia, Homestead, FL; Permit No. PER0028206

The applicant, along with member Scott Golden, and the Organization of Professional Aviculturists (OPA) as their oversight committee, wishes to establish a Cooperative Breeding Program covering White-crested turacos (*Tauraco leucolophus*), Fischer's turacos (*Tauraco fischeri*), Livingstone's turacos (*Tauraco livingstonii*), Schalow's turacos (*Tauraco schalowi*), Hartlaub's turacos (*Tauraco hartlaubi*), Purple-crested turacos (*Gallirex porphyreolophus*), White-cheeked turacos (*Tauraco leucotis*), Red-crested turacos (*Tauraco erythrolophus*), and Persa turacos (*Tauraco persa*).

Applicant: Bethany McMartin, Port Angeles, WA; Permit No. PER1648672

The applicant, along with members Brian Sullivan, Thomas Coulson, Jennifer Coulson, Jeff Rossey, William Keith Hix, Danny Ertsgaard, Troy Morris, Justin Rondeau, Bethany McMartin, and the Washington Falconers Association as their oversight committee, wishes to re-issue the Cooperative Breeding Program CBP-004 covering Eurasian (European) sparrowhawk (*Accipiter nisus*), Red-naped shaheen (*Falco peregrinus babylonicus*), Northern goshawk (*Accipiter gentilis*), aplomado falcon (*Falco femoralis femoralis*) and Aplomado falcon (*Falco femoralis pichinchae*), Barbary falcon (*Falco pelegrinoides*), and ornate hawk-eagle (*Spizaetus ornatus*).

IV. Next Steps

After the comment period closes, we will make decisions regarding permit issuance. If we issue permits to any of the applicants listed in this notice, we

will publish a notice in the **Federal Register**. You may locate the notice announcing the permit issuance by searching <https://www.regulations.gov> for the permit number listed above in this document. For example, to find information about the potential issuance of Permit No. 12345A, you would go to <https://www.regulations.gov> and search for "12345A".

V. Authority

We issue this notice under the authority of the Wild Bird Conservation Act of 1992 (16 U.S.C. 4901–4916). This notice is provided pursuant to section 112(4) of the Wild Bird Conservation Act of 1992, 50 CFR 15.26(c).

Brenda Tapia,

Supervisory Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2023–25436 Filed 11–16–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R1–ES–2022–0074; ES11140100000–245–FF01E0000]

Draft Environmental Impact Statement for the Barred Owl Management Strategy; Washington, Oregon, and California

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; notice of virtual public meetings; request for comments.

SUMMARY: The U.S. Fish and Wildlife Service (Service) developed a proposed barred owl management strategy (management strategy) to address the threat of the nonnative, invasive barred owl (*Strix varia*) to the native northern spotted owl (*Strix occidentalis caurina*) and California spotted owl (*Strix occidentalis occidentalis*). In accordance with the National Environmental Policy Act, this notice announces the availability of a draft environmental impact statement (DEIS) evaluating the impacts on the human environment related to the proposed management strategy and associated take of barred owls, which is prohibited under the Migratory Bird Treaty Act unless authorized by the Service by permit or regulation. We invite public comments on the proposed management strategy and DEIS from the public and Federal, Tribal, State, and local governments.

DATES: *Submitting Comments:* Hardcopy comments must be received or postmarked on or before January 16,

2024. (See **ADDRESSES.**) Comments submitted online at <https://www.regulations.gov> must be received by 11:59 p.m. eastern time on January 16, 2024.

Virtual Public Meetings: We will hold two virtual public meetings, on December 4, 2023, and December 14, 2023, from 6 to 8 p.m. Pacific time. For more information, see Virtual Public Meetings under **SUPPLEMENTARY INFORMATION.**

ADDRESSES: *Submitting Comments:* You may submit comments by one of the following methods:

- **Internet:** <https://www.regulations.gov>. Follow the instructions for submitting comments on Docket No. FWS–R1–ES–2022–0074.
- **U.S. mail:** Public Comments Processing; Attn: Docket No. FWS–R1–ES–2022–0074; U.S. Fish and Wildlife Service Headquarters, MS: PRB/3W; 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We will post all comments on <https://www.regulations.gov>. This generally means that we will post online any personal information that you provide. We request that you submit comments by only the methods above. For additional information about submitting comments, see Public Comments under **SUPPLEMENTARY INFORMATION.**

Public Meeting: A registration link and access instructions for the virtual meetings will be posted to <https://www.fws.gov/office/oregon-fish-and-wildlife> at least 1 week prior to the public meeting dates. *Reviewing U.S. Environmental Protection Agency (EPA) Comments on the DEIS:* See EPA's Role in the EIS Process under **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT:

Robin Bown, by telephone at 503–231–6923, or by email at robin_bown@fws.gov. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The U.S. Fish and Wildlife Service (Service) developed a proposed barred owl management strategy (management strategy) to address the threat of nonnative invasive barred owl on two native owl subspecies in the West, the northern spotted owl (*Strix occidentalis caurina*) and California spotted owl (*Strix occidentalis occidentalis*). Implementation of the management

strategy would involve the reduction of barred owl populations in targeted management areas in Washington, Oregon, and California. On July 22, 2022, the Service published a notice of intent (87 FR 43886) to develop a draft environmental impact statement (DEIS) evaluating the impacts on the human environment from implementation of the proposed management strategy and a reasonable range of alternatives, consistent with the purpose and goals of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*). The Service, with input from several Federal, State, and Tribal cooperating agencies, has prepared this DEIS pursuant to the Council on Environmental Quality's (CEQ's) implementing NEPA regulations at 40 Code of Federal Regulations (CFR) parts 1500–1508, which became effective on May 20, 2022 (April 20, 2022, 87 FR 23453). We invite public comments on the proposed management strategy and DEIS from the public and Federal, Tribal, State, and local governments.

Background

Spotted owls are native to western North America. Competition from the nonnative invasive barred owls has been identified as a primary threat to the northern spotted owl, listed as threatened under the Endangered Species Act (ESA; 16 U.S.C. 1531 *et seq.*), as well as a threat to the persistence of California spotted owl, which the Service has proposed to list as endangered in some areas and threatened in others (88 FR 11600, February 23, 2023). Additional primary threats include the loss of habitat to timber harvest on non-Federal lands and to wildfires on Federal lands.

Barred owls, native to eastern North America, began to expand their range around 1900, concurrent with European settlement and facilitated by the subsequent human-caused changes to the Great Plains and northern boreal forest. These slightly larger and more aggressive owls quickly displaced spotted owls from their historic territories. Without management of barred owls, extirpation of northern spotted owls from major portions of their historic range is likely in the near future. While barred owls have not substantially impacted California spotted owl populations to date, the establishment of a small barred owl population in the northern Sierra Nevada, and the history of the invasion and impacts on northern spotted owls following such expansion, indicates that barred owls are also a significant threat to the persistence of California spotted owls.

The barred owl is protected under the Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703–712), which prohibits take of protected migratory bird species unless authorized by the Service through permit or regulation (50 CFR 21.10).

Purpose and Need for the Proposed Action

Using information from a recently completed barred owl removal experiment and other applicable studies and research findings, the Service determined that barred owl removal can be an effective method for the conservation of spotted owls. The purpose of this action is to reduce barred owl populations to improve the survival and recovery of northern spotted owls and to prevent declines in California spotted owls from barred owl competition. Relative to northern spotted owls, the purpose is to reduce barred owl populations within selected treatment areas in the short term and increase northern spotted owl populations in those treatment areas. Relative to the California spotted owl, the purpose is to limit the invasion of barred owls into the range of the subspecies and provide for a rapid response to reduce barred owl populations that may become established.

This action is needed because invasive barred owls compete with northern and California spotted owls. Competition from the invasive barred owl is a primary cause of the rapid and ongoing decline of northern spotted owl populations. Due to the rapidity of the decline, it is critical that we manage invasive barred owl populations to reduce their negative effect before northern spotted owls are extirpated from large portions of their native range. There is also a need to focus on limiting the invasion of barred owls into the California spotted owl range, as we expect additional impacts to California spotted owl populations would be inevitable without barred owl management, and invasive species are very difficult to remove once established.

Proposed Action and Alternatives

The proposed action is the issuance of a Migratory Bird Special Purpose permit under the MBTA (50 CFR 21.95) and implementation of the management strategy. The DEIS analyzes the proposed action, a no action alternative, and a reasonable range of alternatives to the proposed action, including the environmental consequences of each alternative. All action alternatives include issuance of an MBTA permit for management to reduce barred owl

populations in areas within the northern spotted owl's range and to prevent establishment of barred owl populations within the California spotted owl's range. The locations and relative priorities for removal would vary by action alternative. None of the alternatives would require any entity to implement barred owl management; rather, they outline various combinations of management approaches, geographic areas, and other components that would allow for and guide management actions and the ability to prioritize areas of greatest need.

Six alternatives are analyzed in detail in the DEIS:

Alternative 1—No Action: under the no action alternative, a comprehensive management strategy would not be finalized or implemented, and the Service would not issue an MBTA permit for systematic management of barred owls. Ongoing barred owl removal as part of research efforts in California, and future research efforts that may be proposed anywhere in the range of the spotted owl, would still occur.

Alternative 2—Management Strategy Implementation (Proposed Action): Under the proposed action, we would apply three approaches to barred owl management within the northern spotted owl range: spotted owl site management, General Management Areas with associated Focal Management Areas, and Special Designated Areas. Site management involves removing barred owls from within and around spotted owl sites, with priority given to recently occupied sites. General Management Areas are large areas within which barred owl management would occur on smaller Focal Management Areas. Focal Management Areas would be established at the time of removal by the implementing entity, based on general direction and prioritization provided in the management strategy. Special Designated Areas are areas mapped to support specific identified needs, such as connectivity between populations, buffer zones to provide a barrier to invasion, special emphasis areas, or management of early invasions. In the California spotted owl range, where we are focused on early detection and rapid response at the invasion front, the proposed action focuses on surveys, inventory, and monitoring to detect invading barred owls and rapid removal of any barred owls detected.

Alternative 3—Management Across the Range: Under this alternative, barred owl management could be implemented anywhere within the range of the

northern or California spotted owls or within 15 miles of the range of the subspecies on up to 50 percent of the area. There would be no specific requirements for size or location of management areas.

Alternative 4—Limited Management by Province/Population: Within the northern spotted owl range, this alternative would focus barred owl management on a single large General Management Area within each province. This approach supports a single, but larger, spotted owl population in each province. In the California spotted owl range, barred owl management would be delayed until detections reached 10 percent of surveys in areas within the Sierra Nevada portion of the population, or 5 percent within the Coastal-Southern California portion of the province. This would allow barred owl populations to be established, but removed before they can substantially impact spotted owls.

Alternative 5—Management Focused on Highest Risk Areas: In the northern spotted owl range, this alternative would focus barred owl management in the northern provinces, where the subspecies is at greatest risk of extirpation from barred owl competition in the Washington East Cascades, Washington West Cascades, Oregon East Cascades, Oregon West Cascades, Oregon Coast Ranges, and Olympic Peninsula Physiographic Provinces. In the California spotted owl range, barred owl management would be limited to the northern Sierra Nevada portion of the subspecies range, where the barred owl invasion initially occurred and represents the most likely pathway for larger numbers of barred owls to invade the California spotted owl range.

Alternative 6—Management Focused on Best Conditions: This alternative would focus barred owl management in the southern portion of the northern spotted owl range, where spotted owl populations have not decreased to the degree they have in the north, including the Oregon Klamath, California Coast, California Klamath, and California Cascades Physiographic Provinces. In the California spotted owl range, barred owl management would be focused on areas with the best remaining habitat and areas with higher fire resiliency, including the Sierra Nevada portion of the range with the best remaining habitat, and the Coastal-Southern California portion of the range.

Summary of Impacts

The DEIS describes the potential direct and indirect effects of each alternative on the human environment, focusing on impacts to barred owls,

spotted owls, other wildlife species, recreation and visitor use, wilderness, socioeconomics, and climate change, as well as cumulative effects of the action when added to the effects of other past, present, and reasonably foreseeable actions. Effects to other resources were considered but dismissed from detailed analysis because significant effects on public health and safety, cultural resources, Tribes, ethical considerations, environmental justice, or geology, soils, water, vegetation, or air quality are not expected.

Lead and Cooperating Agencies

The Service is the lead agency for the NEPA process, including development of the DEIS. The following agencies are cooperating agencies in the NEPA process and provided input and assistance with the development of the EIS: U.S. Forest Service (Regions 5 and 6), Bureau of Land Management (Oregon), Bureau of Land Management (California), National Park Service (Interior Regions 8, 9, 10, 12), Washington Department of Fish and Wildlife, Washington Department of Natural Resources, Oregon Department of Forestry, Oregon Department of Fish and Wildlife, California Department of Fish and Wildlife, and the California Department of Forestry and Fire Protection.

Anticipated Permits and Authorizations

In addition to compliance with the ESA and MBTA discussed above, compliance with section 106 of the National Historic Preservation Act is required by law for all Federal undertakings. The proposed action of issuing an MBTA permit is a Federal undertaking. In this case, our preliminary analysis is that the proposed action has no potential to cause effects, because the proposed action, along with all action alternatives, does not involve any ground disturbing or other activities that might result in direct or indirect effects to known or potential cultural resources.

Depending on the location and landowners involved in implementation of the management strategy, barred owl management could require additional Federal and State permits. We anticipate the potential need to acquire permits from the States of Washington, Oregon, and California to carry out the proposed barred owl removal actions under the proposed management strategy.

EPA's Role in the EIS Process

The EPA is charged under section 309 of the Clean Air Act with reviewing all Federal agencies' EISs and commenting

on the adequacy and acceptability of the environmental impacts of proposed actions. Under the CEQ NEPA regulations, EPA is also responsible for administering the EIS filing process. EPA is publishing a notice in the **Federal Register** announcing this DEIS. The publication date of EPA's notice of availability is the official beginning of the public comment period. EPA serves as the repository (EIS database) for EISs prepared by Federal agencies. You may search for EPA comments on EISs, along with EISs themselves, at <https://cdxapps.epa.gov/cdx-enepa-II/public/action/eis/search>.

Public Comments

You may submit your comments and materials on the proposed management strategy and the DEIS by one of the methods in **ADDRESSES**. We specifically request information on the following:

1. Biological information, analysis, and relevant data concerning the barred owl, spotted owl, and their interactions.
2. Components of the barred owl strategy, including but not limited to:
 - a. Locations where barred owl management should be focused or where management should be avoided;
 - b. Specific techniques for removal of barred owls or reduction in barred owl populations; and
 - c. Criteria and approaches for selecting management areas.
3. The alternatives analysis conducted by the Service, including the alternatives analyzed, the range of alternatives analyzed, and the alternatives considered but not analyzed in detail.
4. Potential effects of the proposed action and alternatives on other aspects of the human environment, including other wildlife species and habitats as well as aesthetic, historic, cultural, economic, social, environmental justice, or health resources.
5. Cumulative effects, which are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions, as well as any connected actions that are closely related and should be discussed in the same DEIS.
6. The alternatives, information, and analyses submitted during the public scoping period and the summary thereof.
7. Other information relevant to the proposed management strategy and MBTA take authorization, and its impacts on the human environment.

Virtual Public Meeting

To provide for the wide attendance of interested parties, two virtual public meetings will be conducted. See **DATES** and **ADDRESSES** for the dates and times of the virtual public meetings. During the meetings, the Service will present information about the management strategy and MBTA take authorization and provide an opportunity for the public to ask questions about the proposed management strategy and the DEIS. The first meeting will provide additional focus on barred owl management within the northern spotted owl's range. The second meeting will provide additional focus on management within the range of California spotted owls. No opportunity for oral comments will be provided. Written comments may be submitted by the methods listed in **ADDRESSES**.

Reasonable Accommodations

Persons needing reasonable accommodations in order to participate in the public meetings should contact the Service's Oregon Fish and Wildlife Office as soon as possible, using one of the methods listed in **ADDRESSES**. In order to allow sufficient time to process requests, please make contact at least 10 days before the public meeting date. Information regarding this proposed action is available in alternative formats upon request.

Public Availability of Comments

You may submit your comments and materials by one of the methods listed in **ADDRESSES**. Before including your address, phone number, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—might be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Comments and materials we receive, as well as references for supporting documentation we used in preparing the DEIS, will be available for public inspection online in Docket No. FWS-R1-ES-2022-0074 at <https://www.regulations.gov/> (see **FOR FURTHER INFORMATION CONTACT**).

Next Steps and Decision To Be Made

After public review and comment, the Service will review any comments received and prepare a final EIS (FEIS). The Service will also complete an ESA Section 7 biological opinion before making a final decision. At least 30 days after the FEIS is published, we expect that the Service will complete a record of decision pursuant to 40 CFR 1505.2, in accordance with applicable timeframes established in 40 CFR 1506.11. The current estimate for the issuance of the record of decision is July 2024.

Authority

We provide this notice in accordance with the requirements of NEPA and its implementing regulations (40 CFR 1503.1 and 1506.6).

Bridget Fahey,

Deputy Regional Director, Pacific Region.

[FR Doc. 2023-25032 Filed 11-16-23; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS-R4-ES-2023-0195; FXES11140400000-245-FF04EA1000]

Receipt of Incidental Take Permit Application and Proposed Habitat Conservation Plan for the Alabama Beach Mouse, Baldwin County, AL; Categorical Exclusion

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comment.

SUMMARY: We, the Fish and Wildlife Service (Service), announce receipt of an application from Christopher Johnson and Gator Wood Properties, LLC (applicants) for an incidental take permit (ITP) under the Endangered Species Act. The applicants request the ITP to take the federally listed Alabama beach mouse (*Peromyscus polionotus ammobates*) incidental to construction of a multi-family development in Gulf Shores, Baldwin County, Alabama. We request public comment on the application, which includes the applicants' proposed habitat conservation plan (HCP), and the Service's preliminary determination that the proposed permitting action may be eligible for a categorical exclusion pursuant to the Council on Environmental Quality's National Environmental Policy Act (NEPA) regulations, the Department of the Interior's (DOI) NEPA regulations, and

the DOI Departmental Manual. To make this preliminary determination, we prepared a draft environmental action statement and low-effect screening form, both of which are also available for public review. We invite comment from the public and local, State, Tribal, and Federal agencies.

DATES: We must receive your written comments on or before December 18, 2023.

ADDRESSES:

Obtaining Documents: You may obtain copies of the documents online in Docket No. FWS-R4-ES-2023-0195 at <https://www.regulations.gov>.

Submitting Comments: If you wish to submit comments on any of the documents, you may do so in writing by any of the following methods:

- **Online:** <https://www.regulations.gov>. Follow the instructions for submitting comments on Docket No. FWS-R4-ES-2023-0195.
- **U.S. mail:** Public Comments Processing, Attn: Docket No. FWS-R4-ES-2023-0195; U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041-3803.

FOR FURTHER INFORMATION CONTACT: Erin Lentz, Project Manager, by telephone at 251-298-3853 or via email at erin.lentz@fws.gov. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: We, the Fish and Wildlife Service (Service), announce receipt of an application from Christopher Johnson and Gator Wood Properties, LLC (applicants) for an incidental take permit (ITP) under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The applicants request the ITP to take the federally listed Alabama beach mouse (*Peromyscus polionotus ammobates*) (ABM) incidental to the construction of a 29-unit multi-family development (project) in Gulf Shores, Baldwin County, Alabama. We request public comment on the application, which includes the applicants' proposed habitat conservation plan (HCP), and the Service's preliminary determination that this proposed ITP qualifies as low effect, and may qualify for a categorical exclusion pursuant to the Council on Environmental Quality's National Environmental Policy Act (NEPA) regulations (40 CFR 1501.4), the Department of the Interior's (DOI) NEPA

regulations (43 CFR 46), and the DOI's Departmental Manual (516 DM 8.5(C)(2)). To make this preliminary determination, we prepared a draft environmental action statement and low-effect screening form, both of which are also available for public review.

Proposed Project

The applicants request a 50-year ITP to take ABM by converting approximately 1.24 acre (ac) of occupied ABM foraging and sheltering habitat incidental to the construction of a 29-unit multifamily development located on two parcels totaling 1.50 ac in Baldwin County, Alabama. The western parcel has already been developed (0.26 ac) and the remaining portion of the project area (1.24 ac) is ABM habitat. Even though the parcels consist of highly degraded secondary dune habitat, it is occupied by ABM. The applicants proposed to mitigate for the take of the ABM through a contribution to the City of Gulf Shores Dune Enhancement Fund at a rate of \$250 per unit (\$7,250 annually) for the life of the permit (50 years). Contributions to the Gulf Shores Dune Enhancement Fund are directed towards the maintenance of suitable dune habitat for the ABM within the Gulf Shores City jurisdiction.

Our Preliminary Determination

The Service has made a preliminary determination that the applicants' project, including land clearing, infrastructure building, landscaping, and the proposed mitigation and minimization measures, would individually and cumulatively have a minor effect on the Alabama beach mouse and the environment. Therefore, we have preliminarily determined that the proposed ESA section 10(a)(1)(B) permit would be a low-effect ITP that individually or cumulatively would have a minor effect on the Alabama beach mouse and may qualify for application of a categorical exclusion pursuant to the Council on Environmental Quality's NEPA regulations, DOI's NEPA regulations, and the DOI Departmental Manual. A low-effect incidental take permit is one that would result in (1) minor or nonsignificant effects on species covered in the HCP; (2) nonsignificant effects on the human environment; and (3) impacts that, when added together with the impacts of other past, present, and reasonably foreseeable actions, would not result in significant cumulative effects to the human environment.

Next Steps

The Service will evaluate the application and the comments received to determine whether to issue the requested permit. We will also conduct an intra-Service consultation pursuant to section 7 of the ESA to evaluate the effects of the proposed take on the species. We will consider all of the above in determining whether the permit issuance criteria of section 10(a)(1)(B) of the ESA have been met. If met, the Service will issue ITP number PER4215073 to Christopher Johnson and Gator Wood Properties, LLC.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, be aware that your entire comment, including your personal identifying information, may be made available to the public. While you may request that we withhold your personal identifying information, we cannot guarantee that we will be able to do so.

Authority

The Service provides this notice under section 10(c) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and its implementing regulations (50 CFR 17.32) and the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations (40 CFR 1500–1508 and 43 CFR 46).

William J. Pearson,

Field Supervisor, Alabama Ecological Service Field Office.

[FR Doc. 2023–25435 Filed 11–16–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

National Park Service

**[NPS–WASO–VRP–WS–NPS36769;
PPWOVPADW0–244–PPMPRL1Y.LB0000]**

Evaluation and Authorization Procedures for Fixed Anchors and Fixed Equipment in National Park Service Wilderness Areas

AGENCY: National Park Service, Interior.

ACTION: Notice of availability; request for comment.

SUMMARY: The National Park Service (NPS) announces the availability of a draft Wilderness Stewardship Reference Manual 41 guidance governing the management of climbing activities in wilderness areas in the National Park System. We invite comments from the public, and local, State, Tribal, and Federal agencies.

DATES: We will accept comments received or postmarked on or before 11:59 p.m. ET on January 16, 2024.

ADDRESSES:

Document availability: The draft guidance is available online at: https://parkplanning.nps.gov/RM41_fixed_anchors.

Comment Submission: You may submit written comments by one of the following methods:

- *Electronically:* https://parkplanning.nps.gov/RM41_fixed_anchors.

- *Mail or hand deliver to:* Fixed Anchors, National Park Service, 1849 C Street NW, MS–2457 Washington, DC 20240.

Instructions: Comments will not be accepted by fax, email, or in any way other than those specified above. Comments delivered on external electronic storage devices (flash drives, compact discs, etc.) will not be accepted. Bulk comments in any format (hard copy or electronic) submitted on behalf of others will not be accepted.

FOR FURTHER INFORMATION CONTACT:

Roger Semler, Wilderness Stewardship Division Manager, National Park Service, (202–430–7615), fixed_anchors@nps.gov.

SUPPLEMENTARY INFORMATION:

Background

The Wilderness Act was passed in 1964 and signed into law by President Lyndon B. Johnson. This Act established the National Wilderness Preservation System “. . . for the permanent good of the whole people.” The Wilderness Act directs Federal land management agencies, including the NPS, to manage wilderness areas and preserve wilderness character. To support the mandates of the Wilderness Act, the NPS developed specific policies to address wilderness management and stewardship. NPS Management Policies 2006, Chapter 6, and Director's Order 41 (2013) help managers understand why wilderness is important and how they can effectively manage these areas to preserve wilderness character. The Wilderness Stewardship Reference Manual 41 (RM 41) expands on policies for managing wilderness and offers comprehensive guidance to NPS employees responsible for managing and preserving wilderness character and the wilderness resource throughout the National Park System. RM41 addresses the management of recreational climbing activities in wilderness, including the evaluation and authorization process for fixed anchors and fixed equipment associated with climbing activities in NPS administered wilderness areas.

The NPS updates Reference Manuals on a periodic basis to improve park administration. In response to the growing popularity of climbing on public lands, coupled with concerns regarding increasing impacts to wilderness resources and character, the NPS has identified the need to update its policy to provide consistent guidance to park managers and engage the public to help make informed decisions regarding climbing activities in wilderness areas. For these reasons, the NPS has drafted a proposed guidance for inclusion in RM 41 to provide a more comprehensive and consistent framework for evaluating potential actions taken by national parks to authorize the placement and replacement of fixed anchors and fixed equipment for recreational climbing in NPS wilderness areas. This includes guidance for implementing a minimum requirements analysis (MRA) to determine whether fixed anchors are necessary to preserve wilderness character and further wilderness values, including recreation. The guidance will clarify NPS policy on the management of climbing activities in wilderness in accordance with the Wilderness Act (16 U.S.C. 1133(c)).

Tribal Consultation

As expressed in Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," the Department is committed to honoring the unique government-to-government political relationship that exists between the Federal Government and federally recognized Indian Tribes as listed at 87 FR 4636 (January 28, 2022). Secretary of the Interior Order No. 3403 (November 15, 2021) affirmed the principle that the Native Hawaiian Community has a government-to-sovereign relationship with the Federal Government and uses Native Hawaiian organizations as its informal representatives. Consistent with these commitments and principles, the NPS initiated Tribal consultation in March 2023. The NPS held three virtual Tribal consultation sessions and accepted written comments from Tribes and Native Hawaiian Organizations for 71 days. The NPS developed this draft guidance after consulting with federally recognized Indian Tribes, and the guidance reflects Tribal input.

Michael P. Michener,

Deputy Associate Director, Visitor and Resource Protection, National Park Service.

[FR Doc. 2023-25142 Filed 11-16-23; 8:45 am]

BILLING CODE 4312-52-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1328]

Certain Pillows and Seat Cushions, Components Thereof, and Packaging Thereof; Notice of a Commission Determination To Issue a General Exclusion Order, a Limited Exclusion Order, and Cease and Desist Orders; Termination of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission ("Commission") has determined to issue a limited exclusion order ("LEO") directed to Foshan Dirani Design Furniture Co., Ltd. ("Dirani Design") barring entry of certain pillows and seat cushions, components thereof, and packaging thereof that infringe certain claims of U.S. Patent No. 10,863,837 ("the '837 patent"); a general exclusion order ("GEO") barring entry of certain pillows and seat cushions, components thereof, and packaging thereof that infringe certain claims of U.S. Patent No. 10,772,445 ("the '445 patent"); and cease and desist orders ("CDOs") directed to respondents Dirani Design, Dongguan Jingrui Silicone Technology Co., Ltd., Hangzhou Lydia Sports Goods Co., Ltd., and Shenzhen Leadfar Industry Co., Ltd.

FOR FURTHER INFORMATION CONTACT: Edward S. Jou, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205-3316. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on September 13, 2022, based on a complaint (the "Complaint") filed by Purple Innovation, LLC of Lehi, Utah (the "Complainant"). 87 FR 56086-88 (Sept. 13, 2022). The Complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, based upon the importation, the

sale for importation, or sale within the United States after importation of certain pillows and seat cushions, components thereof, and packaging thereof by reason of infringement of the sole claim of U.S. Design Patent No. D909,092 ("the D'092 patent"); claims 1-16, 18, 19, 21-33, and 35 of U.S. Patent No. 10,772,445 ("the '445 patent"); claims 1-4, 6, 10-12, 19, and 20 of U.S. Patent No. 10,863,837 ("the '837 patent"); U.S. Trademark Registration No. 5,661,556 ("the '556 mark"); and U.S. Trademark Registration No. 6,551,053 ("the '053 mark"). *Id.* at 56086-87. The Complaint further alleged the existence of a domestic industry. *Id.* The Complaint also alleged violations of section 337 in the importation into the United States, or sale of certain products identified above by reason of trade dress infringement, the threat or effect of which is to destroy or substantially injure an industry in the United States. *Id.*

The Commission's notice of investigation named forty-one (41) respondents: Bedmate-U Co., Ltd. ("Bedmate-U") of Gyeonggi-do, Korea; Chuang Fan Handicraft Co., Ltd. of Zhejiang, China; Dongguan Bounce Technology Co., Ltd. of Guangdong, China; Dongguan Jingrui Silicone Technology Co., Ltd. ("Dongguan Jingrui") of Guangdong, China; Dirani Design of Guangdong, China; Global Ocean Trading Co., Ltd. of Guangdong, China; Guang An Shi Lin Chen Zai Sheng Wuzi Co., Ltd. of Zhejiang, China; Guang Zhou Wen Jie Shang Mao Youxian Gongs Co., Ltd. of Shanghai, China; Guangzhou Epsilon Import and Export Co., Ltd. of Guangdong, China; Guangzhoushi Baixiangguo Keji Youxian Gongs Co., Ltd. of Guangdong, China; Haircrafters LLC of Chattanooga, TN; Hangzhou Lishang Import & Export Co., Ltd. of Zhejiang, China; Hangzhou Lydia Sports Goods Co., Ltd. ("Hangzhou Lydia") of Zhejiang, China; Hebei Zeyong Technology Co., Ltd. of Hebei, China; Henson Holdings, LLC ("Henson Holdings") of Lafayette, Louisiana; Hetaibao of Anhui, China; Hubei Sheng Bingyi Dianzi Keji Youxian Gongs Co., Ltd. of Hubei, China; Kaifeng Shi Long Ting Qu Chen Yi Shangmao Youxian Gongs Co. Ltd. of Henan, China; Lankao Junchang Electronic Commerce Co., Ltd. of Henan, China; Lei Lei Wang of Anhui, China; Liu Lin Xian Xu Bin Dian Zi Chan Pin Dian of Shanxi, China; Nanchang Shironag Bao Er Guanggao Youxian Gongs Co., Ltd. of Jiangxi, China; Ningbo Bolian Import & Export Co., Ltd. ("Ningbo Bolian") of Beijing

China; Ningbo Minzhou Import & Export Co., Ltd. (“Ningbo Minzhou”) of Beijing, China; Ruian Xiu Yuan Guoji MaoYi Youxian Gongs Co., Ltd. of Zhejiang, China; Shandong Jiu Hui Xinxi Keji Youxian Gongs Co., Ltd. (“Shangdong Jiu Hui”) of Shandong, China; Shanxi Chao Ma Xun Keji Youxian Gongs Co., Ltd. of Shanxi, China; Shenzhen Baibaikang Technology Co., Ltd. of Guangdong, China; Shenzhen Leadfar Industry Co., Ltd. (“Shenzhen Leadfar”) of Guangdong, China; Shenzhen Shi Mai Rui Ke Dianzi Shangwu Co., Ltd. of Guangdong, China; Shenzhen Shi Xin Shangpin Dianzi Shangwu Youxian Gongs Co., Ltd. (“Shenzhen Shi Xin”) of Guangdong, China; Shenzhen Shi Yan Huang Chu Hai Keji Youxian Gongs Co., Ltd. of Guangdong, China; Shenzhen Shi Yuxiang Meirong Yongju Youxian Gongs Co., Ltd. of Guangdong, China; Shenzhen Tianrun Material Co., Ltd. of Guangdong, China; Wuhan Chenukxuan Technology Co., Ltd. of Hubei, China; Xiao Dawei of Fujian, China; Xiao Xiao Pi Fa Shang Mao You Xian Ze Ren Gongs Co. of Shanxi, China; YaRu Wang of Shanxi, China; Yiwu Youru E-commerce Co., Ltd. of Zhejiang, China; Zhejiang Xinhui Import & Export Co., Ltd. of Zhejiang, China; and Zhou Meng Bo of Guangdong, China. *Id.* at 56087–88. The Office of Unfair Import Investigations (“OUII”) was also a party to this investigation. *Id.* at 56088.

Five (5) respondents were terminated by withdrawal of allegations in the Complaint pursuant to Order No. 15 (Jan. 10, 2023), *unreviewed by Comm’n Notice* (Feb. 8, 2023). Twenty-five (25) additional respondents were terminated by withdrawal of allegations in the Complaint pursuant to Order No. 19 (Feb. 16, 2023), *unreviewed by Comm’n Notice* (Mar. 20, 2023), *reconsidered in part by Comm’n Notice* (May 19, 2023). Complainant also withdrew its allegations with respect to trade dress infringement, the ‘556 mark, the ‘053 mark, and the D’092 patent pursuant to Order No. 19. *Id.* Seven additional respondents were terminated by consent order pursuant to Order No. 23 (Mar. 30, 2023) (Shenzhen Shi Xin), Order No. 24 (Apr. 3, 2023) (Bedmate-U), Order No. 25 (Apr. 7, 2023) (Henson Holdings), Order No. 26 (Apr. 10, 2023) (Ningbo Minzhou), Order No. 27 (Apr. 12, 2023) (Lei Lei Wang), Order No. 28 (Apr. 13, 2023) (Hetaibao), and Order No. 29 (May 10, 2023) (Ningbo Bolian), *unreviewed by Comm’n Notice* (May 19, 2023).

Dirani Design, Dongguan Jingrui, Hangzhou Lydia, and Shenzhen Leadfar (collectively, the “Defaulting Respondents”) were found in default

pursuant to Order No. 16 (Jan. 11, 2023), *unreviewed by Comm’n Notice* (Feb. 8, 2023), and Order No. 21 (Mar. 8, 2023), *unreviewed by Comm’n Notice* (Mar. 30, 2023).

On March 15, 2023, Complainant filed a motion for summary determination of violation with respect to infringement of certain claims of the ‘837 patent and the ‘445 patent by the Defaulting Respondents. On March 29, 2023, OUII filed a response in support of the motion.

On July 13, 2023, the ALJ issued an Initial Determination granting Complainant’s motion with respect to the ‘445 patent, noted that a finding of violation was unnecessary as to Dirani Design relating to the ‘837 patent because Complainant sought only an LEO, and issued a Recommended Determination on Remedy and Bond (Order No. 31, the “ID” and “RD”). No petitions for review of the ID were filed.

On August 28, 2023, the Commission determined to review the ID in part and to affirm, with modifications, the ALJ’s grant of summary determination of a violation of section 337 by reason of infringement of certain claims of the ‘445 patent by Dongguan Jingrui, Hangzhou Lydia, and Shenzhen Leadfar. 88 FR 60491–94. The Commission requested submissions on remedy, the public interest, and bonding. *Id.*

Complainant filed a public interest statement on August 14, 2023, and a written submission on remedy, the public interest, and bonding on September 11, 2023. OUII filed a written submission on remedy, the public interest, and bonding on September 11, 2023, and a reply submission on remedy, the public interest, and bonding on September 18, 2023.

Having examined the record in this investigation, the Commission has determined pursuant to section 337(g)(1) and Commission Rule 210.16(c) to issue an LEO prohibiting the unlicensed entry of certain pillows and seat cushions, components thereof, and packaging thereof that infringe one or more of claims 1, 3, 4, and 10 of the ‘837 patent that are manufactured abroad by, or on behalf of, or imported by or on behalf of Dirani Design. The Commission has also determined pursuant to section 337(d) to issue a GEO prohibiting the unlicensed entry of certain pillows and seat cushions, components thereof, and packaging thereof that infringe one or more of claims 18, 19, 21–29, and 33 of the ‘445 patent. The Commission has further determined to issue CDOs against Dirani Design, Dongguan Jingrui, Hangzhou Lydia, and Shenzhen Leadfar.

The Commission has determined that the public interest factors enumerated in subsections (d)(1), (f), and (g)(1) of section 337 do not preclude the issuance of the remedial orders. The Commission has further determined that the bond during the period of Presidential review pursuant to section 337(j) (19 U.S.C. 1337(j)) shall be set in the amount of one hundred percent (100%) of the entered value of the imported articles that are subject to the LEO and GEO. The Commission’s remedial orders were delivered to the President and to the United States Trade Representative on the day of their issuance. The investigation is hereby terminated.

While temporary remote operating procedures are in place in response to COVID–19, the Office of the Secretary is not able to serve parties that have not retained counsel or otherwise provided a point of contact for electronic service. Accordingly, pursuant to Commission Rules 201.16(a) and 210.7(a)(1) (19 CFR 201.16(a), 210.7(a)(1)), the Commission orders that the Complainant(s) complete service for any party/parties without a method of electronic service noted on the attached Certificate of Service and shall file proof of service on the Electronic Document Information System (EDIS).

The Commission vote for this determination took place on November 13, 2023.

The authority for the Commission’s determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission’s Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: November 13, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–25412 Filed 11–16–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–472 (Fifth Review)]

Silicon Metal From China; Determination

On the basis of the record¹ developed in the subject five-year review, the United States International Trade Commission (“Commission”) determines, pursuant to the Tariff Act of

¹ The record is defined in § 207.2(f) of the Commission’s Rules of Practice and Procedure (19 CFR 207.2(f)).

1930 (“the Act”), that revocation of the antidumping duty order on silicon metal from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted this review on May 1, 2023 (88 FR 26595) and determined on August 4, 2023 that it would conduct an expedited review (88 FR 61613, September 7, 2023).

The Commission made this determination pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determination in this review on November 14, 2023. The views of the Commission are contained in USITC Publication 5473 (November 2023), entitled *Silicon Metal from China: Investigation No. 731-TA-472 (Fifth Review)*.

By order of the Commission.

Issued: November 14, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–25469 Filed 11–16–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1375]

Certain Mobile Phones, Components Thereof, and Products Containing Same; Notice of Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on October 11, 2023, under section 337 of the Tariff Act of 1930, as amended, on behalf of Telefonaktiebolaget LM Ericsson of Sweden. Supplements were filed on October 31, 2023 and November 9, 2023. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain mobile phones, components thereof, and products containing same by reason of the infringement of certain claims of U.S. Patent No. 10,425,817 (“the ‘817 patent’”); U.S. Patent No. 10,306,669 (“the ‘669 patent’”); U.S. Patent No. 11,317,342 (“the ‘342 patent’”); and U.S. Patent No. 11,515,893 (“the ‘893 patent’”). The complaint further alleges that an industry in the

United States exists or is in the process of being established as required by the applicable Federal Statute. The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. Hearing impaired individuals are advised that information on this matter can be obtained 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 at <https://www.usitc.gov>.

FOR FURTHER INFORMATION CONTACT:

Pathenia M. Proctor, The Office of Unfair Import Investigations U.S. International Trade Commission, telephone (202) 205–2560.

SUPPLEMENTARY INFORMATION: Authority:

The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission’s Rules of Practice and Procedure, 19 CFR 210.10 (2023).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on November 13, 2023, *ordered that—*

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 10–16 of the ‘817 patent; claims 1–23 of the ‘669 patent; claims 1–18 and 34–40 of the ‘342 patent; and claims 1–12 of the ‘893 patent, and whether an industry in the United States exists or is in the process of being established as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission’s Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the

investigation, is “mobile phones and smartphones capable of operating in a 5G network”;

(3) Pursuant to Commission Rule 210.50(b)(1), 19 CFR 210.50(b)(1), the presiding administrative law judge shall take evidence or other information and hear arguments from the parties or other interested persons with respect to the public interest in this investigation, as appropriate, and provide the Commission with findings of fact and a recommended determination on this issue, which shall be limited to the statutory public interest factors set forth in 19 U.S.C. 1337(d)(1), (f)(1), (g)(1);

(4) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is: Telefonaktiebolaget LM Ericsson, Torshamnsgatan 21, Kista, Stockholm, Sweden

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Motorola Mobility LLC, 222 W. Merchandise Mart Plaza, Suite 1800, Chicago, Illinois 60654
Lenovo (United States) Inc., 1009 Think Place, Building One, Morrisville, NC 27560

Lenovo Group Limited, 23rd Floor, Lincoln House, Taikoo Place, 979 King’s Road, Quarry Bay, Hong Kong SAR

Motorola (Wuhan) Mobility Technologies, Communication Co., LTD., 19 Gaoxin 4th Road, Donghu New Technology Development Zone, Hubei 430205 Wuhan, China

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW, Suite 401, Washington, DC 20436; and

(5) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission’s Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainant of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint

and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: November 14, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023-25451 Filed 11-16-23; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation. No. 337-TA-1376]

Certain Electronic Devices, Including Mobile Phones, Tablets, Laptops, Components Thereof, and Products Containing the Same; Notice of Institution of Investigation

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on October 12, 2023, under section 337 of the Tariff Act of 1930, as amended, on behalf of Ericsson AB of Sweden and Telefonaktiebolaget LM Ericsson of Sweden. Supplements to the Complaint were filed on October 31, 2023 and November 9, 2023. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain electronic devices, including mobile phones, tablets, laptops, components thereof, and products containing the same by reason of the infringement of certain claims of U.S. Patent No. 7,151,430 (“the ‘430 patent”); U.S. Patent No. 9,509,273 (“the ‘273 patent”); U.S. Patent No. 9,313,178 (“the ‘178 patent”); U.S. Patent No. 11,122,313 (“the ‘313 patent”); and U.S. Patent No. 10,972,654 (“the ‘654 patent”). The complaint

further alleges that an industry in the United States exists as required by the applicable Federal Statute. The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. Hearing impaired individuals are advised that information on this matter can be obtained 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 at <https://www.usitc.gov>.

FOR FURTHER INFORMATION CONTACT: Katherine Hiner, The Office of Docket Services, U.S. International Trade Commission, telephone (202) 205–1802.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission’s Rules of Practice and Procedure, 19 CFR 210.10 (2023).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on November 13, 2023, *ordered that—*

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 2–8, 11, and 13–18 of the ‘430 patent; claims 1–4, 7–10, 12–14, 16, and 18 of the ‘273 patent; claims 1–5 and 16–18 of the ‘178 patent; claims 1–4, 6, 11–14, and 16 of the ‘313 patent; and claims 1, 3, 9, 10, 15, and 16 of the ‘654 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission’s Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused

products, which defines the scope of the investigation, is “mobile phones, tablet computers, laptop computers, components thereof and products containing the same”;

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

Ericsson AB, Torshamnsgatan 23, Kista, Stockholm, Sweden
Telefonaktiebolaget LM Ericsson, Torshamnsgatan 21, Kista, Stockholm, Sweden

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Motorola Mobility LLC, 222 W. Merchandise Mart Plaza, Suite 1800, Chicago, Illinois 60654
Lenovo (United States) Inc., 1009 Think Place, Building One, Morrisville, NC 27560
Lenovo Group Limited, 23rd Floor, Lincoln House, Taikoo Place, 979 King’s Road, Quarry Bay, Hong Kong SAR
Lenovo (Shanghai) Electronics, Technology Co., Ltd., Part 304–305, Building 4, No. 222, Meiyue Road, Pilot Free Trade Zone, Pudong, New District, Shang Hai Shi, 200131 Shanghai
Lenovo Beijing Co., Limited, 6 Chuangye Road, Haidian District, Beijing 100085, China
Lenovo PC HK Limited, 23/F., Lincoln House, Taikoo Place, 979 King’s Road, Hong Kong
Lenovo Information Products, (Shenzhen) Co. Ltd., Fuitan Trade Zone, ISH2 Building, No. 3, Guanglan Road, 518038 Shenzhen
Motorola (Wuhan) Mobility, Technologies Communication Company, Limited, 19, Gaoxin 4th Road, Donghu New, Technology Development Zone, Hubei, 430205 Wuhan, China

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

The Office of Unfair Import Investigations is not participating as a party to this investigation.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission’s Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19,

2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainants of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: November 14, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023-25441 Filed 11-16-23; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701-TA-694 and 731-TA-1641-1642 (Preliminary)]

Aluminum Lithographic Printing Plates From China and Japan

Determinations

On the basis of the record¹ developed in the subject investigations, the United States International Trade Commission ("Commission") determines, pursuant to the Tariff Act of 1930 ("the Act"), that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of aluminum lithographic printing plates (ALPs) from China and Japan, provided for in subheadings 3701.30.00 and 3701.99.60 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value ("LTFV") and to be subsidized by the government of China.²

¹ The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

² 88 FR 73316 and 88 FR 73313 (October 25, 2023).

Commencement of Final Phase Investigations

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigations. The Commission will issue a final phase notice of scheduling, which will be published in the **Federal Register** as provided in § 207.21 of the Commission's rules, upon notice from the U.S. Department of Commerce ("Commerce") of affirmative preliminary determinations in the investigations under §§ 703(b) or 733(b) of the Act, or, if the preliminary determinations are negative, upon notice of affirmative final determinations in those investigations under §§ 705(a) or 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigations need not enter a separate appearance for the final phase of the investigations. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Background

On September 28, 2023, Eastman Kodak Company, Rochester, New York, filed petitions with the Commission and Commerce, alleging that an industry in the United States is materially injured or threatened with material injury by reason of subsidized imports of ALPs from China and LTFV imports of ALPs from China and Japan. Accordingly, effective September 28, 2023, the Commission instituted antidumping and countervailing duty investigation Nos. 701-TA-694 and 731-TA-1641-1642 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of October 4, 2023 (88 FR 68669). The Commission conducted its conference on October 19, 2023. All persons who requested the opportunity were permitted to participate.

The Commission made these determinations pursuant to §§ 703(a) and 733(a) of the Act (19 U.S.C. 1671b(a) and 1673b(a)). It completed

and filed its determinations in these investigations on November 13, 2023. The views of the Commission are contained in USITC Publication 5475 (November 2023), entitled *Aluminum Lithographic Printing Plates from China and Japan: Investigation Nos. 701-TA-694 and 731-TA-1641-1642 (Preliminary)*.

By order of the Commission.

Issued: November 13, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023-25402 Filed 11-16-23; 8:45 am]

BILLING CODE 7020-02-P

LEGAL SERVICES CORPORATION

Sunshine Act Meetings

TIME AND DATE: The Legal Services Corporation Board of Directors will meet virtually on November 27, 2023. The meeting will commence at 2:00 p.m. Eastern Time and will continue until the conclusion of the Board's agenda.

PLACE:

Public Notice of Virtual Meetings: LSC will conduct the November 27, 2023 meeting via Zoom.

Public Observation: Unless otherwise noted herein, the Board of Directors meeting will be open to public observation via Zoom. Members of the public who wish to participate remotely in the public proceedings may do so by following the directions provided below.

Directions for Open Session

November 27, 2023

To join the Zoom meeting by computer, please use this link.

- <https://lsc-gov.zoom.us/j/81526341918?pwd=bxkKcNFLd7coqThbrOTUSQmVgzJobk.1&from=addon>
- Meeting ID: 815 2634 1918
- Passcode: 421397

○ To join the Zoom meeting with one tap from your mobile phone, please click dial:

- +13017158592,,81526341918# US
- +13126266799,,81526341918# US

○ To join the Zoom meeting by telephone, please dial one of the following numbers:

- +1 312 626 6799 (Chicago)
- +1 646 876 9923 (New York)
- +1 301 715 8592 (Washington DC)
- +1 408 638 0968 (San Jose)
- +1 669 900 6833 (San Jose)
- +1 253 215 8782 (Tacoma)
- +1 346 248 7799 (Houston)

- Meeting ID: 815 2634 1918
- Passcode: 421397

Once connected to Zoom, please immediately mute your computer or telephone. Members of the public are asked to keep their computers or telephones muted to eliminate background noise. To avoid disrupting the meetings, please refrain from placing the call on hold if doing so will trigger recorded music or other sound.

From time to time, the Board Chair may solicit comments from the public. To participate in the meeting during public comment, use the 'raise your hand' or 'chat' functions in Zoom and wait to be recognized by the Chair before stating your questions and/or comments.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Approval of Agenda
2. Consider and Act on the Board of Directors' Transmittal Letter to Accompany the Inspector General's Semiannual Report to Congress for the Period of April 1, 2023 through September 30, 2023
3. Public Comment
4. Consider and Act on Other Business
5. Consider and Act on Adjournment of Meeting

CONTACT PERSON FOR MORE INFORMATION: Cheryl DuHart, Administrative Coordinator, at (202) 295-1621. Questions may also be sent by electronic mail to duhartc@lsc.gov.

Non-Confidential Meeting Materials: Non-confidential meeting materials will be made available in electronic format at least 24 hours in advance of the meeting on the LSC website, at <https://www.lsc.gov/about-lsc/board-meeting-materials>.

(Authority: 5 U.S.C. 552b.)

Dated: November 15, 2023.

Stefanie Davis,

Deputy General Counsel for Administrative and Regulatory Practice Legal Services Corporation.

[FR Doc. 2023-25645 Filed 11-15-23; 4:15 pm]

BILLING CODE 7050-01-P

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

Acquisition Data Management

AGENCY: Office of Federal Procurement Policy, Office of Management and Budget.

ACTION: Proposed new Office of Management and Budget Circular No.

A-XXX, "Strategic Management of Acquisition Data and Information".

SUMMARY: The Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget (OMB) is proposing a new OMB Circular, Strategic Management of Acquisition Data and Information. The purpose of this Circular is to improve agency access to reliable data and information. Using relevant acquisition data throughout the acquisition lifecycle facilitates successful contracting outcomes. This Circular establishes a centralized data management strategy to create robust knowledge and data banks, develop standard data sharing processes, and improve agency access to tools and resources for acquisition-related decision-making.

DATES: Interested parties should submit comments in writing to the address below on or before January 16, 2024.

ADDRESSES: Submit comments to the *Federal eRulemaking Portal*: <https://www.regulations.gov>. Follow the instructions on the portal for submitting comments. *Instructions:* Please submit comments only and cite "Proposed New OMB Circular A-XXX" in all correspondence. All comments received will be posted, without change or redaction, to www.regulations.gov, so commenters should not include information that they do not wish to be posted (for example because they consider it personal or business confidential). Additionally, the OMB System of Records Notice, OMB Public Input System of Records, OMB/INPUT/01 includes a list of routine uses associated with the collection of this information.

FOR FURTHER INFORMATION CONTACT:

Kristen Wilson, +1 (202) 881-9426, kristen.h.wilson@omb.eop.gov or send your email to MBX.OMB.OFPV2@OMB.eop.gov, Office of Federal Procurement Policy, 725 17th Street NW, Washington, DC 20006, at 202-395-6805.

SUPPLEMENTARY INFORMATION: There are tens of billions of acquisition data points residing in over 170 contract writing systems (including legacy systems) and over 15 payment processing platforms across the Federal enterprise. Historically, much of this data has been collected and managed by agencies. Agencies have used their resources to build tools within their agency, harnessing internal data and databases, but this has often led to duplicative tools and efforts and a lack of coordination across agencies. This approach has limited Government-wide capacity for analytics, insights, and

efficiency gains other than the System for Award Management and the Federal Procurement Data System, which generally provide aggregate data but very little pricing and best practices information.

To address these challenges, the proposed Circular would establish a new acquisition data management policy of promoting Hi-Definition (Hi-Def) acquisitions where agencies are able to acquire supplies or services using acquisition data that is easily accessed and available at the time of need. To that end, OMB is creating a Hi-Def acquisition framework to promote data interoperability, sharing of acquisition data between agencies, and enterprise-wide data analysis. This framework is supported by a Hi-Def acquisition data environment that includes a scalable technical architecture and solution to store, access, utilize, share, and archive acquisition data without having to duplicate data, tools, or effort. Hi-Def acquisitions are a critical component of the acquisition community's work to buy as an organized enterprise, as it will provide access to the breadth and depth of information needed to support the activities of the largest and most sophisticated buyer in the world.

Achieving a Hi-Def environment will require greater transparency and collaboration in agency data systems planning and investment decisions where these activities would impact the Government's ability to achieve data interoperability for information that is critical or can otherwise significantly improve acquisition decision-making at both the Government-wide and agency-wide level. To this end, the Circular (1) establishes interagency governance, (2) defines agency roles and responsibilities, and (3) supports the design and development of solutions to drive interoperability, allowing systems to connect and share acquisition data wherever they reside within the Federal government without duplication.

Of particular note, the proposed Circular would:

Require agencies to prepare annual strategic plans. Agencies will report on steps to address general data management stewardship, government-wide priority initiatives and individualized acquisition data hurdles or responsibilities that may impact other agencies.

Build appropriate centralization. The Circular will support centralized standards, knowledge banks, and data-sharing tools using established and strengthened governance. Existing standards and processes will be updated, modernized, and enforced

through greater transparency and interoperability. Data sharing tools will allow agencies to maintain existing systems but create the ability to pull data from the source where it resides for much improved analytics and insights. Shared solutions will increase efficiency across all agencies.

Promote data-sharing technologies. The Circular prepares agencies for an interoperable future where all acquisition data can be shared and accessed. Current Hi-Def efforts are being conducted through pilots on a voluntary basis to address challenges in interoperability. The Circular anticipates that agencies will begin exploring, planning for, and building application programming interfaces (APIs) and other access points while and working within the governance structure to develop appropriate standards and processes. It provides a mechanism to enable agencies to ask for further direction and resources in these endeavors from OMB and through the budget process. Increased collaboration between agencies will facilitate knowledge and best practices sharing from agencies that have already explored the implementation of these tools internally, as well as the related pilots.

Establish policies for agency collection and sharing of their acquisition data. Contract cost efficiencies increase when buyers are able to improve their negotiating posture with access to standardized transactional data that can give them insight into prices paid and favorable contract terms and conditions. Accordingly, with limited exception, agencies will be expected to centrally collect acquisition data, such as, but not limited to, market research, contract documents such as statements of work, performance work statements, statements of objective, terms, conditions, prices paid for commodities or services, and other data or information that a contracting official, program official or other member of the integrated product team would use during the acquisition lifecycle as part of their stewardship responsibility to obtain best value for the Federal government. Agencies should share their data with GSA and other agencies responsible for data collection so that the information may be analyzed by data and market experts and made available for agency use, including through on-demand tools that the agencies create. GSA and other data collection agencies will use data sharing agreements, as appropriate, with data protection and security protocols to prevent against the unauthorized

disclosure of data. OMB will work with agencies to develop data sharing agreement templates to address how information is accessed, used, and shared.

Establish an interagency working group. In order to determine the best implementation of data sharing, such as APIs, across contract writing systems, the working group would bring together contract writing system managers, computer engineers, and acquisition data experts. As an initial step, agencies would conduct an initial assessment of their contract pricing and invoicing data to establish an agency baseline and determine the variation of starting points between agencies.

Facilitate other collaborative actions and workforce development with data management. Agencies would be expected to actively contribute to existing knowledge portals on innovative techniques and emerging technology and support expansion, implementation, and promotion of acquisition data management training and certification efforts for the acquisition workforce.

Christine J. Harada,

Senior Advisor, Office of Federal Procurement Policy.

PROPOSED CIRCULAR NO. A-XXX
TO THE HEADS OF EXECUTIVE
DEPARTMENTS AND
ESTABLISHMENTS

SUBJECT: Strategic Management of
Acquisition Data and Information

1. Purpose: The purpose of this Circular is to improve agency access to reliable data and information. Using relevant acquisition data throughout the acquisition lifecycle facilitates successful contracting outcomes. This Circular establishes a centralized data management strategy to create robust knowledge and data banks, develop standard data sharing processes, and improve agency access to tools and resources for acquisition-related decision-making.

The Federal government has taken significant steps to improve the collection and use of data related to contracting transactions, including amounts obligated, information about how contracts are awarded, and the identity of the awardees. For example, the Integrated Award Environment (IAE), through the System for Award Management (SAM), provides important information to the acquisition community and the public and is integral to agencies' management of contracting processes.

However, other important acquisition-related data and information are not

being shared Government-wide—or are underutilized. This is often because such information resides in disparate agency systems, include non-standardized data elements and definitions, across public and commercial domains, and therefore are not generally interoperable across agencies. For example, line item pricing information may be kept in agency-specific contract writing systems, in one or more payment platforms, or in internal or external databases that are not easily accessible. As a result, acquisition professionals across the Federal government may not have access to key information for contract negotiations or for critical contract management functions.

The Office of Management and Budget seeks to promote Hi-Definition (Hi-Def) acquisitions where agencies are able to acquire supplies or services using relevant acquisition data that is easily accessed and available when it is needed. To that end, OMB is creating a Hi-Def acquisition framework to promote data interoperability, sharing of acquisition data between agencies and enterprise-wide data analysis. This framework is supported by a Hi-Def acquisition data environment that includes a scalable technical architecture and solution to store, access, utilize, share, and archive acquisition data without having to duplicate data, tools, or effort. Together, the Hi-Def framework and data environment will provide a coordinated, Government-wide approach to accessing, using, and managing acquisition data and developing and deploying innovative tools that use this information to better support the acquisition lifecycle, such as GSA's Transactional Data Reporting (TDR) program which allows for improved pricing and related data analytics that support enhanced decision-making. The Hi-Def framework and data environment will be built around the following three management and organizing principles:

(1) continuously identify areas of need through interagency governance structures including existing committees, such as the Procurement Committee for E-government (PCE) and other working groups;

(2) assess agency compliance with existing standards, current data collection and interoperability efforts; and identify proper acquisition data subject matter experts for roles defined in section 3 and Appendix C; and

(3) design and develop agency solutions using human-centered design principles to drive interoperability and scalability of acquisition data through existing technology inventories, data

standards, data sharing agreements, as appropriate, and yearly acquisition data strategic planning to support the initiative.

2. *Policy:* Agencies should utilize acquisition data management practices that promote interoperability, scalability, and usability across the Government.¹ These practices should make acquisition data easily accessible when it is needed to inform decision-making throughout the acquisition lifecycle.

3. *Responsibilities:* This policy will be implemented in accordance with the following responsibilities.

a. *OMB*—With the support of the Government-wide governance structures identified in Appendix C, OMB is responsible for the following:

i. *Provide direction to agencies for the annual creation of a strategic plan to prioritize acquisition data management activities.* OMB, in collaboration with the working group established pursuant to section 6a, will provide direction to agencies for the creation of strategic plans that adequately address the agency's acquisition data resources and infrastructure and the status of the agency's activities to implement Government-wide priorities and agency-specific priorities.

ii. *Develop standards, as necessary, to support transactional pricing data or any other transactional activity requiring standardization.* OMB will identify minimum transactional pricing data elements (e.g., CLIN standards) for collection and transmission that would minimize agency burden while providing insight at a government-wide level. OMB will consider the commonalities identified from the initial data assessment performed by agencies as a basis for standardization.

iii. *Require appropriate information sharing and collaboration.* Agencies must share information using proper data security to support greater transparency, and inform buying decisions for the Federal enterprise. OMB will collaborate with governance groups and agencies to prioritize information sharing needs and capabilities and to develop appropriate data sharing agreement templates.

b. *Agencies*—Agencies are responsible for taking the following actions in furtherance of the acquisition data management policies established by this Circular:

i. *Create a strategic plan to prioritize and resource their acquisition data management activities, consistent with direction from OMB.* Agencies shall

annually evaluate and document results of assessments along with any new agency policies and processes in an Annual Acquisition Data Strategic Plan as outlined in Appendix E, using the template provided² to support agency budget planning and investment discussions.

ii. *Integrate best business practices into agency data strategy for the generation, collection, use, sharing, and improvement of data.* Agencies should utilize the Federal Integrated Business Framework (FIBF)³ in developing their Annual Acquisition Data Strategic Plans and share best business practices with GSA who will make the information publicly available and easily accessible.

iii. *Collect data centrally and be prepared, upon request by OMB and the Category Manager, to share their acquisition data, as appropriate, and on an agreed upon cadence.*⁴ Centralized data collection within the agency is critical to the agency's ability to readily share their acquisition data governmentwide. Agencies that are responsible for collecting agency data must use appropriate protocols to prevent the unauthorized disclosure of data. Data sharing agreements may be used to establish how information is accessed, used, and shared. Agencies should not agree to terms and conditions with their contractors that broadly prohibit the sharing of their acquisition data with other Government agencies, except where sharing is prohibited by law or where the contract identifies the data or information is proprietary. OMB may request an explanation from the agency's Senior Procurement Executive when the agency withholds requested acquisition data that is not otherwise legally prohibited from disclosure. Equally important, agencies must assume responsibility for making data-driven decisions and for providing their acquisition workforce with critical information needed to negotiate contracts in the best interest of taxpayers. Agencies should work with GSA on the development and adoption of Government-wide data analytics tools and taking steps to ensure members of the workforce with responsibilities for managing common spending are trained in using these tools.

² Template will be provided on a yearly basis and found on <https://www.acquisition.gov/datainitiatives>.

³ Federal Integrated Business Framework | Federal Shared Services, <https://ussm.gsa.gov/fibf/>.

⁴ Office of Mgmt. & Budget, Exec. Office of the President, OMB M-19-13, Category Management: Making Smarter Use of Common Contract Solutions and Practices (2019), available at <https://www.whitehouse.gov/wp-content/uploads/2019/03/M-19-13.pdf>.

iv. *Actively contribute to existing knowledge portals on innovative techniques and emerging technology.* Agencies should actively collect and share information and data about their innovative activities through organized means, including but not limited to the Inventory of Emerging Technologies, the Periodic Table of Acquisition Innovations, and future knowledge management tools in the Hi-Def environment, that contribute to the collective advancement of a more effective acquisition system.

v. *Support expansion, implementation, and promotion of acquisition data management training and certification efforts for the acquisition workforce.* Agencies should work with sources such as, but not limited to, the Federal Acquisition Institute (FAI)⁵ and the Defense Acquisition University (DAU)⁶ to build data analysis and related skills as a core acquisition workforce capability.

c. *Electronic Invoicing Providers*—Electronic Invoicing Providers are responsible for providing electronic interfaces. Agencies shall ensure compliance with OMB Memorandum M-15-19⁷ and successor policies, directing all Federal Shared Service Providers (FSSPs) and other electronic invoice solution providers to integrate with IAE and develop electronic interfaces.

4. *Authorities*—OMB issues this Circular pursuant to the Office of Federal Procurement Policy Act (41 U.S.C. Chapter 7); the Clinger Cohen Act (also known as "Information Technology Management Reform Act of 1996"); and 31 U.S.C. Ch. 5.

5. *Effective Date, Applicability and Scope:* The Circular is effective upon publication in the **Federal Register**. The policies in this Circular apply to all Federal agencies⁸ and shall only be used for unclassified data.

6. *Transition:* The following phase-in actions shall be taken to help agencies prepare for the responsibilities enumerated in section 3.

a. *Within 90 days of the effective date of the Circular, OMB will establish a working group, that falls under the jurisdiction of the Procurement Committee for E-Government.* OMB will require agencies, within 45 days of the

⁵ FAI Home <https://fai.gov/>.

⁶ DAU Home <https://www.dau.edu/>.

⁷ Office of Mgmt. & Budget, Exec. Office of the President, OMB M-15-19, Improving Government Efficiency and Saving Taxpayer Dollars Through Electronic Invoicing (2015), available at <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-15-19.pdf>.

⁸ For purposes of this Circular, "agency" is defined in 41 U.S.C. 133.

¹ Such requirements and assessment criteria will be available at <https://www.acquisition.gov>.

effective date of the Circular, to identify, in consultation with their PCE representative, one or more government acquisition system technical experts who are knowledgeable on making data machine-readable, in an open format, and available to computer applications to promote interoperability and system integration (*i.e.* exposing data through application programming interfaces (APIs)); the agency contract writing system(s) and associated interfaces; agency electronic invoicing solution; and information technology infrastructure. OMB will further require that working group members:

- i. have the requisite technical developmental expertise to focus on the technical solutions to support the identified areas of need and develop formal communications of technical requirements for software vendors;
- ii. collaborate with the Federal Acquisition Regulatory Council and other acquisition policy organizations identified by OFPP and with governance groups identified in Appendix C; and
- iii. review previous efforts, if any, to accomplish similar initiatives in these areas. Agencies shall identify a working group member as the lead for the initial assessment to take place in the first year after the release of this policy.

The working group's initial priority will be to support agencies in their individual assessments of the acquisition data environment, including through the hosting of workshops, and identify areas of need arising out of this assessment.

b. *Within one year of the effective date of this Circular, agencies shall perform an initial one-time baseline assessment of their acquisition data management capabilities.* The assessment shall focus, at a minimum, on acquisition data principles, reduction of duplicative efforts, data sharing capabilities, and actions to exchange innovative practices and solutions. Agencies shall complete and submit an assessment of and a roadmap for acquisition data systems, structures, and elements involving invoicing, contract writing systems, and transactional pricing data. OMB will develop a template to support the assessment covering the following information:

- i. Analysis of the current collection of transactional pricing data (*i.e.*, contract line-item data) including existing systems, analytical capabilities, reporting requirements, and, if not currently being collected by a vendor, their level of effort and required resources if changes are needed to collect that data;

- ii. Roadmap for making existing and new acquisition data machine-readable, in an open format, and available to computer applications to promote interoperability and system integration, following direction from the working group, governance, and policy while coordinating across agencies using the same or similar systems;

- iii. Adherence to the existing Federal Electronic Invoicing Data Elements Standards mandatory data elements;

- iv. The extent of unstructured acquisition data in contract writing systems that are not in a machine-readable format and would be unable to be transmitted via API (*e.g.* "flat" file PDFs, contract clauses, or additional scanned items that are not machine readable). The focus here is data that cannot easily be transformed to be machine readable. For example, line item pricing information may be kept in agency-specific contract writing systems, in one or more payment platforms, or in internal or external databases that are not easily accessible; and,

- v. Existing and planned capabilities to share data centrally within the agency and to share data with other agencies

7. Attachments.

- a. Appendix A—Definitions
- b. Appendix B—Examples of Hi-Def Applications
- c. Appendix C—Governance
- d. Appendix D—Assuring Uniform Implementation and Data Integrity
- e. Appendix E—Documenting Agency Planning

Appendix A. Definitions

Acquisition—the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract. (Source: FAR 2.101 5/26/2022). For the purposes of this Circular, acquisition and procurement are used interchangeably.

Acquisition data—data or information that a contracting official, program official, or other member of the integrated product team would use during the acquisition lifecycle as part of their stewardship responsibility to obtain best value for the Federal Government, such as, but not limited to, market research, contract documents such as statements of work, performance work statements, and

statements of objective, terms, conditions, and prices paid for commodities or services.

Acquisition data sharing agreement—a document that creates an understanding between two or more agencies on how acquisition data will be accessed, used, and shared, including an understanding of the overall requirements, permissions, procedures, and limitations on sharing to ensure compliance with applicable law.

Acquisition lifecycle—end-to-end management and execution of programs/contract and projects. The lifecycle begins with the identification of a business need and ends with program/contract closeout.

Data integrity—data integrity refers to the accuracy, entirety, and reliability of data both in its physical location and during transmission and throughout the stages of generation, collection, use, sharing, and improvement, which summarize the Federal Data Lifecycle.

Hi-Definition (Hi-Def) acquisition—the acquiring of supplies or services using relevant acquisition data that is easily accessed and consumed at the time of need, supported by a governance framework of standards and policies that promote data interoperability, secure sharing of acquisition data between agencies, and enterprise-wide data analysis to inform government-wide and individual agency procurements, and a data environment that includes a scalable technical architecture and solution to store, access, utilize, share, and archive acquisition data without having to duplicate data, tools, or effort.

Integrated Award Environment (IAE)—a government-wide initiative administered by the General Services Administration that consists of a suite of systems and processes supporting parts of the Federal awarding lifecycle. The IAE facilitates the awards processes in multiple online systems, including the System for Award Management (SAM), that each play a role in the awards lifecycle. Those systems are used for registering to do business with the Federal government, listing contract opportunities, reporting performance, analyzing contract data, and more.

Transactional data reporting (TDR) program—a data collection and reporting system that simplifies the reporting process for contractors and improves the accuracy of pricing information. By collecting transactional data, the GSA can better analyze pricing trends and ensure that government customers are receiving fair and reasonable prices.

Appendix B. Examples of Hi-Def Applications

This appendix provides illustrative examples of how a future Hi-Def environment will benefit the acquisition lifecycle, agency planning and budgeting. The adoption and implementation of these and other applications shall be subject to execution of the responsibilities outlined in section 3 of this Circular including input from the working group established pursuant to section 6 and existing governance bodies.

Acquisition lifecycle phase	Examples of benefits from a hi-def environment
Business Analysis and Acquisition Planning.	- Find and compare information from different agencies on— - Requirements Documents (Statements of Work, Performance Work Statements, Statement of Objectives). - Subcontracting plans. - Labor prices. - Suppliers. - Contract Type(s). - Contract prices paid. - Transactional data. - Other relevant contract deliverables. - Use a script/code to read, index, and search unstructured data. - Customization using existing contract language.
Package Preparation	- Utilize reusable and customizable tools and artifacts, such as templates and macros for items such as task orders, delivery orders and BPA calls. - Look at previous calls within an existing BPA or across other BPAs within separate packages. - Review terms and conditions.
Source Selection	- View past performance data (e.g., Acq360). - See credit ratings, evaluate contractor responsibility, and view financial statements from a commercial subscription service.
Performance	- Linking SAM.gov registrations with invoice processing platforms. - Ability to perform contract modifications within the environment. - Enhanced performance evaluations that offer more targeted questions and can be tailored for product or service contracts. - Ability for CO to generate and communicate data needs for the COR to complete and use for invoice payment or building past performance. This feedback is then reincorporated into earlier phases of the acquisition lifecycle. - Review subcontract performance and small business utilization for subcontractors. - Purchase card data over the micro-purchasing threshold.

Appendix C. Governance

Creating and maintaining a Hi-Def data environment in a vast and complex acquisition ecosystem requires a strong governance structure that addresses all facets of the acquisition data lifecycle—*i.e.*, generation, collection, use, sharing, and improvement.

Acquisition governance, including that which falls outside of the scope of Hi-Def, shall be carried out using the structures described below. These groups below have previously been established between agencies through charters, but have not been officially acknowledged and defined in OMB policy. Agencies shall ensure that their current representatives selected for each governance structure listed below or established in support of the goals of the Circular possess the necessary skills and abilities to make recommendations and decisions that impact the generation, collection, use, sharing, and improvement of agency data. As Hi-Def areas grow, additional working groups may be established.

I. The Award Committee for E-Government (ACE)—The ACE serves as the executive steering committee that collaborates with OMB in developing the vision, strategy, and scope for data management tools and capabilities supporting the Federal award process (both acquisition and financial assistance).

A. Composition—the ACE consists of seven Departments identified by OMB. Three Departments represent the acquisition community, three represent the financial assistance community, and one has significant equity in both communities and is the liaison with the Chief Financial Officers Council (CFOC). Advisory members may be added based on the focus of the activities and/or strategies. OMB, OFPP, and the Office of Federal Financial Management (OFFM) are permanent advisory members (non-voting).

B. Leadership—The ACE leadership consists of two Co-chairs, one of whom is from the Chief Acquisition Officers Council (CAOC) to represent the Federal acquisition community (primary focus on procurement), and one representing the financial assistance community. Co-chairs are responsible for organizing quarterly meetings, including location, logistics, and development of agenda with support from OMB or another agency. The Co-chairs are appointed by OMB.

II. The Procurement Committee for E-Government (PCE)—The PCE serves as the primary interagency body advising OMB on acquisition data with a particular focus on the procurement process. The PCE provides recommendations, priorities, and reaches implementation decisions that consider the policy, operational, technological, and change management aspects necessary to effect positive change in the efficiency and effectiveness of the use of technology and data in the Federal acquisition and procurement processes.

A. Composition—The PCE consists of one member from each of the 24 Executive Branch Agencies as defined by the CFO Act as well as a member representing the Small Agency Council (SAC). OMB is a permanent advisory (non-voting) member. The membership will provide strategic advice and recommendations that may result in Federal-wide policy, regulatory, statutory, business process, or information technology changes per 41 U.S.C. 1122. As such, PCE members must be of sufficient seniority and experience levels to address matters in the context of the full Federal environment as well as speak with authority and commitment on behalf of their agency. There are various working groups under the PCE.

B. Leadership—The PCE will be co-chaired by leaders from two executive branch organizations determined by OMB in

collaboration with the PCE membership. A senior analyst from OFPP will serve as a senior advisor and ad-hoc co-chair, as needed. The PCE will nominate three members to represent the acquisition and procurement communities on the ACE, one as co-chair and two as voting members.

III. Change Control Board (CCB)—The CCB serves as the tactical layer of governance to support the operations, maintenance, and modernization of the centralized fee-for-service systems. The CCB is responsible for serving as liaison between the agency and the IAE, articulating the agency's position on requirements and changes to the IAE, understanding the relationship between agency systems and those in the IAE, understanding the functional aspects of all the applications in the IAE, and voting on behalf of their agency on proposed system changes. As the tactical layer of governance with the most familiarity with operations, the CCB is critical to ensuring the technology matches policy and operational needs.

A. Composition—The CCB consists of voting members from the 24 CFO Act agencies and non-voting members from the SAC. Each CFO Act agency is asked to appoint up to three members (one primary voting member and two alternates if desired). The appointments must be made jointly by the agency SPE and the senior agency official responsible for financial assistance in order to facilitate robust representation. Each CCB member is responsible for voting on behalf of their agency and must:

1. Understand how federal award regulations, policy, and proposed system changes will impact agency operations, systems, and workforce;
2. Possess a high-level familiarity with the operational and functional aspects of all systems in the IAE;
3. Understand the relationship between IAE and agency systems and how any

changes will impact the agency and awarding processes;

4. Ensure sufficient time and availability to appropriately prepare for and attend all CCB meetings and working groups;

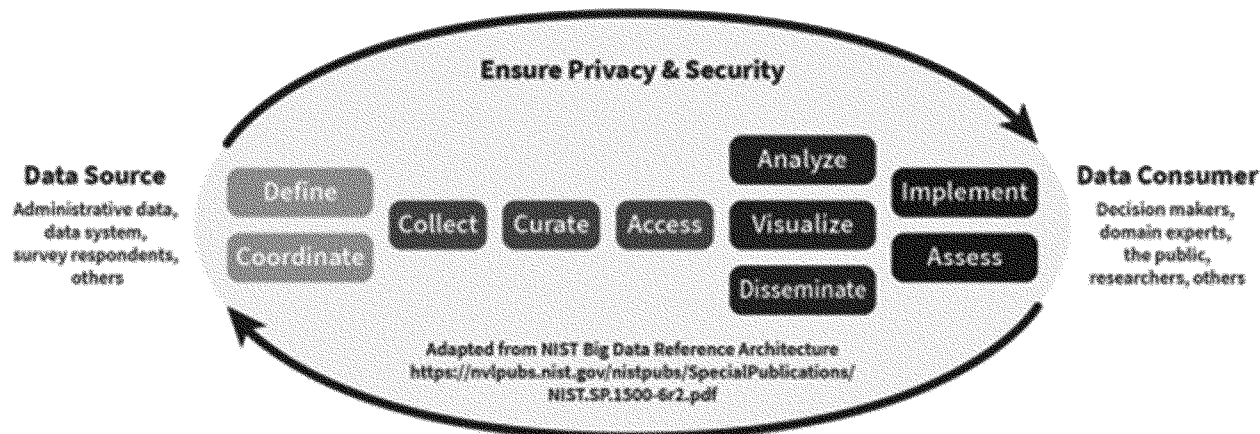
5. Appropriately and consistently communicate information and changes produced by the IAE throughout their agency.

Appendix D. Ensuring Uniform Implementation and Data Integrity

Data integrity refers to the accuracy, completeness, and reliability of data in its physical location, during transmission, and throughout the stages of generation, collection, use, sharing, and improvement, which support the Federal Data Lifecycle (see Figure 1). Data integrity is maintained through compliance with laws, policies, and standards established by governance. The integrity of the Federal acquisition process,

including budgeting for, planning, managing, and closing out contracts that support programs, depends on the quality and availability of data. Innovation leads to ongoing business process improvements, requiring regular assessments of processes and data against established standards. The standardized processes and data will drive strong foundations across the Federal acquisition enterprise, while encouraging and enabling agency innovation and agility in acquisition planning, management, and operations.

Figure 1: Federal Data Lifecycle



Data Roles

This policy builds on the Federal Data Lifecycle by organizing its data roles into the five phases of the acquisition data lifecycle: Generate, Collect, Share, Use and Improve. In addition, privacy and security are roles that affect every aspect of acquisition data, and agencies should ensure that the most current data protection methodologies are being used and that all applicable laws and regulations are being followed.

- **Generate—**
 - **Define:** Identify agency and stakeholder needs for acquisition data of sufficient quality for intended uses
 - **Coordinate:** Assess the ability of acquisition data resources and infrastructure to meet agency and stakeholder needs
- **Collect—**
 - **Collect:** Organize, plan, and execute acquisition data collections and acquisitions to meet agency and stakeholder needs
 - **Curate:** Organize, refine, and maintain agency acquisition data resources with sufficient quality to meet agency and stakeholder needs
- **Share—Access:** Identify and develop multiple acquisition data access methods for agency staff and stakeholders
- **Use—**
 - **Analyze:** Optimize the ability of staff and stakeholders to use agency acquisition data to generate insights
 - **Visualize:** Present acquisition data insights for consumption by all users,

stakeholders, and leaders for their intended needs

- **Disseminate:** Provide multiple avenues for release of acquisition data and insights
- **Improve—Implement & Assess:** Maximize the use of acquisition data for decision-making, accountability, and the public good by continuously improving the acquisition data process

Vision for Data Integrity

The governance model identified in Appendix C supports efforts to identify, develop, and implement common business processes, data, and standards that support the federated model. This includes assessing existing standards instituted at an agency level for their potential application to the broader federal acquisition community. The governance groups also regularly assess and provides recommendations for how shared tools or capabilities in the Hi-Def or regulatory-based environment (e.g., the IAE) are meeting agency operational needs. The future Hi-Def environment will make possible a seamless flow of data from authoritative sources to the point of need. Data will only need to be entered once and will be available for use at any point in the acquisition lifecycle consistent with applicable regulations and policies through implemented machine-readable data, in an open format, and available to computer applications to promote interoperability and system integration such as APIs.

As new regulations or policies are developed, new data may be required; ongoing processes to review how best to

collect this data from new or existing sources should be put into place, including a review of the quality, security, and integrity of those data. Business process re-engineering may be required to avoid manual or redundant processes, improve quality, and make data available at the time of need. Reporting requirements may need to be adjusted or integrated as a result of increased data availability. Agencies must strategically plan how various Federal-wide and agency specific efforts can be harmonized and leveraged to avoid duplication of effort, costs, and diminished data quality resulting from multiple instances of similar data across an agency.

PCE Responsibilities—Quality Technology and Data

The processes and measures for assessing the uniform implementation of standards that is core to this vision will be the responsibility of the PCE (Appendix C). The common technology tools supporting Federal acquisition and the resulting procurement data will be driven by the PCE. The PCE will ensure that applicable regulations and policy are reflected in any technologies, processes, systems, and data to reduce agency burden and ensure quality data are available for downstream use.

Agency Responsibilities—Quality Technology and Data

In the distributed procurement information technology environment, agencies have responsibilities to generate data consistent with procurement policy, standards for business processes, data, and

interoperability. Federal agencies in the Executive Branch must manage data consistent with statutes, regulations, and OMB policies. Agency CAOs, Senior Procurement Executives (SPEs), CDOs, Chief Financial Officers (CFOs), CIOs, and Budget Officers must collaborate to:

- Assess the feasibility of building and/or maintain appropriate and secure APIs to permit sharing and interoperability of procurement data and are developed through the working group and after the initial data assessment period;
- Promote best business practices of appropriate data hygiene, data principles, and data standards as developed by the PCE;
- Further innovation and efficiency in the Federal acquisition system by leading or actively participating in the development and implementation of emerging technology tools that align with policy; and,
- Actively develop professionals with skills in Federal Acquisition Regulations (FAR)-based data analytics for decision-making.

Data Security and Quality Control

Building security and fraud protection aspects into the management of procurement data will ensure usable data. This is a responsibility across the Federal enterprise and requires due diligence at all levels. Hi-Def and IAE data will only be useful if it is accurate, timely, definable, and available in real-time. The maintenance of an Acquisition Data & Process Dictionary (ADD),⁹ managed by the PCE, will resolve discrepancies among models and support uniform implementation of policy-based terminology. Such a dictionary will provide consistency across the Federal Government and identify and fill in gaps if existing data models do not capture the full acquisition lifecycle. The dictionary helps to build a foundation against which agencies can map existing tools and processes throughout the acquisition lifecycle. Integrating the standards and processes identified by the PCE, for example those defined in the FIBF, provides a common starting place for all agencies. Common business process and data definitions can be made accessible and transparent for many users in accordance with PCE identified guidance.

Validation and Verification (V&V) of the acquisition data is paramount to quality control. V&V aims to ensure both completeness and accuracy of select data. The PCE will update the existing parameters and methods for annual V&V every 5 years to align with policy, regulatory and agency needs. The most recent memoranda, stored: "Improving Federal Procurement Data Quality—Guidance for Annual Verification and Validation,"¹⁰ (May 2011), and "Improving Small Business Procurement Data—Quality and Process,"¹¹ (November 2011). This cadence of review and updates permits the longitudinal analysis and continuous improvement.

¹⁰ Improving Federal Procurement Data Quality—Guidance for Verification and Validation.

¹¹ Improving Small Business Procurement Data—Quality and Process.

Appendix E. Annual Agency Planning Requirements

Strategic and operational planning by agencies, including budget planning, is essential to an interoperable environment where data are shared and available at the point of need. These activities provide opportunities for addressing gaps identified through assessments and innovation in business processes and technology, including lessons learned from pilots or shared activities. As such, agencies must include appropriate analyses of these considerations in agency annual strategic plans, as required by OMB Circular A-11 and any supplementary direction from OMB during the budget process. These plans will be reviewed by OMB to inform and shape actions necessary to support Hi-Def implementation and maintenance.

Planning and Budgeting—To assist agencies in ensuring acquisition data interoperability is appropriately considered in agency-wide strategic planning and budgeting, each year, OFPP will provide a template with questions and structure for compiling the strategic plan. The template will include sections for responding to questions related to acquisition data resources and infrastructure, government-wide priorities established by OMB and governance groups, and agency-specific priorities. The yearly priority areas will be posted with an updated template on the Acquisition.gov Data Initiatives Page.¹² The acquisition data resources and infrastructure questions will generally address the following areas, though may include other areas of interest as appropriate:

a. Appropriate resource management activities necessary to support innovative practices and alignment of data with statutes, regulations, policies, and standards to support interoperability. The identification of activities should be accomplished in coordination with the appropriate agency leaders directing the acquisition, information, security, data, finance, and human capital functions.

b. Solutions identified by the agency workforce as the greatest opportunity for improving processes and leveraging technology to support innovation and reduce burden. Such ideas support agency operations and mission success by addressing issues, challenges, and best practices identified by those most impacted on a daily basis by access (or lack thereof) to data and information.

c. Details on how agencies are assuring any new technologies at the agency level are aligned with policy and regulations, and how agency technology supports the interoperability of data in the federated model established through this Circular.

d. Recommendations on any business processes that should be re-engineered to support innovation or just-in-time access to quality information or data. Re-imagining the process before applying emerging technologies or shared tools can lead to a more impactful change; this can be done by seeking workforce input, taking maximum

¹² <https://www.acquisition.gov/datainitiatives>.

advantage of FAR flexibilities, leveraging data and information technology as strategic assets, consulting with governance on how data is supposed to be used and displayed, and driving changes to agency-specific requirements.

Initial projects. Initial projects will focus on electronic invoicing (e.g., Invoice Processing Platform (IPP) and G-Invoicing), and the collection of transactional pricing data. Additional and future Hi-Def projects to implement this policy will generally be identified through an annual strategic planning process, as described in section 3 of the Circular and this Appendix.

[FR Doc. 2023-25370 Filed 11-16-23; 8:45 am]

BILLING CODE 3110-01-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 25 meetings 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: *Arts Education* (review of applications): This meeting will be closed.

Date and time: December 1, 2023; 11:30 a.m. to 1:30 p.m.

Arts Education (review of applications): This meeting will be closed.

Date and time: December 1, 2023; 2:30 p.m. to 4:30 p.m.

Presenting and Multidisciplinary Works (review of applications): This meeting will be closed.

Date and time: December 5, 2023; 12:00 p.m. to 2:00 p.m.

Musical Theater (review of applications): This meeting will be closed.

Date and time: December 5, 2023; 1:00 p.m. to 3:00 p.m.

Arts Education (review of applications): This meeting will be closed.

Date and time: December 5, 2023; 1:30 p.m. to 3:30 p.m.

Presenting and Multidisciplinary Works (review of applications): This meeting will be closed.

Date and time: December 5, 2023; 3:00 p.m. to 5:00 p.m.

Theater (review of applications): This meeting will be closed.

Date and time: December 5, 2023; 4:00 p.m. to 6:00 p.m.

Our Town (review of applications): This meeting will be closed.

Date and time: December 6, 2023; 11:00 a.m. to 1:00 p.m.

Presenting and Multidisciplinary Works (review of applications): This meeting will be closed.

Date and time: December 6, 2023; 12:00 p.m. to 2:00 p.m.

Local Arts Agencies (review of applications): This meeting will be closed.

Date and time: December 6, 2023; 2:00 p.m. to 4:00 p.m.

Our Town (review of applications): This meeting will be closed.

Date and time: December 6, 2023; 2:30 p.m. to 4:30 p.m.

Presenting and Multidisciplinary Works (review of applications): This meeting will be closed.

Date and time: December 6, 2023; 3:00 p.m. to 5:00 p.m.

Our Town (review of applications): This meeting will be closed.

Date and time: December 7, 2023; 11:00 a.m. to 1:00 p.m.

Presenting and Multidisciplinary Works (review of applications): This meeting will be closed.

Date and time: December 7, 2023; 12:00 p.m. to 2:00 p.m.

Theater (review of applications): This meeting will be closed.

Date and time: December 7, 2023; 1:00 p.m. to 3:00 p.m.

Local Arts Agencies (review of applications): This meeting will be closed.

Date and time: December 7, 2023; 1:00 p.m. to 3:00 p.m.

Our Town (review of applications): This meeting will be closed.

Date and time: December 7, 2023; 2:30 p.m. to 4:30 p.m.

Presenting and Multidisciplinary Works (review of applications): This meeting will be closed.

Date and time: December 7, 2023; 3:00 p.m. to 5:00 p.m.

Local Arts Agencies (review of applications): This meeting will be closed.

Date and time: December 7, 2023; 3:30 p.m. to 5:30 p.m.

Museums (review of applications): This meeting will be closed.

Date and time: December 12, 2023; 11:30 a.m. to 1:30 p.m.

Folk and Traditional Arts (review of applications): This meeting will be closed.

Date and time: December 12, 2023; 2:00 p.m. to 4:00 p.m.

Museums (review of applications): This meeting will be closed.

Date and time: December 12, 2023; 2:30 p.m. to 4:30 p.m.

Museums (review of applications): This meeting will be closed.

Date and time: December 13, 2023; 11:30 a.m. to 1:30 p.m.

Folk and Traditional Arts (review of applications): This meeting will be closed.

Date and time: December 13, 2023; 2:00 p.m. to 4:00 p.m.

Museums (review of applications): This meeting will be closed.

Date and time: December 13, 2023; 2:30 p.m. to 4:30 p.m.

Dated: November 13, 2023.

David Travis,

Specialist, National Endowment for the Arts.

[FR Doc. 2023-25369 Filed 11-16-23; 8:45 am]

BILLING CODE 7537-01-P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meetings

The National Science Board's Committee on Strategy's Subcommittee on Technology, Innovation and Partnerships hereby gives notice of the scheduling of a teleconference for the transaction of National Science Board business pursuant to the NSF Act and the Government in the Sunshine Act.

TIME AND DATE: Tuesday, November 21, 2023, from 3:30–4:30 p.m. Eastern.

PLACE: This meeting will be via videoconference through the National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314.

STATUS: Closed

MATTERS TO BE CONSIDERED: The agenda is:

- Subcommittee Chair's opening remarks regarding the agenda
- Discussion of Draft TIP Roadmap
- Discussion of NSF's Regional Innovation Engines 2 Portfolio

CONTACT PERSON FOR MORE INFORMATION:

Point of contact for this meeting is: Chris Blair, cblair@nsf.gov, 703/292-7000. Meeting information and updates may be found at www.nsf.gov/nsb.

Christopher Blair,

Executive Assistant to the National Science Board Office.

[FR Doc. 2023-25608 Filed 11-15-23; 4:15 pm]

BILLING CODE 7555-01-P

OFFICE OF PERSONNEL MANAGEMENT

Federal Prevailing Rate Advisory Committee Virtual Public Meeting

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: According to the provisions of section 10 of the Federal Advisory Committee Act, notice is hereby given that a virtual meeting of the Federal Prevailing Rate Advisory Committee will be held on Thursday, December 21, 2023. There will be no in-person gathering for this meeting.

DATES: The virtual meeting will be held on December 21, 2023, beginning at 10:00 a.m. (ET).

ADDRESSES: The meeting will convene virtually.

FOR FURTHER INFORMATION CONTACT: Ana Paunoiu, 202-606-2858, or email pay-leave-policy@opm.gov.

SUPPLEMENTARY INFORMATION: The Federal Prevailing Rate Advisory Committee is composed of a Chair, five representatives from labor unions holding exclusive bargaining rights for Federal prevailing rate employees, and five representatives from Federal agencies. Entitlement to membership on the Committee is provided for in 5 U.S.C. 5347.

The Committee's primary responsibility is to review the Prevailing Rate System and other matters pertinent to establishing prevailing rates under subchapter IV, chapter 53, 5 U.S.C., as amended, and from time to time advise the Office of Personnel Management.

Annually, the Chair compiles a report of pay issues discussed and concluded recommendations. These reports are available to the public. Reports for calendar years 2008 to 2022 are posted

at <http://www.opm.gov/fprac>. Previous reports are also available, upon written request to the Committee.

The public is invited to submit material in writing to the Chair on Federal Wage System pay matters felt to be deserving of the Committee's attention. Additional information on these meetings may be obtained by contacting the Committee at Office of Personnel Management, Federal Prevailing Rate Advisory Committee, Room 7H31, 1900 E Street NW, Washington, DC 20415, (202) 606-2858.

This meeting is open to the public, with an audio option for listening. This notice sets forth the agenda for the meeting and the participation guidelines.

Meeting Agenda. The tentative agenda for this meeting includes the following Federal Wage System items:

- The definition of Monroe County, PA.
- The definition of San Joaquin County, CA.
- The definition of the Salinas-Monterey, CA, wage area.
- The definition of the Puerto Rico wage area.

Public Participation: The December 21, 2023, meeting of the Federal Prevailing Rate Advisory Committee is open to the public through advance registration. Public participation is available for the meeting. All individuals who plan to attend the virtual public meeting to listen must register by sending an email to pay-leave-policy@opm.gov with the subject line "December 21, 2023" no later than Tuesday, December 19, 2023.

The following information must be provided when registering:

- Name.
- Agency and duty station.
- Email address.
- Your topic of interest.

Members of the press, in addition to registering for this event, must also RSVP to media@opm.gov by December 19, 2023.

A confirmation email will be sent upon receipt of the registration. Audio teleconference information for participation will be sent to registrants the morning of the virtual meeting.

Office of Personnel Management.

Kayyonne Marston,
Federal Register Liaison.

[FR Doc. 2023-25389 Filed 11-16-23; 8:45 am]

BILLING CODE 6325-49-P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2024-50 and CP2024-50; MC2024-51 and CP2024-51]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* November 20, 2023.

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

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

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Introduction
- II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (<http://www.prc.gov>). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.¹

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).*: MC2024-50 and CP2024-50; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 104 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 9, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* November 20, 2023.

2. *Docket No(s).*: MC2024-51 and CP2024-51; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 105 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 9, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* November 20, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,
Secretary.

[FR Doc. 2023-25374 Filed 11-16-23; 8:45 am]

BILLING CODE 7710-FW-P

¹ See Docket No. RM2018-3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19-22 (Order No. 4679).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98905; File No. SR–ISE–2023–11]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Order Approving a Proposed Rule Change To Amend the Short Term Option Series Program To Permit the Listing of Two Wednesday Expirations for Options on Certain Exchange Traded Products

November 13, 2023.

I. Introduction

On May 31, 2023, Nasdaq ISE, LLC (“Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”) ¹ and Rule 19b–4 thereunder,² a proposed rule change to amend the Exchange’s short term option series program (“Short Term Option Series Program”) in Supplementary Material .03 of Options 4, Section 5 (Series of Options Contracts Open for Trading). The proposed rule change was published for comment in the **Federal Register** on June 20, 2023.³ On August 2, 2023, the Commission designated a longer period within which to act on the proposed rule change.⁴ On September 15, 2023, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change.⁵

This order approves the proposed rule change.

II. Description of the Proposal⁶

Currently, the Exchange may open for trading series of options on certain symbols that expire at the close of business on each of the next two Mondays, Tuesdays, Wednesdays, and Thursdays, respectively, that are business days and are not business days in which monthly options series or Quarterly Options Series expire (“Short Term Option Daily Expirations”).⁷ The

Exchange proposes to expand the Short Term Option Series Program⁸ to permit the listing of two Wednesday expirations for options on the United States Oil Fund, LP, United States Natural Gas Fund, LP, SPDR Gold Shares, iShares Silver Trust, and iShares 20+ Year Treasury Bond ETF (collectively, “Wednesday ETP Expirations”).⁹

According to the Exchange, the Wednesday ETP Expirations would be similar to the existing Short Term Option Daily Expirations in that the Exchange may open for trading on any Tuesday or Wednesday that is a business day (beyond the current week)¹⁰ series of options on the ETPs that expire on any Wednesday of the month that is a business day and is not a Wednesday in which Quarterly Options Series expire.¹¹ And like Short Term Option Daily Expirations, in the event that Wednesday ETP Expirations would expire on a Wednesday, and that Wednesday is the same day that a Quarterly Options Series expires, the Exchange would skip that week’s listing and instead list the following week; the two weeks would therefore not be consecutive. Options on each of the ETPs with Friday expirations would

than a total of two Monday and Wednesday expirations on the iShares Russell 2000 ETF (“IWM”) and no more than a total of two Monday, Tuesday, Wednesday, and Thursday expirations on the SPDR S&P 500 ETF Trust (“SPY”) and the Invesco QQQ Trust (“QQQ”). See Table 1, Supplementary Material .03 to Options 4, Section 5.

⁸ Options 1, Section 1(a)(49) provides that a Short Term Option Series means a series in an option class that is approved for listing and trading on the Exchange in which the series is opened for trading on any Monday, Tuesday, Wednesday, Thursday or Friday that is a business day and that expires on the Monday, Tuesday, Wednesday, Thursday, or Friday of the following business week that is a business day, or, in the case of a series that is listed on a Friday and expires on a Monday, is listed one business week and one business day prior to that expiration. If a Tuesday, Wednesday, Thursday or Friday is not a business day, the series may be opened (or shall expire) on the first business day immediately prior to that Tuesday, Wednesday, Thursday or Friday. For a series listed pursuant to this section for Monday expiration, if a Monday is not a business day, the series shall expire on the first business day immediately following that Monday.

⁹ The United States Oil Fund, LP, United States Natural Gas Fund, LP, SPDR Gold Shares, iShares Silver Trust, and iShares 20+ Year Treasury Bond ETF are referred to collectively as the “ETPs.”

¹⁰ The Exchange proposes to clarify the rule text in Supplementary Material .03 to Options 4, Section 5 to specify that it can list two Short Term Option Expiration Dates beyond the current week for each Monday, Tuesday, Wednesday, and Thursday expiration. Consistent with the current operation of the rule, the Exchange states that if it adds a Wednesday expiration (“Wednesday Expiration”) on a Tuesday, there would be three outstanding Wednesday Expirations at one time. See Notice, *supra* note 3, 88 FR at 39877, n.4.

¹¹ See *id.* at 39877.

continue to have a total of five Short Term Option Expiration Dates, provided those Friday expirations are not Fridays in which monthly options series or Quarterly Options Series expire. The interval between strike prices for the proposed Wednesday ETP Expirations would be the same as those for the current Short Term Option Series for Friday expirations applicable to the Short Term Option Series Program.¹² As is the case with other equity options series listed pursuant to the Short Term Option Series Program, the Wednesday ETP Expirations series would be P.M.-settled.

In support of its proposal, the Exchange represents that it has an adequate surveillance program in place to detect manipulative trading in the proposed option expirations, in the same way that it monitors trading in the current Short Term Option Daily Expirations.¹³ The Exchange also represents that it has the necessary system capacity to support and properly monitor trading in the proposed new expirations.¹⁴ Additionally, the Exchange states that it does not believe that any market disruptions will be encountered with the introduction of these proposed option expirations.¹⁵ The Exchange currently trades Short Term Option Daily Expirations on SPY, QQQ, and IWM, including Wednesday Expirations, and states that it has not experienced any market disruptions nor issues with capacity.¹⁶ Further, the Exchange provides data comparing the ETPs to SPY, QQQ, and IWM, which have Wednesday Expirations today.¹⁷ According to the Exchange, the occurrence of the ETPs moving through at least one strike price after the close of trading has been less frequent than for SPY, QQQ, and IWM. In addition, the average annualized closing volatility in the last thirty minutes of trading for the ETPs has historically been lower than that of SPY, QQQ, and IWM.¹⁸ Finally, the Exchange states that the ETPs trade within “complexes” where, in addition to the underlying security, there are multiple highly-correlated instruments available for hedging.¹⁹ Therefore, the Exchange believes the

¹² The Wednesday ETP Expirations would have a strike interval of \$0.50 or greater for strike prices below \$100, \$1 or greater for strike prices between \$100 and \$150, and \$2.50 or greater for strike prices above \$150.

¹³ See *id.* at 39884.

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *id.* at 39878.

¹⁷ See *id.* at 39882–83.

¹⁸ See *id.* at 39883.

¹⁹ See *id.* at 39884.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 97719 (June 13, 2023), 88 FR 39876 (“Notice”).

⁴ See Securities Exchange Act Release No. 98040, 88 FR 53569 (August 8, 2023) (designating September 18, 2023, as the date by which the Commission shall either approve, disapprove, or institute proceedings to determine whether the proposed rule change should be disapproved).

⁵ See Securities Exchange Act Release No. 98409, 88 FR 65208 (September 21, 2023). Comments on the proposed rule change are available at: <https://www.sec.gov/comments/sr-ise-2023-11/sr-ise202311.htm>.

⁶ For a full description of the proposal, refer to the Notice, *supra* note 3.

⁷ See Supplementary Material .03 to Options 4, Section 5. Currently, the Exchange may list no more

proposal would not be a strain on liquidity providers.²⁰

III. Discussion and Commission Findings

The Commission received one supportive comment on the proposed rule change from a market maker. The commenter states that there is a great amount of liquidity in the Short Term Option Daily Expirations, and they do not cause market disruption and may be used to hedge more narrowly defined risks.²¹ The commenter expects that the proposed Wednesday ETP Expirations to exhibit the same characteristics and provide the same benefits.²²

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, with Section 6(b) of the Act.²³ The Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,²⁴ which requires, among other things, that a national securities exchange have rules designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

As noted above, the Exchange currently has Wednesday Expirations for SPY, QQQ, and IWM. The Exchange proposes to limit the listing of additional Wednesday Expirations to the five ETPs, which generally have similar or lower volatility in terms of post-closing and end of day volatility as SPY, QQQ, and IWM. And, like SPY, QQQ, and IWM, the ETPs have multiple highly-correlated instruments available for hedging. In addition, the Wednesday ETP Expirations will be subject to the same rules for Wednesday Expirations in SPY, QQQ, and IWM. Further, as noted above, the commenter expects that the proposed Wednesday ETP

Expirations to exhibit the same characteristics and provide the same benefits as existing Short Term Option Daily Expirations in SPY, QQQ, and IWM.²⁵ The Exchange's proposal is reasonably designed as a limited expansion of Wednesday Expirations and may provide the investing public and other market participants more flexibility to closely tailor their investment and hedging decisions using options on these ETPs, thus allowing them to better manage their risk exposure. Further, the Exchange has represented that it has an adequate surveillance program in place to detect manipulative trading in the Wednesday ETP Expirations and has the necessary systems capacity to support the new options series.²⁶ The proposal, which would overall add a small number of Wednesday ETP Expirations by limiting the additional Wednesday Expirations to five ETPs and to two weeks beyond the current week, reasonably balances the Exchange's desire to offer a wider array of investment opportunities with the need to avoid unnecessary proliferation of options series.

Therefore, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act²⁷ and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²⁸ that the proposed rule change (SR-ISE-2023-11), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁹

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-25378 Filed 11-16-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98913; File No. SR-CboeBZX-2023-091]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

November 13, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 1, 2023, Cboe BZX Exchange, Inc. (the "Exchange" or "BZX") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the "Exchange" or "BZX") proposes to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/options/regulation/rule_filings/bzx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

²⁰ See *id.*

²¹ See letter from Richard J. McDonald, Susquehanna International Group, LLP (October 20, 2023).

²² See *id.*

²³ 15 U.S.C. 78f(b). In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁴ 15 U.S.C. 78f(b)(5).

²⁵ See *supra* note 22 and accompanying text.

²⁶ See *supra* notes 13 and 14, and accompanying text.

²⁷ 15 U.S.C. 78f(b)(5).

²⁸ 15 U.S.C. 78s(b)(2).

²⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule, effective November 1, 2023.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 17 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 17% of the market share.³ Thus, in such a low-concentrated and highly competitive market, no single options exchange, including the Exchange, possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. In response to competitive pricing, the Exchange, like other options exchanges, offers rebates and assesses fees for certain order types executed on or routed through the Exchange.

The Exchange's fee schedule sets forth standard rebates and rates applied per contract. For example, the Exchange provides a rebate of \$0.29 per contract for Market Maker orders that add liquidity in Penny Securities, yielding fee code PM. Additionally, in response to the competitive environment, the Exchange also offers tiered pricing, which provides Members opportunities to qualify for higher rebates or reduced fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria. For example, the Exchange currently offers five Market Maker Penny Add Volume

Tiers ("MM Penny Add Tier") under footnote 6 of the Fee Schedule which provide rebates between \$0.31 and \$0.43 per contract for qualifying Market Maker orders which meet certain add liquidity thresholds and yield fee code PM.

The Exchange proposes to amend the criteria for one of the MM Penny Add Tiers, specifically the Market Maker Cross-Asset Add Tier, which requires participation on the Exchange's equities platform ("BZX Equities"). Under this tier, the Exchange currently provides a rebate of \$0.38 per contract where a Member (1) has an ADAV⁴ in Market Maker orders greater than or equal to 0.05% of average OCV;⁵ (2) has on BZX Equities an ADAV greater than or equal to 0.35% of average TCV;⁶ and (3) is the Lead Market Maker ("LMM")⁷ on BZX Equities in at least 50 equity symbols. The Exchange proposes to amend the criteria for this Market Maker Cross-Asset Add Tier.⁸ Under the proposed criteria, the Exchange will provide a rebate of \$0.38 per contract where a Member (1) has an ADAV in Market Maker orders greater than or equal to 0.10% of average OCV; (2) has on BZX Equities an ADAV greater than or equal to 0.40% of average TCV; and (3) is the LMM on BZX Equities in at least 50 equity symbols.

Additionally, the Exchange proposes to adopt a new MM Penny Add Tier, specifically Market Maker Cross-Asset Add Tier 2, which also requires participation on BZX Equities.⁹ Under the proposed tier, the Exchange would provide a rebate of \$0.39 per contract where a Member (1) has an ADAV in Market Maker orders greater than or equal to 0.20% of average OCV; (2) has on BZX Equities an ADAV greater than or equal to 0.45% of average TCV; and

⁴ "ADAV" means average daily added volume calculated as the number of contracts added.

⁵ "OCV" means the total equity and ETF options volume that clears in the Customer range at the Options Clearing Corporation ("OCC") for the month for which the fees apply, excluding volume on any day that the Exchange experiences an Exchange System Disruption and on any day with a scheduled early market close.

⁶ "TCV" means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

⁷ "Lead Market Maker" means a Market Maker registered with the Exchange for a particular LMM Security that has committed to maintain Minimum Performance Standards in the LMM Security. See Rule 11.8(e).

⁸ As part of this proposed rule change, the Exchange proposes to rename this Market Maker Cross-Asset Tier as Market Maker Cross-Asset Tier 1.

⁹ The Exchange proposes to add this Tier as described in the table in Footnote 6 and to the amounts of the rebates in the Standard Rates table.

(3) is the LMM on BZX Equities in at least 50 equity symbols.

The Exchange believes the amended tier criteria for Market Maker Cross-Asset Tier 1 and the proposed Market Maker Cross-Asset Tier 2, along with the existing MM Penny Add Tiers, continue to provide an incremental incentive for Members to strive for the highest tier levels, which provide increasingly higher rebates for such transactions. The proposed thresholds for Market Maker Cross-Asset Tiers 1 and 2 include thresholds relating to ADAV in Market Maker orders and cross-asset thresholds, which are designed to incentivize Members to achieve certain levels of participation on both the Exchange's options and equities platforms. Overall, the MM Penny Add Tiers, including the Market Maker Cross-Asset Tiers, are designed to encourage Members to increase their order flow, thereby contributing to a deeper and more liquid market, which benefits all market participants and provides greater execution opportunities on the Exchange.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.¹⁰ Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)¹¹ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)¹² requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4) of the Act,¹³ which requires that Exchange rules provide for the equitable allocation of reasonable

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(5).

¹² *Id.*

¹³ 15 U.S.C. 78f(b)(4).

³ See Cboe Global Markets U.S. Options Monthly Market Volume Summary (October 30, 2023), available at https://markets.cboe.com/us/options/market_statistics/.

dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

In particular, the Exchange believes the proposed changes to the MM Penny Add Tiers are reasonable because they provide additional opportunities for Members to receive a rebate by providing alternative criteria for which they can reach. The Exchange notes that volume-based incentives and discounts have been widely adopted by exchanges,¹⁴ including the Exchange,¹⁵ and are reasonable, equitable and non-discriminatory because they are open to all Members on an equal basis and provide additional benefits or discounts that are reasonably related to (i) the value to an exchange's market quality and (ii) associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns. Additionally, as noted above, the Exchange operates in a highly competitive market. The Exchange is only one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. Competing options exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates and fees that apply based upon Members achieving certain volume and/or growth thresholds. These competing pricing schedules, moreover, are presently comparable to those that the Exchange provides.

Moreover, the Exchange believes the proposed MM Penny Add Tier, namely Market Maker Cross-Asset Tier 2, is a reasonable means to encourage Members to increase their liquidity on the Exchange and also their participation on BZX Equities. The Exchange believes that adopting tiers with alternative criteria to the existing MM Penny Add Tiers may encourage those Members who could not previously achieve the criteria under existing MM Penny Add Tiers to increase their order flow on BZX Options and Equities.

For example, the proposed Cross-Asset Tier 2 would provide an opportunity for Members who have an ADAV in Market Maker orders of at least 0.20% of average OCV, but less than the more stringent 0.45% of

average OCV (the requirement under current Tier 3), to receive a higher rebate than they may currently receive but equal or slightly lower than the rebate they would receive for reaching the more stringent criteria under current Tiers 3 through 4, if they also meet the threshold requirements based on BZX Equities participation. Similarly, for Market Makers that participate on both BZX Options and Equities, and do not currently meet the 0.35% ADAV threshold under current Tier 2, but can or do meet the proposed equities thresholds, the proposed tier may incentivize those participants to grow their options volume in order to receive enhanced rebates. Increased liquidity benefits all investors by deepening the Exchange's liquidity pool, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection. The Exchange also believes that proposed enhanced rebate is reasonable based on the difficulty of satisfying the tier's criteria and ensures the proposed rebate and thresholds appropriately reflect the incremental difficulty to achieve the existing MM Penny Add Tiers.

The proposed enhanced rebate amounts also do not represent a significant departure from the enhanced rebates currently offered under the Exchange's existing MM Penny Add Tiers. Indeed, the proposed enhanced rebate amount under the proposed Cross-Asset Add Tier 2 (\$0.39) is incrementally higher than current Tiers 1 and 2 (\$0.31 and \$0.38, respectively), which the Exchange believes offer slightly less stringent criteria than the proposed Cross-Asset Add Tier 2, but is incrementally lower than the rebate offered under existing Tier 4 (\$0.43), which the Exchange believes is more stringent than the proposed criteria under the proposed Cross-Asset Tier 2. Similarly, the proposed enhanced rebate amount under the proposed Cross-Asset Tier 2 (\$0.39) is the same as current Tier 3 (\$0.39), which the Exchange believes reflects a similar level of difficulty but using alternative types of criteria. Finally, the proposed enhanced rebate amount under the proposed Cross-Asset Tier 2 (\$0.39) is incrementally higher than the rebate offered under existing Cross-Asset Add Tier 1, which the Exchange believes is less stringent than the proposed criteria than the proposed Cross-Asset Add Tier 2. The Exchange also notes that the proposed rebates remain within the range of the enhanced rebates offered under the current MM Penny Add Tiers (*i.e.*, \$0.31–\$0.43).

Further, the Exchange believes that the amended criteria for Market Maker Cross-Asset Tier 1 is a reasonable, as such changes are designed to encourage Members to increase their liquidity on the Exchange and also their participation on BZX Equities to continue to achieve the rebate offered under Market Maker Cross-Asset Tier 1. The Exchange notes that increased Market Maker activity (including LMMs), particularly, facilitates tighter spreads and an increase in overall liquidity provider activity, both of which signal additional corresponding increase in order flow from other market participants, contributing towards a robust, well-balanced market ecosystem. Indeed, increased overall order flow benefits investors across both the Exchange's options and equities platforms by continuing to deepen the Exchange's liquidity pool, potentially providing even greater execution incentives and opportunities, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection.

The Exchange believes that the proposal represents an equitable allocation of fees and is not unfairly discriminatory because it applies uniformly to all Market Makers. Additionally, a number of Market Makers have a reasonable opportunity to satisfy the criteria of the proposed Cross-Asset Add Tier 2, which the Exchange believes is less stringent than the existing MM Penny Add Tiers 3 and 4, and the criteria of Cross-Asset Add Tier 1, as amended, which the Exchange believes is less stringent than MM Penny Add Tier 1. While the Exchange has no way of knowing whether this proposed rule change would definitively result in any particular Market Maker qualifying for the proposed tiers, the Exchange anticipates that approximately one Market Maker will be able to compete for and achieve the proposed criteria of Cross-Asset Add Tier 1 and approximately one Market Maker will be able to compete for and achieve the proposed criteria of the proposed Cross-Asset Add Tier 2; however, the proposed tiers are open to any Market Maker that satisfies the applicable tiers' criteria. The Exchange believes the proposed tiers could provide an incentive for other Members to submit additional liquidity on BZX Options and Equities to qualify for the proposed enhanced rebates. To the extent a Member participates on the Exchange but not on BZX Equities, the Exchange does believe that the proposal

¹⁴ See *e.g.*, Cboe EDGX U.S. Options Exchange Fee Schedule, Footnote 2, Market Maker Volume Tiers, which provide reduced fees between \$0.02 and \$0.17 per contract for Market Maker Penny and Non-Penny orders where Members meet certain volume thresholds.

¹⁵ See *e.g.*, Cboe BZX U.S. Options Exchange Fee Schedule, Footnotes 6 and 7, Market Maker Penny and Non-Penny Volume Tiers which provide enhanced rebates for Market Maker orders where Members meet certain volume thresholds.

is still reasonable, equitably allocated and non-discriminatory with respect to such Member based on the overall benefit to the Exchange resulting from the success of BZX Equities.

Particularly, the Exchange believes such success allows the Exchange to continue to provide and potentially expand its existing incentive programs to the benefit of all participants on the Exchange, whether they participate on BZX Equities or not. The proposed pricing program is also fair and equitable in that membership in BZX Equities is available to all market participants, which would provide them with access to the benefits on BZX Equities provided by the proposed change, even where a member of BZX Equities is not necessarily eligible for the proposed enhanced rebates on the Exchange.

The Exchange also notes that it does not believe the proposed tier will adversely impact any Member's pricing or ability to qualify for other tiers. Rather, should a Member not meet the proposed criteria, the Member will merely not receive the proposed enhanced rebate, and has four alternative choices to aim to achieve under the MM Penny Add Tiers. Furthermore, the proposed enhanced rebate would apply to all Members that meet the required criteria under proposed tier.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe the proposed changes to the MM Penny Add Tiers will impose any burden on intramarket competition. Particularly, the proposed change applies uniformly to all Market Makers. As discussed above, to the extent a Member participates on the Exchange but not on BZX Equities, the Exchange notes that the proposed changes can provide an overall benefit to the Exchange resulting from the success of BZX Equities. Such success enables the Exchange to continue to provide and potentially expand its existing incentive programs to the benefit of all participants on the Exchange, whether they participate on BZX Equities or not. The proposed pricing program is also fair and equitable in that membership in BZX Equities is available to all market participants. Additionally, the proposed change is designed to attract additional order flow to the Exchange and BZX Equities. Greater liquidity benefits all

market participants on the Exchange by providing more trading opportunities and encourages Members to send orders, thereby contributing to robust levels of liquidity, which benefits all market participant. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."¹⁶

The Exchange does not believe that the proposed rule changes will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including 17 other options exchanges and off-exchange venues. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 17% of the market share.¹⁷ Therefore, no exchange possesses significant pricing power in the execution of option order flow. Indeed, participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."¹⁸ The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: "[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of

where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . .".¹⁹ Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act²⁰ and paragraph (f) of Rule 19b-4²¹ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBZX-2023-091 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange

¹⁶ Securities Exchange Act Release No. 51808, 70 FR 37495, 37498-99 (June 29, 2005) (S7-10-04) (Final Rule).

¹⁷ See *supra* note 3.

¹⁸ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

¹⁹ *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

²⁰ 15 U.S.C. 78s(b)(3)(A).

²¹ 17 CFR 240.19b-4(f).

Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeBZX–2023–091. 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–CboeBZX–2023–091 and should be submitted on or before December 8, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023–25383 Filed 11–16–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98906; File No. SR–BOX–2023–25]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule for Trading on the BOX Options Market LLC Facility To Amend Sections IV.A (Non-Auction Transactions) and IV.A.1 (Tiered Volume Rebate for Non-Auction Transactions)

November 13, 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 November 1, 2023, BOX Exchange LLC (“Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to section 19(b)(3)(A)(ii) of the Act,³ and Rule 19b–4(f)(2) thereunder,⁴ which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange is filing with the Securities and Exchange Commission (“Commission”) a proposed rule change to amend Section IV.A (Non-Auction Transactions) and Section IV.A.1 (Tiered Volume Rebate for Non-Auction Transactions) of the Fee Schedule on the BOX Options Market LLC (“BOX”) options facility. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's internet website at <https://rules.boxexchange.com/rulefilings>.

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 Section IV.A (Non-Auction Transactions) and Section IV.A.1 (Tiered Volume Rebate for Non-Auction Transactions) of the BOX Fee Schedule. First, the Exchange proposes to increase Public Customer taker fees on transactions for options overlying the Standard and Poor's Depository Receipts Trust (“SPY”) in Section IV.A.⁵ Next, the Exchange proposes to reduce Tier 4 rebates and establish a new Tier 5 in the Tiered Volume Rebate for Non-Auction Transactions for Percentage National Customer Volume in Multiply-Listed Options Classes.

Non-Auction Transactions

In Section IV.A of the BOX Fee Schedule, fees and credits for Electronic Non-Auction Transactions are assessed depending on three factors: (i) the account type of the Participant submitting the order; (ii) whether the Participant is a liquidity provider or liquidity taker; and (iii) the account type of the contra party. Currently, when a Public Customer SPY order is a liquidity taker contra to a Professional Customer, Broker Dealer, or a Market Maker, the Public Customer is assessed no fee. The Exchange now proposes to increase Public Customer taker fees on SPY Non-Auction Transactions. Accordingly, when a Public Customer SPY order is a liquidity taker contra to a Professional Customer, Broker Dealer, or a Market Maker, the Public Customer will be assessed a fee of \$0.10.

Tiered Volume Rebate for Non-Auction Transactions

The Exchange also proposes to amend Section IV.A.1 of the Fee Schedule. Specifically, the Exchange proposes to add a Tier and to adjust the Percentage Thresholds of National Customer Volume in Multiply-Listed Options Classes. Currently, Public Customers

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b–4(f)(2).

⁵ Options overlying Standard and Poor's Depository Receipts/SPDRs (“SPY”) are based on the SPDR exchange-traded fund (“ETF”), which is designed to track the performance of the S&P 500 Index.

²² 17 CFR 200.30–3(a)(12).

receive a per contract rebate for electronic Non-Auction Transactions according to the Tier achieved by the Public Customer as provided in the Percentage Thresholds of National Customer Volume in Multiply-Listed Options Classes table in Section IV.A.1 of the BOX Fee Schedule.⁶ Percentage

thresholds are calculated on a monthly basis by totaling the Public Customer's executed Auction and Non-Auction transaction volume on BOX, relative to the total national customer volume in multiply-listed options classes.

The Exchange notes that Non-Auction Transactions where a Public Customer

order interacts with another Public Customer order are exempt from a per contract rebate. However, these transactions still count toward the Public Customer's monthly volume on BOX. The current thresholds and rebates are as follows:

Tier	Percentage thresholds of national customer volume in multiply-listed options classes (monthly)	Per contract rebate				SPY	
		Penny interval classes		Non-penny interval classes			
		Maker	Taker	Maker	Taker	Maker	Taker
1	0.000–0.249	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
2	0.250–0.499	(0.05)	(0.15)	(0.15)	(0.27)	(0.05)	0.00
3	0.500–0.749	(0.10)	(0.20)	(0.30)	(0.32)	(0.10)	0.00
4	0.750 and Above	(0.27)	(0.27)	(0.60)	(0.40)	(0.27)	0.00

The Exchange proposes to modify Tier 4 from 0.750% and Above to 0.750%–0.999% and to establish Tier 5 which will be 1.000% and Above. The Exchange also proposes to reduce Tier 4 rebates to \$0.20 and \$0.22 for Maker and Taker respectively in Penny Interval

Classes, \$0.45 and \$0.35 for Maker and Taker respectively in Non-Penny Interval Classes, and \$0.20 and \$0.00 for Maker and Taker respectively in SPY. Finally, the Exchange proposes to establish Tier 5 rebates of \$0.27 and \$0.27 for Maker and Taker respectively

in Penny Interval Classes, \$0.60 and \$0.40 for Maker and Taker respectively in Non-Penny Interval Classes, and \$0.27 and \$0.11 for Maker and Taker respectively in SPY. The proposed rebate structure is as follows:

Tier	Percentage thresholds of national customer volume in multiply-listed options classes (monthly)	Per contract rebate					
		Penny interval classes		Non-penny interval classes		SPY	
		Maker	Taker	Maker	Taker	Maker	Taker
1	0.000–0.249	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
2	0.250–0.499	(0.05)	(0.15)	(0.15)	(0.27)	(0.05)	0.00
3	0.500–0.749	(0.10)	(0.20)	(0.30)	(0.32)	(0.10)	0.00
4	0.750–0.999	(0.20)	(0.22)	(0.45)	(0.35)	(0.20)	0.00
5	1.000 and Above	(0.27)	(0.27)	(0.60)	(0.40)	(0.27)	(0.11)

The Exchange notes that the proposed SPY taker fees are lower than comparable taker fees at several other exchanges.⁷ The Exchange notes further that other exchanges employ similar incentive programs; and the Exchange believes that the proposed changes are reasonable and competitive when compared to incentive structures at other exchanges.⁸

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of section 6(b) of the Act, in general, and section 6(b)(4) and 6(b)(5) of the Act,⁹ in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among BOX Participants and

other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange notes that it operates in a highly competitive environment. Indeed, there are currently 17 registered options exchanges that trade options. Based on publicly available information, no single options exchange has more than 21% of the market share and currently the Exchange represents only approximately 7% of the market share.¹⁰ The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices

and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹¹ As stated above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The proposed fee changes reflect a competitive pricing structure designed to incentivize Public Customer electronic non-auction order flow to BOX.

⁶ The Exchange notes that Public Customers do not initiate transactions on BOX directly. BOX Participants initiate Electronic Non-Auction Transactions on the behalf of Public Customers and are assessed fees or provided rebates by the Exchange.

⁷ See e.g., Nasdaq PHLX LLC, Options 7, Section 3 Part A. (“Simple Order” Customer fee for removing SPY liquidity of \$0.41); Cboe C2 Exchange, Inc. Fee Schedule (“Transaction Fees” applicable to SPY for Public Customer Remove rates

of \$0.37); MIAX PEARL, LLC Fee Schedule (“Transaction Rebates/Fees” for Priority Customer SPY Taker in Tier 1 of \$0.46).

⁸ See Nasdaq PHLX LLC (“Nasdaq PHLX”) Options 7, Section 2 (Customer Rebate Program) and Cboe Exchange, Inc. (“CBOE”) Fee Schedule (Volume Incentive Program). The Exchange notes that these programs use different tier structures, volume calculations, and rebate amounts, however, their rebate programs operate similarly to BOX's in

that they are driven by volume and designed to incentivize Public Customer order flow.

⁹ 15 U.S.C. 78f(b)(4) and (5).

¹⁰ See Cboe Global Markets U.S. Options Market Month-to-Date Volume Summary (September 29, 2023), available at https://markets.cboe.com/us/options/market_statistics/.

¹¹ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

Non-Auction Transactions

The Exchange believes the proposed electronic Non-Auction transaction taker fees for Public Customer SPY transactions are reasonable as the proposed taker fees are lower than similar transaction fees assessed at other exchanges.¹² The Exchange further believes that the proposed SPY taker fee for electronic Non-Auction Public Customer transactions will not disincentivize Public Customer order flow because BOX's electronic Non-Auction Transactions fee structure is designed to attract competitive quotes and orders, which results in liquid markets that Public Customers may find attractive. Specifically, the Exchange assesses no fees for Public Customers that make liquidity in SPY and, no fees for Market Makers that make liquidity in SPY, which incentivizes competitive quotes and resting orders. The Exchange believes that Public Customers may be willing to pay a nominal taker fee of \$0.10 to access such competitive markets. The Exchange notes that other exchanges assess fees between \$0.37 and \$0.46 for customer transactions taking liquidity in SPY.¹³

The Exchange believes that assessing Public Customers a taker fee of \$0.10 for SPY electronic Non-Auction Transactions is equitable and not unfairly discriminatory. The Exchange notes that Professional Customer, Broker Dealer, and Market Maker taker fees for SPY electronic Non-Auction Transactions are \$0.50. The securities markets generally, and BOX in particular, have historically aimed to improve markets for investors and develop various features within the market structure for Public Customer benefit. Accordingly, the Exchange believes that charging a lower taker fee for Public Customers for their SPY transactions compared to other account types on BOX is appropriate and not unfairly discriminatory.

Tiered Volume Rebate for Non-Auction Transactions

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to adjust certain percentage thresholds in the volume-based thresholds for Public Customers in electronic Non-Auction Transactions. The volume-based thresholds and applicable rebates are designed to continue to incentivize Public Customers to direct order flow to BOX to obtain the benefit of the rebate, which may in turn benefit all market participants by increasing liquidity on

BOX. The Exchange proposes to amend Tier 4, which was 0.750% and Above, to 0.750%–0.999%, and to add Tier 5 with a threshold of 1.000% and Above. This fee structure is designed to incentivize Public Customers to send their order flow to BOX, which may result in increased trading opportunities and executions on BOX.¹⁴ Further, the Exchange notes that the proposed amendment to the percentage thresholds in the volume-based thresholds for Public Customers in electronic Non-Auction Transactions is not designed to benefit one firm in particular, but, as discussed herein, is designed to further incentivize order flow to BOX. While the Exchange proposes to decrease Tier 4 rebates, the Exchange believes that Public Customers will still benefit from the opportunity to obtain a rebate for their executions on BOX. The Exchange notes that other exchanges employ similar incentive programs; and the Exchange believes that the proposed changes are reasonable and competitive when compared to incentive structures at other exchanges.¹⁵

The Exchange believes that the proposed changes to the thresholds in Tiers 4 and 5 are equitable and not unfairly discriminatory as they are available to all Public Customers, and Public Customers may choose whether or not to take advantage of the percentage thresholds and their applicable rebates. The securities markets generally, and BOX in particular, have historically aimed to improve markets for investors and develop various features within the market structure for Public Customer benefit. Accordingly, the Exchange believes that providing a rebate structure for Public Customers is appropriate and not unfairly discriminatory. Based on its review of competitor exchanges, the Exchange believes that lowering Tier 4 rebates, and adding more difficulty to obtain Tier 5 rebates, will not disincentivize Public Customer order flow. Rather, the Exchange believes that the proposed rebates will continue to help attract a high level of Public Customer order flow to the BOX, which will ultimately benefit all Participants trading on BOX.

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow and discontinue or reduce use of certain categories of

products in response to fee changes. Accordingly, competitive forces constrain options exchange transaction fees. Stated differently, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow. The Exchange believes the proposed changes are a reasonable attempt to effectively compete for electronic Non-Auction Public Customer orders. The Exchange believes that the proposed change may incentivize Public Customer order flow and, in turn, may make BOX a more competitive venue for order execution to the benefit of all Participants. Finally, the Exchange believes the proposed changes are consistent with the Act because, to the extent the modifications permit the Exchange to continue to attract greater volume and liquidity, the proposed changes would improve BOX's overall competitiveness and strengthen market quality for all market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange believes the proposed changes to Public Customer SPY taker fees in the electronic Non-Auction Transactions fee structure will not impose a burden on intramarket competition as BOX believes that the changes will result in Public Customers being charged appropriately for their SPY taker transactions. The proposed change would apply to all similarly situated market participants and, accordingly, the proposed change would not impose a disparate burden on competition among Participants on BOX. The proposed change is designed to assess Public Customers a nominal taker fee for Electronic SPY Non-Auction Transactions. The Exchange notes that Public Customer taker fees remain lower than Professional Customer, Broker Dealer, and Market Maker taker fees because BOX has historically aimed to improve markets for investors and develop various features within the market structure for Public Customer benefit.

The Exchange believes further the proposed changes to Public Customer SPY taker fees in the Electronic Non-Auction Transactions fee structure will not impose a burden on intermarket competition. The Exchange notes that the Non-Auction Transaction fee structure as a whole, including the proposed change, is designed to be competitive with other options

¹² See *supra* note 7.

¹³ See *supra* note 7.

¹⁴ The Exchange notes that BOX Participants collect rebates on behalf of Public Customers and have independent fee arrangements with such Public Customers.

¹⁵ See *supra* note 8.

exchanges and to attract order flow. The Exchange believes the electronic Non-Auction Transactions fee structure, including the proposed change, will remain competitive with other options exchanges and will continue to assess lower Public Customer taker fees than several other exchanges.¹⁶

The Exchange believes the proposed changes to Tier 4 and the addition of Tier 5 in Section IV.A.1 will not impose a burden on competition among various BOX Participants. The Exchange believes that the proposed changes will result in Public Customers being rebated appropriately for their transactions. The Exchange believes further that the proposed rebates will continue to attract Public Customer order flow to the BOX, which will ultimately benefit all Participants trading on BOX.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and rebates to remain competitive with other exchanges. Because competitors are free to modify their own fees and rebates in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee or rebate changes in this market may impose any burden on competition is extremely limited. The Exchange notes that other exchanges provide programs to incentivize customer order flow and that the proposed changes to the volume thresholds remain competitive when compared to incentive structures at other exchanges.¹⁷ For the reasons described above, the Exchange believes that the proposed rule change will encourage intermarket competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Exchange Act¹⁸ and Rule 19b-4(f)(2) thereunder.¹⁹

because it establishes or changes a due, or fee.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further 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-BOX-2023-25 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-BOX-2023-25. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet 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-BOX-2023-25 and should be submitted on or before December 8, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-25379 Filed 11-16-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98915; File No. SR-CBOE-2023-049]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Order Approving a Proposed Rule Change To Adopt Monthly Options Series

November 13, 2023.

I. Introduction

On September 27, 2023, Cboe Exchange, Inc. ("Exchange" or "Cboe Options") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change to amend its rules to accommodate the listing of option series that would expire at the close of business on the last business day of a calendar month ("Monthly Option Series").³ The proposed rule change was published for comment in the **Federal Register** on October 4, 2023.⁴ The Commission did not receive any comment letters and is approving the proposed rule change.

II. Description of the Proposal

Cboe Options proposes to amend its rules to adopt the listing and trading of Monthly Options Series. The proposed rule change will allow Cboe Options to open for trading Monthly Option Series that would expire at the close of business on the last business day of a calendar month.⁴ The Exchange may list

²⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 98593 (September 28, 2023), 88 FR 68833 ("Notice").

⁴ The Exchange also proposes to make a nonsubstantive change to Rules 4.5(d) and 4.13(a)(2)(A) to change current references to "monthly options series" to "standard expiration

¹⁶ See *supra* note 7.

¹⁷ See *supra* note 8.

¹⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁹ 17 CFR 240.19b-4(f)(2).

Monthly Option Series for up to five currently listed option classes that are either index options or options on exchange-traded funds (“ETFs”).⁵ In addition, the Exchange may also list Monthly Option Series on any options classes that are selected by other securities exchanges that employ a similar program under their respective rules. The Exchange may list 12 expirations for Monthly Option Series. Monthly Option Series need not be for consecutive months; however, the expiration date of a nonconsecutive expiration may not be beyond what would be considered the last expiration date if the maximum number of expirations were listed consecutively.⁶ Other expirations in the same class are not counted as part of the maximum numbers of Monthly Option Series expirations for a class.⁷ Monthly Options Series will be p.m.-settled.⁸

The strike price of each Monthly Options Series will be fixed at a price per share, with at least two, but no more than five, strike prices above and at least two, but no more than five, strike prices below the value of the underlying index or price of the underlying security at about the time that a Monthly Options Series is opened for trading on the Exchange.⁹ The Exchange will list strike prices for Monthly Options Series that

options series” (*i.e.*, series that expire on the third Friday of a month), to eliminate potential confusion. The current references to “monthly options series” in those rules are intended to refer to those series that expire on the third Friday of a month, which are generally referred to in the industry as standard expirations.

⁵ The Exchange proposes to amend Rule 4.5(a) and (b) to provide that proposed Rule 4.5(g) will describe how the Exchange will fix a specific expiration date and exercise price for Monthly Option Series and that proposed Rule 4.5(g) will govern the procedures for opening Monthly Options Series, respectively.

⁶ The Exchange notes this provision considers consecutive monthly listings. For example, if it is January 2024 and the Exchange lists Quarterly Options Series in class ABC with expirations in March, June, September, December, and the following March, the Exchange could also list Monthly Options Series in class ABC with expirations in January, February, April, May, July, August, October, and November 2024 and January and February of 2025. *See Notice, supra* note 3 at 68834.

⁷ *See* proposed Rules 4.5(g)(2) and 4.13(a)(2)(C)(ii).

⁸ *See* proposed Rule 4.5(g)(3) and 4.13(a)(2)(C)(iii).

⁹ *See* proposed Rules 4.5(g)(4) and 4.13(a)(2)(C)(iv). The Exchange notes these proposed provisions are consistent with the initial series provision for the Quarterly Options Series program in Rule 4.13(a)(2)(B)(iv). While different than the initial strike listing provision for the Quarterly Options Series program in current Rule 4.5(e)(4), the Exchange believes the proposed provision is appropriate, as it contemplates classes that may have strike intervals of \$5 or greater. *See Notice, supra* note 3 at 68834. For consistency, the Exchange also proposes to amend Rule 4.5(e)(4) to incorporate the same provision for initial series.

are reasonably related to the current price of the underlying security or current index value of the underlying index to which such series relates at about the time such series of options is first opened for trading on the Exchange.¹⁰

Monthly Option Series cannot expire in the same week as a standard expiration series (which expire on the third Friday of a month) in the same class expires. The same, however, is not the case with regards to Short Term Options Series or Quarterly Options Series. In order to account for this, the Exchange proposes to amend Rules 4.5(d) and 4.13(a)(2)(A) to provide that the Exchange will not list a Short Term Options Series in a class on a date on which a Monthly Options Series or Quarterly Options Series expires. Similarly, proposed Rules 4.5(g)(2) and 4.13(a)(2)(C)(ii) provide that no Monthly Options Series may expire on a date that coincides with an expiration date of a Quarterly Options Series in the same index or ETF class. In other words, the Exchange will not list a Short Term Options Series on an index or ETF if a Monthly Options Series on that index or ETF were to expire on the same date, nor will the Exchange list a Monthly Options Series on an ETF or index if a Quarterly Options Series on that index or ETF were to expire on the same date to prevent the listing of series with concurrent expirations.¹¹

With respect to Monthly Options Series added pursuant to proposed Rules 4.5(g)(1) through (6) and 4.13(a)(2)(C)(i) through (iv), the Exchange will, on a monthly basis, review series that are outside a range of five strikes above and five strikes below the current price of the underlying index or security, and delist series with no open interest in both the put and the call series having a: (i) strike higher than the highest strike price with open interest in the put and/or call series for a given expiration month; and (ii) strike lower than the lowest strike price with open interest in the put and/or call

¹⁰ The term “reasonably related to the current price of the underlying security or index value of the underlying index” means that the exercise price is within 30% of the current underlying security price or index value. *See* proposed Rules 4.5(g)(4) and 4.13(a)(2)(C)(iv).

¹¹ The Exchange notes this would not prevent the Exchange from listing a p.m.-settled Monthly Options Series on an index with the same expiration date as an p.m.-settled Short Term Options Series on the same index, both of which may expire on a Friday. In other words, the Exchange may list a p.m.-settled Monthly Options Series on an index concurrent with an a.m.-settled Short Term Options Series on that index. This could not occur with respect to ETFs, as all Short Term Options Series on ETFs are p.m.-settled. *See Notice, supra* note 3 at 68834.

series for a given expiration month.¹² In connection with this delisting policy, if the Exchange identifies series for delisting, the Exchange will notify other options exchanges with similar delisting policies regarding eligible series for delisting and will work with such other exchanges to develop a uniform list of series to be delisted, so as to ensure uniform series delisting of multiply listed Monthly Options Series.¹³ The Exchange also proposes to amend Rules 8.30 through 8.34 to provide that positions in Monthly Options Series will be aggregated with positions in options contracts on the same underlying security or index.¹⁴

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁵ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁶ which requires, among other things, that the Exchange’s rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In support of its proposal, the Exchange states the proposed monthly expirations will allow market

¹² Notwithstanding this delisting policy, customer requests to add strikes and/or maintain strikes in Monthly Options Series in series eligible for delisting will be granted. *See Notice, supra* note 3 at 68834.

¹³ *See* proposed Rules 4.5(g)(7) and 4.13(a)(2)(C)(vii). Pursuant to Rule 8.42, exercise limits for impacted index and ETF classes would be equal to the applicable position limits.

¹⁴ *See* proposed Rules 8.30, Interpretation and Policy .09 (regarding position limits for options on stocks and ETFs), 8.31(e) (regarding position limits for broad-based index options), 8.32(f) (regarding position limits for industry index options), 8.33(c) (regarding position limits for micro narrow-based indexes), and 8.34(c) (regarding position limits for individual stock or ETF based volatility index options). The Exchange notes the proposed rule change adds Interpretation and Policy .09 to Rule 8.30 to state that with respect to options on stocks or ETFs, positions in Short Term Option Series, Monthly Options Series, and Quarterly Options Series shall be aggregated with positions in options contracts on the same underlying security. This is currently true with respect to Short Term Option Series and Quarterly Options Series but was inadvertently omitted from Rule 8.30. *See Notice, supra* note 3 at 68835.

¹⁵ In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

¹⁶ 15 U.S.C. 78f(b)(5).

participants to transact in the index and ETF options listed pursuant to the proposed rule change based on their timing as needed and allow them to tailor their investment and hedging needs more effectively.¹⁷ Further, the Exchange notes the proposed terms of Monthly Options Series, including the limitation to five index and ETF option classes, are substantively the same as the current terms of Quarterly Options Series.¹⁸ The Exchange states that it currently lists Quarterly Options Series in certain index¹⁹ and ETF classes, which expire at the close of business at the end of each calendar quarter, and has not experienced any market disruptions nor issues with capacity.²⁰ The Exchange believes limiting Monthly Options Series to five classes will ensure the addition of these new series will have a negligible impact on the Exchange's and Options Price Reporting Authority's quoting capacity.²¹ The Exchange represents it has the necessary systems capacity to support new options series that will result from the introduction of Monthly Options Series.²²

The Exchange represents its current surveillance programs will apply to Monthly Options Series and will properly monitor trading in the proposed Monthly Options Series.²³ The Exchange's surveillance programs currently in place to support and properly monitor trading in Quarterly Options Series, as well as Short Term Option Series and standard expiration series, will apply to the proposed Monthly Options Series.²⁴ The Exchange believes its surveillances continue to be designed to deter and detect violations of its Rules, including position and exercise limits and possible manipulative behavior, and these surveillances will apply to Monthly Options Series.²⁵ Further, the Exchange does not believe the proposed rule change raises any unique regulatory concerns because existing safeguards—such as position and exercise limits (and the aggregation of options overlying the same index or ETF) and

reporting requirements—would continue to apply.²⁶

As noted above, the Exchange currently has Quarterly Options Series for up to five ETF or index classes. In addition, the Commission recently approved a proposal by the Exchange to permanently establish a Nonstandard Expiration Program, which permits, among other things, the listing and trading of broad-based index options with end of month expirations.²⁷ The Commission believes that the proposed Monthly Options Series, which the Exchange proposes to limit to a total of five ETF or index classes, strikes a reasonable balance between the Exchange's desire to offer a wider array of investment opportunities and the need to avoid unnecessary proliferation of options series and the corresponding increase in quotes. Further, the Exchange has represented that it has an adequate surveillance program in place to detect manipulative trading in the Monthly Options Series and has the necessary systems capacity to support the new options series.²⁸ The Commission expects the Exchange, consistent with its Monthly Options Series delisting policy, to continue to monitor for option series with little or no open interest and trading activity and to act promptly to delist such options in order to mitigate the number of options series with no open interest.

Accordingly, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act²⁹ and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,³⁰ that the proposed rule change (SR-CBOE-2023-049) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³¹

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-25384 Filed 11-16-23; 8:45 am]

BILLING CODE 8011-01-P

²⁶ See *id.*

²⁷ See Securities Exchange Act Release No. 98456 (September 20, 2023), 88 FR 66091 at 66092 (September 26, 2023) (SR-CBOE-2023-020).

²⁸ See *supra* notes 23–25 and accompanying text.

²⁹ 15 U.S.C. 78f(b)(5).

³⁰ 15 U.S.C. 78s(b)(2).

³¹ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98912; File No. SR-NASDAQ-2023-043]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Equity 7, Section 118

November 13, 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 November 1, 2023, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's schedule of credits and fees at Equity 7, Section 118(a) as described further below. The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to (i) eliminate a credit to members for displayed quotes/orders

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

¹⁷ See Notice, *supra* note 3 at 68835.

¹⁸ Compare proposed Rules 4.5(g) and 4.13(a)(2)(C) to Rules 4.5(e) and 4.13(a)(2)(B), respectively. See Notice, *supra* note 3 at 68835.

¹⁹ The Exchange notes it currently lists quarterly expirations on index options pursuant to Rule 4.13(c) (regarding quarterly index expirations).

²⁰ See Notice, *supra* note 3 at 68835.

²¹ See *id.*

²² See *id.*

²³ See *id.*

²⁴ See *id.*

²⁵ See *id.*

(other than Supplemental Orders or Designated Retail Orders) that provide liquidity and (ii) eliminate a fee for routing orders at Equity 7, Section 118(a).

The Exchange proposes to eliminate the \$0.0026 per share executed credit for securities in Tapes A, B, and C offered to a member that, through one or more of its Nasdaq Market Center MPIDs: (i) provides shares of liquidity in all securities that represent equal to or greater than 0.15% of Consolidated Volume; (ii) increases the extent to which it provides liquidity in all securities as a percentage of Consolidated Volume by 20% or more during the month relative to the month of May 2021; and (iii) has a ratio of at least 50% NBBO liquidity provided (as defined in Equity 7, Section 114(g)) to liquidity provided by displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) during the month. The Exchange proposes to eliminate this credit because it is not heavily utilized and includes a baseline month of May 2021 for the growth element of the credit, which is no longer a relevant benchmark. As such, this credit no longer provides a growth incentive that is aligned with the Exchange's needs. The Exchange also seeks to simplify its schedule of credits. The Exchange has limited resources to allocate to incentives and it must, from time to time, reallocate those resources to maximize their net impact on the Exchange, market quality, and participants.

Additionally, the Exchange proposes to eliminate the \$0.01 per order charge for round lot or mixed lot DOTI Orders, incurred when, during the month: (i) a market participant sends an average of more than 10,000 DOTI Orders per day through one or more of its MPIDs; and (ii) the ratio of DOTI Orders to executions exceeds 300 to 1.³ The Exchange seeks to simplify its charges for routed orders by eliminating such fee. The Exchange has limited resources to devote to incentive programs, and it is appropriate for the Exchange to reallocate these incentives periodically in a manner that best achieves the Exchange's overall mix of objectives.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁴ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5)

of the Act,⁵ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange's proposed changes to its schedule of credits and fees are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for equity securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: "[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . ."⁶

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."⁷

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for equity security transaction services. The Exchange is only one of several equity venues to which market participants may direct their order flow. Competing equity exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of

rebates and fees that apply based upon members achieving certain volume thresholds.

Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

The Exchange believes it is reasonable, equitable, and not unfairly discriminatory to eliminate the Exchange's \$0.0026 per share executed transaction credit and the Exchange's \$0.01 fee for routing orders. The Exchange seeks to simplify and streamline its schedule of credits by eliminating the \$0.0026 per share executed credit that is not heavily utilized and is no longer based on a relevant benchmark, as described above. The Exchange also seeks to eliminate the \$0.01 charge for round lot or mixed lot DOTI Orders described above in an effort to simplify and streamline its fees for routing orders. Together, the proposed changes are designed to better align with the Exchange's needs. The Exchange has limited resources to devote to incentive programs, and it is appropriate for the Exchange to reallocate these incentives periodically in a manner that best achieves the Exchange's overall mix of objectives.

Those participants that are dissatisfied with the eliminations from the Exchange's schedule of credits and fees are free to shift their order flow to competing venues that provide incentives or qualifying criteria more in line with participants' objectives.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

The Exchange does not believe that its proposals will place any category of Exchange participant at a competitive disadvantage.

The Exchange intends for the proposed changes to simplify its credit and fee schedule, remove a credit with an outdated benchmark month, preserve its limited resources for optimized effect, and better align the schedule of credits and fees with the Exchange's overall mix of objectives. The Exchange notes that its members are free to trade on other venues to the extent they believe that these proposals are not

³ 15 U.S.C. 78f(b)(4) and (5).

⁶ *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

⁷ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) ("Regulation NMS Adopting Release").

³ The fee applies to each DOTI Order that exceeds the 300 to 1 ratio. In calculating daily average DOTI Orders, the Exchange excludes the day with the highest ratio of DOTI Orders to executions.

⁴ 15 U.S.C. 78f(b).

attractive. As one can observe by looking at any market share chart, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes.

Intermarket Competition

In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its credits and fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own credits and fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which credit or fee changes in this market may impose any burden on competition is extremely limited. The proposals are reflective of this competition.

Even as one of the largest U.S. equities exchanges by volume, the Exchange has less than 20% market share, which in most markets could hardly be categorized as having enough market power to burden competition. Moreover, as noted above, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes. This is in addition to free flow of order flow to and among off-exchange venues, which comprises upwards of 40% of industry volume.

In sum, if the change proposed herein is unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed change will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing of Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.⁸

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NASDAQ-2023-043 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-NASDAQ-2023-043. 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-NASDAQ-2023-043 and should be submitted on or before December 8, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-25382 Filed 11-16-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-182, OMB Control No. 3235-0237]

Proposed Collection; Comment Request; Extension: Form N-54A

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) (the "Investment Company Act"), certain investment companies can elect to be regulated as business development companies, as defined in Section 2(a)(48) of the Investment Company Act (15 U.S.C. 80a-2(a)(48)). Under Section 54(a) of the Investment Company Act (15 U.S.C. 80a-53(a)), any company defined in Section 2(a)(48)(A) and (B) may elect to be subject to the provisions of Sections 55 through 65 of the Investment Company Act (15 U.S.C. 80a-54 to 80a-64) by filing with the Commission a notification of election, if such company has: (1) a class of equity securities registered under Section 12 of

⁸ 15 U.S.C. 78s(b)(3)(A)(iii).

⁹ 17 CFR 200.30-3(a)(12).

the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (“Exchange Act”); or (2) filed a registration statement pursuant to Section 12 of the Exchange Act for a class of its equity securities. The Commission adopted Form N-54A (17 CFR 274.53) as the form for notification of election to be regulated as a business development company.

The purpose of Form N-54A is to notify the Commission that the investment company making the notification elects to be subject to Sections 55 through 65 of the Investment Company Act, enabling the Commission to administer those provisions of the Investment Company Act to such companies.

The Commission estimates that on average approximately 21 business development companies file these notifications each year. Each of those business development companies need only make a single filing of Form N-54A. The Commission further estimates that this information collection imposes a burden of 0.5 hours, resulting in a total annual PRA burden of 10.5 hours. Based on the estimated wage rate, the total cost to the business development company industry of the hour burden for complying with Form N-54A would be approximately \$4,462.50.

The collection of information under Form N-54A 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 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 January 16, 2024.

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: November 14, 2023.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-25476 Filed 11-16-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98917; File No. SR-MIAX-2023-36]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Order Approving a Proposed Rule Change To Amend Exchange Rule 404, Series of Option Contracts Open for Trading

November 13, 2023.

I. Introduction

On September 14, 2023, Miami International Securities Exchange LLC (“MIAX” 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 amend Exchange Rule 404, Series of Option Contracts Open for Trading. The proposed rule change was published for comment in the **Federal Register** on October 2, 2023.³ This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 404, Series of Option Contracts Open for Trading, to adopt Interpretations and Policies .12 to Exchange Rule 404 to implement a strike interval program for stocks that are priced less than \$2.50 and have an average daily trading volume of at least 1,000,000 shares per day for the three preceding calendar months (the “Low Priced Stock Strike Price Interval Program”). The Exchange also proposes to amend the table in Exchange Rule 404, Interpretations and Policies .11 to harmonize that table to the proposed rule change.

The Exchange proposes to adopt the Low Priced Stock Strike Price Interval Program for underlying stocks that are not in the \$0.50 Strike Program⁴ (or the

Short Term Option Series Program)⁵ and that close below \$2.50 and have an average daily trading volume of at least 1,000,000 shares per day for the three preceding calendar months. To be eligible for the inclusion in the proposed Low Priced Stock Strike Price Interval Program, an underlying stock must (i) close below \$2.50 in its primary market on the previous trading day and (ii) have an average daily trading volume of at least 1,000,000 shares per day for the three (3) preceding calendar months.⁶ For stocks added to the Low Priced Stock Strike Price Interval Program, if the underlying stock closes at or above \$2.50 in its primary market no additional series in \$0.50 intervals may be listed, and additional series in \$0.50 intervals may not be added until the underlying stock again closes below \$2.50.⁷

After a stock is added to the Low Priced Stock Strike Price Interval Program, the Exchange proposes that it may list \$0.50 strike price intervals from \$0.50 up to \$2.00.⁸ The Exchange represents that there will be no limit to the number of classes eligible for inclusion in the proposed program, so long as the underlying stock satisfies both the price and average daily trading volume requirements.⁹

Additionally, the Exchange proposes to amend the table in Exchange Rule 404, Interpretations and Policies .11 to insert a column to harmonize the Exchange’s proposal to the strike intervals for Short Term Options Series as described in Interpretations and Policies .02 of Exchange Rule 404. The table in Interpretations and Policies .11 is intended to limit the intervals between strikes for multiply listed equity options within the Short Term

different strike interval programs, including the \$0.50 Strike Program, the \$1 Strike Price Interval Program, and the \$2.50 Strike Price Program. See Interpretations and Policies .04 of Exchange Rule 404, Interpretations and Policies .01 of Exchange Rule 404, and Exchange Rule 404(f).

⁵ See Interpretations and Policies .02 of Exchange Rule 404.

⁶ The Exchange notes this is the same methodology used in the \$1 Strike Price Interval Program. See Interpretations and Policies .01(c)(3) of Exchange Rule 404. For the purpose of adding strikes under the Low Priced Stock Strike Price Interval Program, the “price of the underlying stock” shall be measured in the same way as “the price of the underlying security” as set forth in Exchange Rule 404A(b)(1).

⁷ See Notice, *supra* note 3, at 67831.

⁸ While the Exchange may list new strikes on underlying stocks that meet the eligibility requirements of the new program, the Exchange states that it will exercise its discretion and will not list strikes on underlying stocks the Exchange believes are subject to imminent delisting from their primary exchange. See Notice, *supra* note 3, at 67831 n.12.

⁹ See Notice, *supra* note 3, at 67831.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 98534 (September 26, 2023), 88 FR 67830 (“Notice”). The Commission received no comment letters on the proposed rule change.

⁴ See Interpretations and Policies .04 of Exchange Rule 404. Exchange Rule 404 includes several

Options Series program that have an expiration date more than twenty-one days from the listing date. Specifically, the table defines the applicable strike intervals for options on underlying stocks given the closing price on the primary market on the last day of the calendar quarter, and a corresponding average daily volume of the total number of options contracts traded in a given security for the applicable calendar quarter divided by the number of trading days in the applicable calendar quarter.¹⁰ However, the lowest share price column is titled “Less than \$25.” The Exchange proposes to insert a column entitled “Less than \$2.50” and to set the strike interval at \$0.50 for each average daily volume tier represented in the table. Also, the Exchange proposes to amend the heading of the column currently titled “Less than \$25” to “\$2.50 to less than \$25” as a result of the new column entitled, “Less than \$2.50.”¹¹

III. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.¹² In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹³ which requires, among other things, that the Exchange’s rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange recognizes that its proposal will increase the total number of option series available on the Exchange; however, it believes this is appropriate to address a gap in strike coverage for low priced stocks, and the Exchange represents that it will only add strikes where there is investor demand and adequate liquidity.¹⁴ The Exchange represents that as of August 9,

2023, 106 symbols met the criteria for inclusion in the proposed program.¹⁵ Of those symbols, 36 are currently in the \$1 Strike Price Interval Program with \$1.00 and \$2.00 strikes listed.¹⁶ If MIAX adds \$0.50 and \$1.50 strikes for these symbols for the current expiration terms, and \$0.50, \$1.00, \$1.50 and \$2.00 strikes to current expiration terms for the remaining 70 symbols eligible under the proposal, a total of approximately 3,250 options would be added, which represents an increase of only 0.294% in the number of options listed on the Exchange.¹⁷

In support of its proposal, the Exchange provided examples of symbols that would qualify for the new program but are not currently in pre-existing strike price interval programs. For example, the Exchange states that on August 9, 2023, symbol SOND closed at \$0.50 and had open interest of over 44,000 contracts and an average daily trading volume in the underlying stock of over 1,900,000 shares for the three preceding calendar months.¹⁸ In the absence of the Low Priced Stock Strike Price Interval Program, the lowest strike listed for the symbol is for \$2.50, making the lowest strike 400% away from the closing stock price. Similarly, according to the Exchange, symbol CTXR, which closed at \$0.92 on August 9, 2023 and had open interest of over 63,000 contracts and an average daily trading volume in the underlying stock of over 1,900,000 shares for the three preceding calendar months, had a lowest strike listed at \$2.50 which is more than 170% away from the closing stock price.¹⁹

The Exchange states that for these and similar symbols that presently have no at-the-money options, as well as no in-the-money calls or out-of-the-money puts, the Low Priced Stock Strike Price Interval Program will provide for more effective and tailored trading and hedging opportunities for this subset of stocks.²⁰

The Exchange believes that the proposed average daily trading volume requirement of 1,000,000 shares is a reasonable threshold to ensure adequate liquidity in eligible underlying stocks.²¹

The Exchange represents that it has the necessary capacity and surveillance programs in place to support and properly monitor trading in the proposed Low Priced Stock Strike Price

Interval Program; it believes that the Options Price Reporting Authority (“OPRA”) has the necessary systems capacity to handle any additional messaging traffic associated with this proposed rule change; and that Members will not have capacity issues as a result of the proposed rule change.

Finally, the Exchange believes the change proposed to the table in Interpretations and Policies .11 to Exchange Rule 404 will remove any potential conflict between the strike intervals under the Short Term Options Series Program and those described under the proposed Low Priced Stock Strike Price Interval Program. The Commission believes that this change would add clarity to the Exchange rulebook and help avoid investor confusion.

The Commission believes that the proposal to add the Low Priced Stock Strike Price Interval Program to Exchange Rule 404, and the corresponding changes to the table in Exchange Rule 404, Interpretations and Policies .11, strikes a reasonable balance between the Exchange’s desire to offer a wider array of products with the need to avoid unnecessary proliferation of options series and the corresponding increase in quotes. The proposal adds a limited range of more granular strike intervals where they are more relevant and likely more in demand from customers, but only for those lower priced underlying stocks where there is adequate liquidity. In addition, the Commission believes that the proposed rule change is reasonably designed to effectuate the Exchange’s goals of increasing liquidity, providing more tailored and effective trading and hedging opportunities for market participants, and improving market quality. Accordingly, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act²² and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²³ that the proposed rule change (SR-MIAX-2023-36), be and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-25385 Filed 11-16-23; 8:45 am]

BILLING CODE 8011-01-P

¹⁰ See Securities Exchange Release Act No. 91125 (February 21, 2021), 86 FR 10375 (February 19, 2021) (SR-BX-2020-032) (Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Amend Options 4, Section 5, To Limit Short Term Options Series Intervals Between Strikes That Are Available for Quoting and Trading on BX).

¹¹ See Notice, *supra* note 3, at 67831.

¹² In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ See Notice, *supra* note 3, at 67831-32.

¹⁵ See Notice, *supra* note 3, at 67832.

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ See Notice, *supra* note 3, at 67833.

²² 15 U.S.C. 78f(b)(5).

²³ 15 U.S.C. 78f(b)(2).

²⁴ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98919; File No. SR-PHLX-2023-48]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Delay the Implementation of the FLEX and Cabinet Automation

November 13, 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 November 9, 2023, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to delay the implementation of SR-Phlx-2023-22.³

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the 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 delay the implementation of a rule change to automate FLEX and Cabinet Orders. The Exchange previously filed SR-Phlx-2023-22, a rule change that amended several Phlx Options 8 rules related to Phlx’s trading floor.

FLEX Orders

With respect to FLEX Orders, SR-Phlx-2023-22 amended FLEX Orders in 3 ways. First, the Exchange amended the rules to require FLEX Orders to be reported into Phlx’s Options Floor Based Management System or “FBMS,” thereby further automating the execution and reporting of FLEX Options. All executed FLEX contracts will be reported to OPRA and sent to The Options Clearing Corporation (“OCC”) for clearing, similar to all other equity, equity index and U.S. dollar-settled foreign currency options orders executed on the Exchange’s trading floor. Second, the Exchange removed its RFQ process including the BBO Improvement Interval Process, with the rule change. Third, the Exchange reorganized Options 8, Section 34 to restructure the rule to include additional information which describes current FLEX trading on Phlx.

Cabinet Options

With respect to Cabinet Orders, SR-Phlx-2023-22 amended Options 8, Section 33 to require Cabinet Orders to be reported into FBMS. With this change, members and member organizations will be required to record all Cabinet Orders represented in the trading crowd into FBMS. All executed contracts will be reported to OPRA and sent to OCC for clearing similar to all other equity, equity index and U.S. dollar-settled foreign currency options orders executed on the Exchange’s trading floor.

SR-Phlx-2023-22 stated that the rule change would be implemented on or before March 29, 2024. At this time, the Exchange proposes to delay the implementation of SR-Phlx-2023-22 to on or before August 30, 2024 to permit the Exchange additional time to code and test the functionality. The Exchange would issue an Options Trader Alert announcing the exact implementation date to members and member organizations.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁴ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁵ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The Exchange’s proposal to delay the implementation of SR-Phlx-2023-22 to on or before August 30, 2024 is consistent with the Act and the protection of investors and the general public as it will permit the Exchange additional time to code and test the functionality.

B. Self-Regulatory Organization’s Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange’s proposal to delay the implementation of SR-Phlx-2023-22 to on or before August 30, 2024 does not impose any burden on competition as it will permit the Exchange additional time to code and test the functionality.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act⁶ and subparagraph (f)(6) of Rule 19b-4 thereunder.⁷

At any time within 60 days of the filing of the proposed rule change, the

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(5).

⁶ 15 U.S.C. 78s(b)(3)(A)(iii).

⁷ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 97658 (June 7, 2023), 88 FR 38562 (June 13, 2023) (SR-Phlx-2023-22) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Various Options 8 Rules) (“SR-Phlx-2023-22”).

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-PHLX-2023-48 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to file number SR-PHLX-2023-48. 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-PHLX-2023-48 and should be submitted on or before December 8, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-25386 Filed 11-16-23; 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 Wednesday, November 29, 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: November 15, 2023.

Vanessa A. Countryman,
Secretary.

[FR Doc. 2023-25606 Filed 11-15-23; 4:15 pm]

BILLING CODE 8011-01-P

⁸ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-185, OMB Control No. 3235-0238]

Proposed Collection; Comment Request; Extension: Form N-6F

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.

The title for the collection of information is "Form N-6F (17 CFR 274.15), Notice of Intent to Elect to be Subject to Sections 55 through 65 of the Investment Company Act of 1940." The purpose of Form N-6F is to notify the Commission of a company's intent to file a notification of election to become subject to Sections 55 through 65 of the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) ("1940 Act"). Certain companies may have to make a filing with the Commission before they are ready to elect to be regulated as a business development company.¹ A company that is excluded from the definition of "investment company" by Section 3(c)(1) because it has fewer than one hundred shareholders and is not making a public offering of its securities may lose such an exclusion solely because it proposes to make a public offering of securities as a business development company. Such company, under certain conditions, would not lose its exclusion if it notifies the Commission on Form N-6F of its intent to make an election to be regulated as a business development company. The company only has to file a Form N-6F once.

The Commission estimates that on average approximately 9 companies file these notifications each year. Each of those companies need only make a single filing of Form N-6F. The Commission further estimates that this information collection imposes burden of 0.5 hours, resulting in a total annual

¹ A company might not be prepared to elect to be subject to Sections 55 through 65 of the 1940 Act because its capital structure or management compensation plan is not yet in compliance with the requirements of those sections.

PRA burden of 4.5 hours. Based on the estimated wage rate, the total cost to the industry of the hour burden for complying with Form N-6F would be approximately \$1,912.50.

The collection of information under Form N-6F is mandatory. The information provided under 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 January 16, 2024.

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: November 14, 2023.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-25478 Filed 11-16-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 35047; File No. 812-15459]

Saratoga Investment Advisors, LLC, et al.

November 14, 2023.

AGENCY: Securities and Exchange Commission ("Commission" or "SEC").

ACTION: Notice.

Notice of application for an order ("Order") under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the "Act") and rule 17d-1 under the Act to permit certain joint transactions

otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d-1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain business development companies ("BDCs") and closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment entities.

APPLICANTS: Saratoga Investment Advisors, LLC, Saratoga Management Company LLC, Saratoga Investment Corp., Saratoga Investment Corp. SBIC LP, Saratoga Investment Corp. SBIC II LP, Saratoga Investment Corp. SBIC III LP, Saratoga Investment Corp. CLO 2013-1 LTD, Saratoga Investment Funding II, LLC, SIA-Avionte, Inc., SIA-AX, Inc., SIA-GH, Inc., SIA-G4, Inc., SIA-MAC, Inc., SIA-ARC, Inc., SIA-PP, Inc., SIA-TG, Inc., SIA-TT, Inc., SIA-Vector, Inc., SIA-VR, Inc., SIA-AAP, Inc., Saratoga Credit Fund I L.P., SIA-MDP Inc., and SIA-SZ, Inc.

FILING DATES: The application was filed on April 25, 2023, and amended on September 1, 2023.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at Secretaries-Office@sec.gov and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on, December 11, 2023, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at Secretaries-Office@sec.gov.

ADDRESSES:

The Commission: Secretaries-Office@sec.gov.

Applicants: Rochelle Kracoff, Assistant Chief Compliance Officer, Saratoga Investment Corp., at rkracoff@saratogapartners.com, and Steven B. Boehm, Esq., Payam Siadatpour, Esq., and Anne G. Oberndorf, Esq., Eversheds Sutherland (US) LLP, at

anneoberndorf@eversheds-sutherland.us.

FOR FURTHER INFORMATION CONTACT:

Michael Schrader, Senior Counsel, or Terri Jordan, Branch Chief, at (202) 551-6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' first amended and restated application, dated September 1, 2023, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC's EDGAR system. The SEC's EDGAR system may be searched at, <http://www.sec.gov/edgar/searchedgar/legacy/companysearch.html>. You may also call the SEC's Public Reference Room at (202) 551-8090.

For the Commission, by the Division of Investment Management, under delegated authority.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-25498 Filed 11-16-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-381, OMB Control No. 3235-0434]

**Submission for OMB Review;
Comment Request; Extension: Rule 15g-2**

Upon Written Request, Copies Available From: U.S. 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.*) ("PRA"), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget ("OMB") a request for extension of the previously approved collection of information discussed below.

Rule 15g-2 (17 CFR 240.15g-2) (The "Penny Stock Disclosure Rule") under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) ("Exchange Act") requires broker-dealers to provide their customers with a risk disclosure document, as set forth in Schedule 15G, prior to their first non-exempt transaction in a "penny stock." As amended, the rule requires broker-dealers to obtain written acknowledgement from the customer that he or she has received the required

risk disclosure document. The amended rule also requires broker-dealers to maintain a copy of the customer's written acknowledgement for at least three years following the date on which the risk disclosure document was provided to the customer, the first two years in an accessible place. Rule 15g-2 also requires a broker-dealer, upon request of a customer, to furnish the customer with a copy of certain information set forth on the Commission's website.

The risk disclosure documents are for the benefit of the customers, to assure that they are aware of the risks of trading in "penny stocks" before they enter into a transaction. The risk disclosure documents are maintained by the broker-dealers and may be reviewed during the course of an examination by the Commission.

The Commission estimates that approximately 175 broker-dealers are engaged in penny stock transactions and that each of these firms processes an average of three new customers for penny stocks per week. The Commission further estimates that half of the broker-dealers send the penny stock disclosure documents by mail, and the other half send them through electronic means such as email. Because the Commission estimates the copying and mailing of the penny stock disclosure document takes two minutes, this means that there is an annual burden of 27,456 minutes, or 447 hours, for this third-party disclosure burden of mailing documents. Additionally, because the Commission estimates that sending the penny stock disclosure document electronically takes one minute, the annual burden is 13,728 minutes, or 229 hours, for this third-party disclosure burden of emailing documents.

Broker-dealers also incur a recordkeeping burden of approximately two minutes per response when filing the completed penny stock disclosure documents as required pursuant to the Rule 15g-2(c), which means that the respondents incur an aggregate recordkeeping burden of 54,600 minutes, or 910 hours.

Furthermore, Rule 15g-2(d) requires a broker-dealer, upon request of a customer, to furnish the customer with a copy of certain information set forth on the Commission's website, which takes a respondent no more than two minutes per customer. Because the Commission estimates that a quarter of customers who are required to receive the Rule 15g-2 disclosure document will request that their broker-dealer provide them with the additional microcap and penny stock information

posted on the Commission's website, the Commission therefore estimates that each broker-dealer respondent processes approximately 39 requests for paper copies of this information per year or an aggregate total of 78 minutes per respondent, which amounts to an annual burden of 13,650 minutes, or 228 hours. There was an overall decrease in the total burden hours because the number of registered broker-dealers the Commission estimates will be engaged in penny stock transactions decreased from 182 to 175.

The Commission does not maintain the risk disclosure document. Instead, it must be retained by the broker-dealer for at least three years following the date on which the risk disclosure document was provided to the customer, the first two years in an accessible place. The collection of information required by the rule is mandatory. The risk disclosure document is otherwise governed by the internal policies of the broker-dealer regarding confidentiality, etc.

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.

The public may view background documentation for this information collection at the following website: www.reginfo.gov. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. Written comments and recommendations for the proposed information collection should be sent by December 18, 2023 to

(i) www.reginfo.gov/public/do/PRAMain and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: PRA_Mailbox@sec.gov.

Dated: November 14, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-25479 Filed 11-16-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98908; File No. SR-PEARL-2023-62]

Self-Regulatory Organizations; MIAx PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Provide an Additional Means To Access the Exchange's Equity Trading Platform Member Firm Portal

November 13, 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 November 2, 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, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to provide an additional means to access the Exchange's equity trading platform (referred to herein as "MIAx Pearl Equities") Member Firm Portal.³

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.

³ See MIAx Exchanges Member Firm Portal User Manual, available at https://www.miaxglobal.com/sites/default/files/page-files/MIAx_Exchanges_Member_Firm_Portal_User_Manual_07142023.pdf.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange provides Equity Members⁴ access to an internet-facing portal which provides self-service functions to Equity Members, known as the Member Firm Portal ("MFP"). Specifically, the MFP allows Equity Members to view current connectivity and services, manage various order entry settings,⁵ view all orders and cancel individual open orders, and view current and request changes for current session notifications, session configurations, and Market Participant Identifier ("MPID") configurations. The MFP also provides Equity Members the ability to adjust risk settings and allows Equity Market Makers⁶ to view and manage their securities assignments. The MFP allows Equity Members to more efficiently manage their back office operations at the Equity Member level. Currently, access to the MFP is provided on a per user basis, whereby Equity Members seek to have individuals within their organization permissioned to access the MFP via a web portal on their behalf (known as the "MFP User Interface" or "MFP UI"). The Exchange provides the MFP UI to Equity Members free of charge.⁷

Equity Members have requested that the Exchange also provide access to the MFP via an Application Programming Interface ("API" and together "MFP API"), in addition to the current MFP UI accessed via the web portal. The Exchange currently provides MFP API to Members⁸ on its options platform,⁹ as

do its affiliates, Miami International Holdings, LLC ("MIAX") and MIAX Emerald, LLC ("MIAX Emerald").¹⁰

In sum, an API is a way for two or more computer programs to talk to each other. It is a software to software interface that defines the data and the transactions that can be communicated between systems. In providing the MFP API, functions that would otherwise be done manually via the MFP UI, can be automated. The MFP API, in essence, facilitates and expedites the transaction processing for the supported functionality such that Equity Members can automate their interactions with the MFP. This allows for more efficient processing, the potential reduction of operational risk due to issues caused by human error, the timeliness of the completion of MFP-related functions, etc.¹¹ Providing API access to the MFP would allow Equity Members to enable their systems and applications to communicate directly with the MFP, thereby eliminating or reducing the need for individuals to access the MFP UI via the web portal.

The Exchange does not propose to alter the current MFP or MFP UI. The Exchange simply proposes to provide an additional and optional means to access the MFP, in the form of an API. API access to the MFP would allow an Equity Member's applications to communicate directly with the MFP. Therefore, by its nature, the MFP API does not lend itself to access on a per user basis, as is the case today with the MFP UI via the web portal. API access would allow Equity Members to automate functions they perform today on the MFP, such as adjusting risk settings or managing various order entry settings. Equity Members who do not prefer to access the MFP API would be able to perform the same functions when accessing the MFP UI via the current web portal. However, due to associated technological changes needed to provide API access, the Exchange does not plan to offer all MFP functionality that is currently available via the MFP UI on day one and intends

to rollout the functionality over a period of time.

The Exchange notes that the use of accessing the MFP API would be completely voluntary and would simply be a second optional means to access the MFP. Equity Members who wish to continue to access the MFP UI via the web portal may continue to do so for no fee.

Implementation Date and Rollout

Due to the technological changes associated with this proposed change, the Exchange will issue a trading alert publicly announcing the implementation date of the proposed rule change and will announce in that trading alert which MFP functions will be available via the API. The Exchange anticipates that it will begin to offer API access to the MFP in first quarter of 2024. The Exchange will issue a trading alert each time it makes additional MFP functions available via the API.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,¹² in general, and Section 6(b)(5),¹³ in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Exchange notes that providing the MFP API to Equity Members is consistent with the Act in that the use of MFP API is completely voluntary and simply provides Equity Members with an additional means to access the Exchange's MFP. The MFP is a useful tool for Equity Members to manage their trading on the Exchange, including back office operations, risk controls settings, and Equity Market Maker assignments. The Exchange also notes that it currently provides MFP API to Members on its options platform,¹⁴ as do its affiliates, MIAX and MIAX Emerald.¹⁵ The Exchange simply seeks to do the same for MIAX Pearl Equities in this filing.

As noted above, accessing the MFP via an API would be an optional alternative to web access. Those not

⁴ The term "Equity Member" is a Member authorized by the Exchange to transact business on MIAX Pearl Equities. See Exchange Rule 1901.

⁵ This includes whether an order should be attributed by its MPID or as Retail on the Exchange's proprietary data feeds or when routed pursuant to the PAC routing option, adjusting port level settings, adjusting risk controls, and retrieving assignment history for a given symbol assignments. See, e.g., Exchange Rules 2614(c)(5), 2617(a)(5)(ii)(A)(3), 2618(a), and 2622(f).

⁶ The term "Equities Market Maker" shall mean an Equity Member that acts as a Market Maker in equity securities, pursuant to Chapter XXVI. See Exchange Rule 1901.

⁷ The Exchange does not currently intend to charge fees for API access to the MFP and will submit a separate filing with the Commission pursuant to Section 19(b)(1) should it decide to do so in the future.

⁸ The term "Member" means an individual or organization that is registered with the Exchange pursuant to Chapter II of these Rules for purposes of trading on the Exchange as an "Electronic Exchange Member" or "Market Maker." Members are deemed "members" under the Act. See Exchange Rule 100.

⁹ See Securities Exchange Act Release No. 98016 (July 28, 2023), 88 FR 51364 (August 3, 2023) (SR-

PEARL-2023-32) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Provide an Additional Means of Access to the Member Firm Portal Through an Application Programming Interface).

¹⁰ See Securities Exchange Act Release Nos. 98017 (July 28, 2023), 88 FR 51366 (August 3, 2023) (SR-MIAX-2023-29); and 98018 (July 28, 2023), 88 FR 51374 (August 3, 2023) (SR-EMERALD-2023-18) (Notices of Filing and Immediate Effectiveness of a Proposed Rule Change To Provide an Additional Means of Access to the Member Firm Portal Through an Application Programming Interface).

¹¹ See, e.g., *What is an API?*, available at <https://www.ibm.com/topics/api> (last visited October 9, 2023).

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ See *supra* note 9.

¹⁵ See *supra* note 10.

electing to access the MFP via an API may continue to use the MFP UI via the web portal free of charge. The MFP, whether accessed via an API or web portal, allow Equity Members to more efficiently manage their back office operations, view all orders and cancel individual open orders, and view current and request changes for current session notifications, session configurations, MPID configurations, and in managing Equity Market Maker assignments. The Exchange notes that trade information in the MFP is specific to each Equity Member and their trades, allowing them to conveniently manage their back office operations as needed.

Providing API access to the MFP would be provided purely for convenience, in response to Equity Member demand, and would be entirely optional. As stated above, API access to the MFP would enable Equity Members to connect their applications to the MFP allowing their application to communicate directly with the MFP. This enables Equity Members to automate functions that would normally be performed by individual users access the MFP via the current web portal, such as adjusting risk settings and managing various order entry settings. Equity Members who do not prefer to access the MFP API would be able to perform the same functions by accessing the MFP UI via the existing web portal.

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. API access to the MFP would simply be an optional additional means to access the MFP. The Exchange does not believe that the proposal would impose any inappropriate burden on intramarket competition because Equity Members who access the MFP via an API would not receive any competitive advantage over those who access it via the current web portal because any functionality available to Equity Members who access the MFP via an API would be available to those who access MFP UI via the current web portal. API access would simply be a convenience and would enable Equity Members to automate their back office operations performed via the MFP as they choose. The Exchange does not believe an Equity Member's ability to automate this functionality provides any competitive advantage when trading on the Exchange because the MFP is only used by Equity Members for back office

operations and not order entry or execution.

The Exchange believes that the proposed rule change would not impose any inappropriate burden on intermarket competition as other exchanges currently offer similar API access to their comparable member portals.¹⁶ The proposal would enhance the Exchange's competitive position vis-a-vis other exchanges by allowing it to upgrade the means of access to its MFP, which would provide added convenience to Equity Members that wish to utilize the MFP via an API. Further, the proposed rule change would enable the Exchange to improve its customer service and enhance Equity Members' experience when managing their back office and other operations performed via the MFP.

As such, the Exchange does not believe that the proposed rule change will impose any burden on intermarket or intramarket competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

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, it has become effective pursuant to 19(b)(3)(A) of the Act¹⁷ and Rule 19b-4(f)(6)¹⁸ thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the

Commission takes such action, the Commission shall institute proceedings 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-2023-62 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-2023-62. 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-2023-62 and should be submitted on or before December 8, 2023.

¹⁶ See, e.g., Cboe US Secure Web API manual, available at https://cdn.cboe.com/resources/membership/US_Secure_Web_API.pdf.

¹⁷ 15 U.S.C. 78s(b)(3)(A).

¹⁸ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–25380 Filed 11–16–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98910; File No. SR-CboeEDGX–2023–068]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

November 13, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b–4 thereunder,² notice is hereby given that on November 1, 2023, Cboe EDGX Exchange, Inc. (the “Exchange” or “EDGX”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the “Exchange” or “EDGX”) proposes to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (https://markets.cboe.com/us/options/regulation/rule_filings/edgx/), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The

Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule, effective November 1, 2023. The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 17 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 17% of the market share.³ Thus, in such a low-concentrated and highly competitive market, no single options exchange, including the Exchange, possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain the Exchange’s transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

The Exchange’s Fees Schedule sets forth standard rebates and rates applied per contract. For example, the Exchange provides standard rebates ranging from \$0.01 up to \$0.21 per contract for Customer orders in both Penny and Non-Penny Securities. The Fee Codes and Associated Fees section of the Fees Schedule also provides for certain order types and market participants that provide for various other fees or rebates. For example, the Exchange assesses a fee of \$0.05 per contract for AIM⁴ Contra orders, yielding fee code BB; assesses a fee of \$1.05 per contract for AIM Responder orders in Non-Penny Securities, yielding fee code BE; and provides a rebate of \$0.06 for AIM

Agency Customer orders, yielding fee code BC.

The Exchange proposes to amend the Fee Codes and Associated Fees table of the Fee Schedule to adopt new fee codes for AIM Contra and AIM Agency Customer orders in Non-Penny Securities. Specifically, the Exchange proposes to adopt new fee codes, BF and BG, to apply to AIM Contra⁵ orders in Non-Penny Securities and AIM Agency⁶ Customer orders in Non-Penny Securities, respectively. The Exchange proposes to assess a fee of \$0.02 per contract for AIM Contra orders in Non-Penny Securities yielding fee code BF and to assess no fee per contract for AIM Agency Customer orders in Non-Penny Securities yielding fee code BG.

The Exchange also proposes to amend the description of current fee code BB to provide it applies to AIM Contra orders in Penny Securities, and to amend the current description of current fee code BC to provide it applies to AIM Agency Customer orders in Penny Securities. The Exchange also proposes to increase the standard fee for AIM Responder orders in Non-Penny Securities (*i.e.*, yield fee code BE) from \$1.05 per contract to \$1.15 per contract.

The proposed rule change also amends Footnote 6 of the Fee Schedule to include new fee codes BF and BG, and to reflect the proposed change in fees for orders yielding fee code BE.⁷ Further, AIM Agency Customer order in Non-Penny Securities yielding fee code BG will not be eligible for rebates under the Automated Improvement “AIM” Tiers set forth in Footnote 9 of the Fee Schedule. As such, the Exchange proposes to rename Footnote 9 as Automated Improvement Mechanism (“AIM”) Penny Tiers, and revise the definition of Interaction Rate set forth in Footnote 9 to state that the Interaction Rate is the percentage of the Penny Agency Order that trades against the Initiating Order.

⁵ The term “AIM Contra Order” refers to an order submitted by a Member entering a AIM Agency Order for execution within AIM that will potentially execute against the AIM Agency Order pursuant to Rules 21.19 and 21.22.

⁶ The term “AIM Agency Order” refers to an order represented as agent by a Member on behalf of another party and submitted to AIM for potential price improvement pursuant to Rules 21.19 and 21.22.

⁷ As part of the proposed rule change, the Exchange proposes to delete duplicative information in the chart in Footnote 6 related to Customer AIM and SAM Auction fees. Further, the Exchange proposes to delete headers in the table referring to issues and consolidate all fee code and rate information on an order type basis. The Exchange also proposes to amend Footnote 6 to remove an inadvertent reference to XB, as such fee code was previously removed from the Exchange Fee Schedule.

¹⁹ 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Cboe Global Markets U.S. Options Market Monthly Volume Summary (October 30, 2023), available at https://markets.cboe.com/us/options/market_statistics/.

⁴ The term “AIM” refers to Automated Improvement Mechanism.

In addition, the Exchange also proposes to amend certain Break-Up Credits located under the AIM and SAM Pricing table in Footnote 6. The Break-Up Credits provision applies to agency orders submitted in either the AIM or SAM auction that trades with a response order in the respective auction. Specifically, the Exchange will apply a Break-Up Credit to the Member that submitted an Agency Order (*i.e.*, either an AIM or SAM Agency Order), including a Member who routed an order to the Exchange with a Designated Give Up, when the Agency Order trades with a Response Order (*i.e.*, an AIM or SAM Response Order, as applicable). The Exchange proposes to amend the Break-Up Credit for qualifying AIM Agency Orders in Non-Penny Securities, from \$0.60 per contract to \$1.06 per contract.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.⁸ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁹ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹⁰ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act,¹¹ which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

As described above, the Exchange operates in a highly competitive market in which market participants can

readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The proposed rule change reflects a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all market participants. The Exchange is only one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. The proposed fee changes reflect a competitive pricing structure designed to incentivize market participants to direct their order flow, which the Exchange believes would enhance market quality to the benefit of all Members.

Overall, the Exchange believes that its proposed adoption of new fee codes for AIM Contra and AIM Agency Customer orders in Non-Penny Securities (and related changes for AIM Contra and AIM Agency Customer orders in Penny Securities) is consistent with Section 6(b)(4) of the Act in that the proposed fees are reasonable, equitable and not unfairly discriminatory. The Exchange believes that the proposed fees are reasonable, equitable, and not unfairly discriminatory in that competing options exchanges offer a similar distinction between order types in connection with similar price improvement auctions,¹² as the Exchange now proposes. Further, competing exchanges charge different rates for transactions in their price improvement mechanisms, for orders in Penny or Non-Penny Securities, in a manner similar to the proposal. The Exchange believes the fee and rebate schedule as proposed continues to reflect differentiation among different product classes typically found in options fee and rebate schedules.

The proposed fees in relation to AIM orders are designed to promote order flow through AIM and, in particular, to attract liquidity, which benefits all market participants by providing additional trading opportunities at improved prices. This, in turn, attracts increased large-order flow from liquidity providers which facilitates

tighter spreads and potentially triggers a corresponding increase in order flow originating from other market participants.

Also, the Exchange believes that the proposed fee for AIM Contra and AIM Agency Customer orders in Non-Penny Securities (\$0.02 per contract and no charge, respectively) is reasonable because it encourages participation in AIM by offering a rate that is equivalent to or better than most other price improvement auctions offered by other options exchanges as well as the Exchange itself.¹³

Further, the Exchange believes the proposed change to the standard fee for AIM Responder orders in Non-Penny Securities (*i.e.*, yield fee code BE) from \$1.05 per contract to \$1.15 per contract is reasonable as the rate is equivalent to fees at competing exchanges.¹⁴

Finally, the Exchange believes its proposal to amend the AIM-related Break-Up Credit for qualifying orders in Non-Penny Securities is reasonable because it encourages use of AIM. Specifically, the Exchange believes that the proposed Break-Up Credit for AIM Agency Orders in Non-Penny Securities will encourage increased Agency Order flow to AIM Auctions, thereby potentially increasing the initiation of and volume executed through AIM Auctions. Additional auction order flow provides market participants with additional trading opportunities at improved prices. The Exchange also believes that the proposed AIM Break-Up Credit of \$1.06 for Non-Penny Securities is reasonable and equitable as this credit is in-line with, albeit slightly higher than, corresponding break-up fee for a price improvement auction offered by other options exchanges.¹⁵ Also, the proposed AIM Break-Up Credits, as amended, are not unreasonably discriminatory because such credits are

¹³ See MIAX Options Fee Schedule, Section 1(a)(v), “MIAX Price Improvement Mechanism (“PRIME”) Fees”, which provides for a fee of no charge to \$0.30 per contract for PRIME Agency orders, depending on market participant; and provides for a fee of no charge to \$0.05 per contract for PRIME Contra-side orders, depending on market participant.

¹⁴ See Box Options Fee Schedule, Section IV(B), “PIP and COPIP Transactions”, which provides for a fee of \$1.15 for Professional Customer or Broker Dealer or Market Maker Improvement Orders in Non-Penny Interval Classes. Footnote 21 to the Fee Schedule states that an Improvement Order is a response to a PIP or COPIP auction.

¹⁵ See Box Options Fee Schedule, Section IV(B), “PIP and COPIP Transactions”, which provides for PIP and COPIP Break-Up Credits of \$0.81 per contract for Non-Penny Interval Classes. See also “MIAX Options Fee Schedule, Section 1(a)(v), “MIAX Price Improvement Mechanism (“PRIME”) Fees”, which provides for PRIME Break-Up Credits ranging from \$0.60 to \$0.73 per contract for Non-Penny Classes.

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ *Id.*

¹¹ 15 U.S.C. 78f(b)(4).

¹² See Box Options Fee Schedule, Section IV(B), “PIP and COPIP Transactions”, which, for certain fees, provides varying rates for orders in Penny Interval Classes and Non-Penny Interval Classes submitted into its PIP and COPIP auction mechanism. See also MIAX Options Fee Schedule, Section 1(a)(v), “MIAX Price Improvement Mechanism (“PRIME”) Fees”, which, for certain fees, provides for varying rates for orders in Non-Penny Classes and Penny Classes submitted into its PRIME auctions.

equally available to all Members submitting AIM Agency Orders to the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. First, the Exchange believes that the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed changes apply uniformly to similarly situated Members. The Exchange believes that the proposed changes related to AIM transactions would not impose any burden on intramarket competition, but rather, serves to increase intramarket competition by incentivizing members to direct their AIM orders to the Exchange, in turn providing for more opportunities to compete at improved prices.

The Exchange also believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues they may participate on and direct their order flow, including 17 other options exchanges. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 17% of the market share. Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchanges if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies." The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: "[n]o one disputes

that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .". Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁶ and paragraph (f) of Rule 19b-4¹⁷ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeEDGX-2023-068 on the subject line.

¹⁶ 15 U.S.C. 78s(b)(3)(A).

¹⁷ 17 CFR 240.19b-4(f).

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-CboeEDGX-2023-068. 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-CboeEDGX-2023-068 and should be submitted on or before December 8, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-25381 Filed 11-16-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-267, OMB Control No. 3235-0272]

Proposed Collection; Comment Request; Extension: Rule 11a-2

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services,

¹⁸ 17 CFR 200.30-3(a)(12).

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.

Rule 11a–2 (17 CFR 270.11a–2) under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) permits certain registered insurance company separate accounts, subject to certain conditions, to make exchange offers without prior approval by the Commission of the terms of those offers. Rule 11a–2 requires disclosure, in certain registration statements filed pursuant to the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) of any administrative fee or sales load imposed in connection with an exchange offer.

The Commission staff estimates that 657 registrants are governed by Rule 11a–2. Based on this estimate, the total annual burden hours associated with the rule is estimated to be 657 hours. The estimated burden hours associated with rule 11a–2 has decreased by 19 hours from the current allocation of 676 hours. The decrease is due to a decrease in the number of registrants. The estimated external cost associated with this collection of information continues to be \$0. The Commission includes the estimated burden of complying with the information collection required by Rule 11a–2 in the total number of burden hours estimated for completing the relevant registration statements and reports the burden of Rule 11a–2 in the separate Paperwork Reduction Act (“PRA”) submissions for those registration statements (see the separate PRA submissions for Form N–3 (17 CFR 274.11b), Form N–4 (17 CFR 274.11c) and Form N–6 (17 CFR 274.11d). The Commission is requesting a burden of one hour for Rule 11a–2 for administrative purposes.

The estimate of average burden hours is made solely for the purposes of the PRA and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules or forms. The information collection requirements imposed by Rule 11a–2 are mandatory. Responses to the collection of information will not be kept confidential.

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 January 16, 2024.

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: November 14, 2023.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023–25477 Filed 11–16–23; 8:45 am]

BILLING CODE 8011–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. MCF 21111]

Van Pool Transportation LLC— Acquisition of Control—PLSIII LLC

AGENCY: Surface Transportation Board.

ACTION: Notice Tentatively Approving and Authorizing Finance Transaction.

SUMMARY: On October 19, 2023, Van Pool Transportation LLC (Van Pool or Applicant), a noncarrier, filed an application for Van Pool to acquire control of an interstate passenger motor carrier, PLSIII LLC (PLS), by acquiring all the outstanding equity interests in PLS from Founders Mobility LLC (Founders), the sole member of PLS. The Board is tentatively approving and authorizing the transaction, and, if no opposing comments are timely filed, this notice will be the final Board action.

DATES: Comments must be filed by January 2, 2024. If any comments are filed, Van Pool may file a reply by January 16, 2024. If no opposing comments are filed by January 2, 2024, this notice shall be effective on January 3, 2024.

ADDRESSES: Comments may be filed with the Board either via e-filing or in

writing addressed to: Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001. In addition, send one copy of comments to Van Pool’s representative: Andrew K. Light, Scopelitis, Garvin, Light, Hanson & Feary, P.C., 10 W Market Street, Suite 1400, Indianapolis, IN 46204.

FOR FURTHER INFORMATION CONTACT:

Sarah Fancher at (202) 245–0355. If you require an accommodation under the Americans with Disabilities Act, please call (202) 245–0245.

SUPPLEMENTARY INFORMATION: According to the application, Van Pool is a limited liability company organized under Delaware law and headquartered in Wilbraham, Mass. (Appl. 2.) Applicant states that it is not a federally regulated carrier but that it indirectly owns and controls all equity and voting interest in eight interstate passenger motor carriers (the Affiliate Regulated Carriers) that are among its operating subsidiaries. (*Id.*) The Affiliate Regulated Carriers are as follows:¹

- NRT Bus, Inc., which primarily provides non-regulated student transportation services for schools in Massachusetts (Essex, Middlesex, Norfolk, Suffolk, and Worcester counties), and occasional charter services;

- Trombly Motor Coach Service, Inc., which primarily provides non-regulated student transportation services for schools in Massachusetts (Essex and Middlesex counties), and occasional charter services;

- Salter Transportation, Inc., which primarily provides non-regulated student transportation services for schools in Massachusetts (Essex County) and southern New Hampshire, and occasional charter services;

- Easton Coach Company, LLC, which provides (i) intrastate paratransit, shuttle, and line-run services under contracts with regional transportation authorities and other organizations, primarily in New Jersey and eastern Pennsylvania, and (ii) private charter motor coach and shuttle services (interstate and intrastate), primarily in eastern Pennsylvania;

- F. M. Kuzmeskus, Inc., d/b/a Travel Kuz, which provides (i) non-regulated school bus transportation services, (ii) intrastate and interstate motor coach and limousine charter services, and (iii) limited intrastate and interstate charter services, all in western Massachusetts and southern Vermont;

¹ Additional information about these motor carriers, including U.S. Department of Transportation (USDOT) numbers, motor carrier numbers, and USDOT safety fitness ratings, can be found in the application. (See Appl. 3–6, Ex. A.)

- Alltown Bus Service Inc., which primarily provides non-regulated student transportation services for schools in the metropolitan area of Chicago, Ill., and its northern suburbs, and occasional charter services;

- DS Bus Lines, Inc., which primarily provides (i) non-regulated student transportation services for schools in Kansas (Beloit, Kansas City, Lincoln, Olathe, and Shawnee), Missouri (Belton and Smithville), Colorado (the metropolitan area of Denver), and Oklahoma (the metropolitan area of Tulsa), (ii) intrastate employee shuttle services in Colorado and Texas, and (iii) occasional charter services; and

- Royal Coach Lines, Inc., which primarily provides (i) non-regulated student transportation services for schools in the metropolitan area of Westchester County, N.Y., and southern Connecticut, and (ii) contract and charter transportation services.²

According to the application, Van Pool also has operating subsidiaries that provide transportation services that do not involve regulated interstate transportation or require interstate passenger authority, primarily in the northeastern and central portions of the United States. (Appl. 2–3.) Van Pool states that it is indirectly owned and controlled by investment funds affiliated with Audax Management Company, LLC, a Delaware limited liability company. (*Id.* at 8–9.)³

The application explains that PLS, the carrier being acquired, is a New York limited liability company headquartered in Buffalo, N.Y., and provides the following services: (i) primarily transit disabled transportation services under contracts with private non-profit organizations for fixed route and shuttle services in New York (Buffalo, western New York, Rochester, Utica and surrounding areas, and Poughkeepsie and surrounding areas), and (ii) very limited group day trip charter transportation services. (Appl. 7.) The application states that PLS holds intrastate carrier operating authority issued by the New York State Department of Transportation, as well as interstate carrier operating authority under FMCSA Docket No. MC–540425. (*Id.*) Applicant states that PLS has no safety rating. (*Id.*) Applicant states that

it will acquire control of PLS by acquiring all the equity interests in PLS from Founders, the sole member of PLS. (*Id.* at 1, 8.)

Under 49 U.S.C. 14303(b), the Board must approve and authorize a transaction that it finds consistent with the public interest, taking into consideration at least (1) the effect of the proposed transaction on the adequacy of transportation to the public, (2) the total fixed charges that result from the proposed transaction, and (3) the interest of affected carrier employees. Van Pool has submitted the information required by 49 CFR 1182.2, including information to demonstrate that the proposed transaction is consistent with the public interest under 49 U.S.C. 14303(b), *see* 49 CFR 1182.2(a)(7), and a jurisdictional statement under 49 U.S.C. 14303(g) that the aggregate gross operating revenues of the involved carriers exceeded \$2 million during the 12-month period immediately preceding the filing of the application, *see* 49 CFR 1182.2(a)(5). (*See* Appl. 9–13.)

Van Pool asserts that the proposed transaction will not have a material, detrimental impact on the adequacy of transportation services available for the public. (*Id.* at 10.) According to Van Pool, PLS will continue to provide the same services it currently provides under the same name; however, going forward, PLS will operate within the holdings of Applicant, an organization thoroughly experienced in passenger transportation operations. (*Id.*) Van Pool states that it is experienced in the same market segments served by PLS (transit disabled and private charter transportation) and that the passenger carrier management capacity of Applicant is expected to result in improved operating efficiencies, increased equipment utilization rates, and cost savings derived from economies of scale, which will help to ensure the provision of adequate service to the public. (*Id.*) Van Pool also asserts that the addition of PLS will enhance the viability of Applicant's organization and its subsidiaries. (*Id.* at 11.)

Van Pool states that the impact of the transaction on the regulated motor carrier industry will be minimal at most and that neither competition nor the public interest will be adversely affected. (*Id.* at 13.) According to Van Pool, the transit disabled transportation market is competitive in the areas serviced by PLS, and a majority of contracts for the applicable services are subject to the bidding processes. (*Id.*) Van Pool also asserts that it, and all charter service providers, compete with other modes of passenger transportation, including rail, low-cost airlines,

carpools, and passenger transportation network companies. (*Id.*) Van Pool states that there is virtually no overlap in the service areas and/or customer bases among the Affiliate Regulated Carriers and PLS. (*Id.*)

Van Pool asserts that the proposed transaction will increase fixed charges in the form of interest expenses because funds will be borrowed to assist in financing the transaction; however, Van Pool states that the increase will not impact the provision of transportation services to the public. (*Id.* at 11.) Van Pool also asserts that it does not expect the transaction to have substantial impacts on employees or labor conditions, and it does not anticipate a measurable reduction in force or changes in compensation levels or benefits at PLS. (*Id.*) Van Pool submits, however, that staffing redundancies could result in limited downsizing of back-office and/or managerial-level personnel. (*Id.*)

Based on Van Pool's representations, the Board finds that the acquisition as proposed in the application is consistent with the public interest and should be tentatively approved and authorized. If any opposing comments are timely filed, these findings will be deemed vacated, and, unless a final decision can be made on the record as developed, a procedural schedule will be adopted to reconsider the application. *See* 49 CFR 1182.6. If no opposing comments are filed by expiration of the comment period, this notice will take effect automatically and will be the final Board action in this proceeding.

This action is categorically excluded from environmental review under 49 CFR 1105.6(c).

Board decisions and notices are available at www.stb.gov.

It is ordered:

1. The proposed transaction is approved and authorized, subject to the filing of opposing comments.

2. If opposing comments are timely filed, the findings made in this notice will be deemed vacated.

3. This notice will be effective January 3, 2024, unless opposing comments are filed by January 2, 2024. If any comments are filed, Applicant may file a reply by January 16, 2024.

4. A copy of this notice will be served on: (1) the U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; (2) the U.S. Department of Justice, Antitrust Division, 10th Street & Pennsylvania Avenue NW, Washington, DC 20530; and (3) the U.S. Department of Transportation, Office of the General

²In *Van Pool Transportation LLC—Acquisition of Control—Local Motion, Inc.*, MCF 21104 (STB served Feb. 10, 2023), Applicant received approval to acquire control of Local Motion, Inc., which became effective on March 28, 2023, but Applicant states that it has not yet completed the transaction. (Appl. 3 n.4.)

³Further information about Applicant's corporate structure and ownership can be found in the application. (*See* Appl. 8–9, Ex. B.)

Counsel, 1200 New Jersey Avenue SE, Washington, DC 20590.

Decided: November 8, 2023.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

Stefan Rice,
Clearance Clerk.

[FR Doc. 2023-25391 Filed 11-16-23; 8:45 am]

BILLING CODE 4915-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36733]

Buckingham Branch Railroad Company—Acquisition Exemption—Norfolk Southern Railway Company

Buckingham Branch Railroad Company (BBRR), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to acquire from Norfolk Southern Railway Company (NSR) approximately 58.1 route miles of railroad line extending from milepost F86.0 at Burkeville, Va., to milepost F65.8 at Keysville, Va. (historically known as the F Line), and from milepost D0.0 at Keysville to milepost D37.9 at Clarksville, Va. (historically known as the D Line) (collectively, the Lines).

According to the verified notice, except for a portion of the F Line between milepost F86.0 and F84.8 at or near Burkeville, BBRR has operated the Lines pursuant to a lease since 2009. BBRR states that the parties have agreed in principle to the sale of the Lines from NSR to BBRR under the terms of a draft transaction agreement. The verified notice also states that BBRR intends to consummate the subject transaction on or after the effective date of this exemption, and that BBRR will provide all rail common carrier service on the Lines.

BBRR certifies that the transaction agreement does not have an interchange commitment. BBRR further certifies that its projected annual revenues will not result in BBRR's becoming a Class I or Class II rail carrier, but that its annual revenues currently exceed \$5 million and are expected to continue to exceed \$5 million following its acquisition of the Lines. Pursuant to 49 CFR 1150.42(e), if a carrier's projected annual revenues will exceed \$5 million, it must, at least 60 days before the exemption is to become effective, post a notice of its intent to undertake the proposed transaction at the workplace of the employees on the affected lines, serve a copy of the notice on the national offices of the labor unions with employees on the affected lines, and certify to the Board that it has done so. On October 6, 2023, BBRR certified that

it had complied with those advance notice requirements.

The transaction may be consummated on or after December 8, 2023, the effective date of the exemption (30 days after the verified notice was filed).

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than December 1, 2023.

All pleadings, referring to Docket No. FD 36733, must be filed with the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423-0001. In addition, one copy of each pleading must be served on BBRR's representative, Bradon J. Smith, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606.

According to BBRR, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at www.stb.gov.

Decided: November 14, 2023.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

Jeffrey Herzig,
Clearance Clerk.

[FR Doc. 2023-25492 Filed 11-16-23; 8:45 am]

BILLING CODE 4915-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. MCF 21112]

TBL Group, Inc.—Acquisition of Control—East Coast Transportation Company of North Florida LLC

AGENCY: Surface Transportation Board.

ACTION: Notice tentatively approving and authorizing finance transaction.

SUMMARY: On October 19, 2023, TBL Group, Inc. (TBL Group or Applicant), a holding company, filed an application to acquire substantially all of the business operations and assets of East Coast Transportation Company of North Florida LLC (East Coast Transportation or Seller). The Board is tentatively approving and authorizing the transaction, and, if no opposing comments are timely filed, this notice will be the final Board action.

DATES: Comments may be filed by January 2, 2024. If any comments are filed, TBL Group may file a reply by

January 16, 2024. If no opposing comments are filed by January 2, 2024, this notice shall be effective on January 3, 2024.

ADDRESSES: Comments may be filed with the Board either via e-filing at www.stb.gov/proceedings-actions/e-filing/other-filings/ or in writing addressed to: Surface Transportation Board, 395 E Street SW, Washington, DC 20423-0001. Comments must reference Docket No. MCF 21112. In addition, one copy of comments must be sent to TBL Group's representative: Barry Lewis, United States Transit Funding, Inc., P.O. Box 2563, Ormond Beach, FL 32175.

FOR FURTHER INFORMATION CONTACT: Amy Ziehm at (202) 245-0391. If you require an accommodation under the Americans with Disabilities Act, please call (202) 245-0245.

SUPPLEMENTARY INFORMATION: According to the application, TBL Group is a domestic for-profit incorporated entity headquartered in the state of Texas. TBL Group has been in operation since 2015 and has two wholly owned subsidiaries, GBJ, Inc. and Echo Tours & Charters LP, which primarily provide charter, tour, and local intercity and intracity transportation in the Houston-Dallas-San Antonio, Texas corridor, as well as the Jacksonville, North Florida market. (Appl. 1-2 (pdf pages 3-4).) According to Applicant, its subsidiaries currently operate 189 commercial motor vehicles in the above-mentioned markets.¹ (*Id.* at 2 (pdf page 4).)

East Coast Transportation is an S Corporation with its principal place of business located in the state of Florida. (*Id.*) According to the application, East Coast Transportation is federally registered to provide passenger-carrier motor services and has been in operation for 14 years, providing charter service in Florida and other parts of the Southeast United States. (*Id.*) East Coast Transportation operates 23 motorcoaches and currently has no parent, subsidiary, or affiliate companies. (*Id.*) TBL Group clarified by letter filed October 30, 2023, that, through the proposed transaction, Seller intends to transfer 80% ownership and control of East Coast Transportation to TBL Group, under the name Echo East Coast Transportation, LLC (Echo East Coast Transportation), and Robert M. Sobol, Chief Executive Officer of East Coast Transportation, will hold 20% ownership of the company. (TBL Group Letter 1, Oct. 30, 2023.)

¹ Additional information about the carriers, including U.S. Department of Transportation (USDOT) numbers, motor carrier numbers, and USDOT safety fitness ratings, can be found in the application. (See Appl. 1-3, 9 (pdf pages 3-5, 11).)

Under 49 U.S.C. 14303(b), the Board must approve and authorize a transaction that it finds consistent with the public interest, taking into consideration at least (1) the effect of the proposed transaction on the adequacy of transportation to the public, (2) the total fixed charges that result, and (3) the interest of affected carrier employees. TBL Group has submitted the information required by 49 CFR 1182.2, including information to demonstrate that the proposed transaction is consistent with the public interest under 49 U.S.C. 14303(b), *see* 49 CFR 1182.2(a)(7), and a jurisdictional statement under 49 U.S.C. 14303(g) that the aggregate gross operating revenues of TBL Group and East Coast Transportation exceeded \$2 million during the 12-month period immediately preceding the filing of the application, *see* 49 CFR 1182.2(a)(5).

TBL Group asserts that the transaction is consistent with the public interest. TBL Group states that the transaction is not expected to have a material, detrimental impact on the adequacy of transportation services available for the public, but rather it anticipates that public services will be improved as operating efficiencies will “enable the carriers to provide service across a broad geographic area.” (Appl. 5 (pdf page 7).) With respect to fixed charges, TBL Group asserts that the restructuring of day-to-day operations will allow the Applicant to lower operational costs and continue to provide affordable passenger-carrier transportation services. (*Id.* at 7 (pdf page 9).) Further, TBL Group anticipates that there will be no overall negative impact to employees as a result of the transaction. According to TBL Group, the transaction will enable the parties to consolidate some headquarters and administrative personnel. (*Id.*) TBL Group, asserts, however, that labor force additions in higher paying sales and field operations in multiple cities will offset any personnel contraction across Texas and Florida. (*Id.*) TBL Group notes that, “while the current goal of the transaction is to maximize utilization with fewer vehicles, over time the companies will be able to grow by taking advantage of economies of scale, better financial terms, and increased buying power, resulting in additions to driver and non-driver personnel.” (*Id.*) Lastly, TBL Group asserts that the transaction will not have a material, adverse effect on competition. According to TBL Group, the areas served by the carriers are subject to robust competition. (*Id.*) Specifically, TBL Group states that the Jacksonville,

Florida market has over 20 interstate transportation providers offering charter and tour service. (*Id.*) TBL Group estimates that interstate and intrastate carriers in the Jacksonville, Florida market generate over \$75 million in annual revenues and operate approximately 800 vehicles, including sedans, mini buses, and motor coaches. (*Id.* at 7–8 (pdf pages 9–10).) After the transaction, TBL Group states that the combined revenues of Echo East Coast Transportation will be less than 10% of \$75 million and will account for less than five percent of the vehicles in the local market. (*Id.* at 8 (pdf page 10).) Thus, TBL Group asserts that the applicable carriers are largely separate and distinct, with a small amount of overlap in the larger markets, and do not plan on significantly altering their current operations, but merely wish to take advantage of efficiencies gained through working under one corporate structure. (*Id.* at 7–8 (pdf pages 8–9).)

The Board finds that the acquisition as proposed in the application is consistent with the public interest and should be tentatively approved and authorized. If any opposing comments are timely filed, these findings will be deemed vacated, and, unless a final decision can be made on the record as developed, a procedural schedule will be adopted to reconsider the application. *See* 49 CFR 1182.6. If no opposing comments are filed by expiration of the comment period, this notice will take effect automatically and will be the final Board action. Persons wishing to oppose the application must follow the rules at 49 CFR 1182.5 and 1182.8.

This action is categorically excluded from environmental review under 49 CFR 1105.6(c).

Board decisions and notices are available at www.stb.gov.

It is ordered:

1. The proposed transaction is approved and authorized, subject to the filing of opposing comments.

2. If opposing comments are timely filed, the findings made in this notice will be deemed vacated.

3. This notice will be effective January 3, 2024, unless opposing comments are filed by January 2, 2024. If any comments are filed, TBL Group may file a reply by January 16, 2024.

4. A copy of this notice will be served on: (1) the U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; (2) the U.S. Department of Justice, Antitrust Division, 10th Street & Pennsylvania Avenue NW, Washington, DC 20530; and (3) the U.S. Department of

Transportation, Office of the General Counsel, 1200 New Jersey Avenue SE, Washington, DC 20590.

Decided: November 9, 2023.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

Jeffrey Herzig,
Clearance Clerk.

[FR Doc. 2023–25491 Filed 11–16–23; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. AB 55 (Sub-No. 813X)]

CSX Transportation, Inc.— Abandonment Exemption—in Worcester, Mass.

CSX Transportation, Inc. (CSXT), has filed a verified notice of exemption under 49 CFR part 1152 subpart F—*Exempt Abandonments* to abandon an approximately 0.38-mile rail line that runs between milepost QBU 4.2 and milepost QBU 4.58, on its Albany Division, Boston Subdivision, Fitchburg Branch, in Worcester, Mass. (the Line). The Line traverses U.S. Postal Service Zip Code 01453.

CSXT has certified that: (1) no local freight traffic has moved over the Line during the past two years; (2) any overhead traffic on the Line can be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the Line (or by a state or local government on behalf of such user) regarding cessation of service over the Line is pending with either the Surface Transportation Board (Board) or any U.S. District Court or has been decided in favor of a complainant within the two-year period; and (4) the requirements at 49 CFR 1105.7(b) and 1105.8(c) (notice of environmental and historic reports), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to government agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received,¹

¹ Persons interested in submitting an OFA must first file a formal expression of intent to file an

exemption will be effective on December 17, 2023, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,² formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2), and interim trail use/rail banking requests under 49 CFR 1152.29 must be filed by November 27, 2023.³ Petitions to reopen and requests for public use conditions under 49 CFR 1152.28 must be filed by December 7, 2023.

All pleadings, referring to Docket No. AB 55 (Sub-No. 813X), must be filed with the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423-0001. In addition, a copy of each pleading must be served on CSXT's representative, Louis E. Gitomer, 600 Baltimore Avenue, Suite 301, Towson, MD 21204.

If the verified notice contains false or misleading information, the exemption is void ab initio.

CSXT has filed a combined environmental and historic report that addresses the potential effects, if any, of the abandonment on the environment and historic resources. OEA will issue a Draft Environmental Assessment (Draft EA) by November 24, 2023. The Draft EA will be available to interested persons on the Board's website, by writing to OEA, or by calling OEA at (202) 245-0294. If you require an accommodation under the Americans with Disabilities Act, please call (202) 245-0245. Comments on environmental or historic preservation matters must be filed within 15 days after the Draft EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), CSXT shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the Line. If consummation has not been effected by CSXT's filing of a notice of consummation by November 17, 2024,

offer, indicating the type of financial assistance they wish to provide (*i.e.*, subsidy or purchase) and demonstrating that they are preliminarily financially responsible. See 49 CFR 1152.27(c)(2)(i).

² The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Office of Environmental Analysis (OEA) in its independent investigation) cannot be made before the exemption's effective date. See *Exemption of Out-of-Serv. Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

³ Filing fees for OFAs and trail use requests can be found at 49 CFR 1002.2(f)(25) and (27), respectively.

and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available at www.stb.gov.

Decided: November 14, 2023.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

Stefan Rice,
Clearance Clerk.

[FR Doc. 2023-25474 Filed 11-16-23; 8:45 am]

BILLING CODE 4915-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Random Drug and Alcohol Testing Percentage Rates of Covered Aviation Employees for the Period of January 1, 2024, Through December 31, 2024

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: The FAA has determined that the minimum random drug and alcohol testing percentage rates for the period January 1, 2024, through December 31, 2024, will remain at 25 percent of safety-sensitive employees for random drug testing and 10 percent of safety-sensitive employees for random alcohol testing.

FOR FURTHER INFORMATION CONTACT: Ms. Vicky Dunne, Federal Aviation Administration, Office of Aerospace Medicine, Drug Abatement Division, Program Policy Branch; Email drugabatement@faa.gov; Telephone (202) 267-8442.

SUPPLEMENTARY INFORMATION:

Discussion: Pursuant to 14 CFR 120.109(b), the FAA Administrator's decision on whether to change the minimum annual random drug testing rate is based on the reported random drug test positive rate for the entire aviation industry. If the reported random drug test positive rate is less than 1.00%, the Administrator may continue the minimum random drug testing rate at 25%. In 2022, the random drug test positive rate was 0.786%. Therefore, the minimum random drug testing rate will remain at 25% for calendar year 2023.

Similarly, 14 CFR 120.217(c), requires the decision on the minimum annual random alcohol testing rate to be based on the random alcohol test violation rate. If the violation rate remains less than 0.50%, the Administrator may continue the minimum random alcohol testing rate at 10%. In 2022, the random alcohol test violation rate was 0.150%.

Therefore, the minimum random alcohol testing rate will remain at 10% for calendar year 2022.

If you have questions about how the annual random testing percentage rates are determined, please refer to the Code of Federal Regulations title 14, section 120.109(b) (for drug testing), and 120.217(c) (for alcohol testing).

Issued in Washington, DC.

Susan Northrup,
Federal Air Surgeon.

[FR Doc. 2023-25488 Filed 11-16-23; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2014-0214; FMCSA-2015-0116; FMCSA-2019-0030; FMCSA-2019-0031; FMCSA-2019-0033; FMCSA-2019-0034].

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions for seven individuals from the requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) that interstate commercial motor vehicle (CMV) drivers have "no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV." The exemptions enable these individuals who have had one or more seizures and are taking anti-seizure medication to continue to operate CMVs in interstate commerce.

DATES: The exemptions were applicable on October 4, 2023. The exemptions expire on October 4, 2025.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, (202) 366-4001, fmcsamedical@dot.gov. Office hours are from 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Comments

To view comments go to www.regulations.gov. Insert the docket number (FMCSA–2014–0214, FMCSA–2015–0116, FMCSA–2019–0030, FMCSA–2019–0031, FMCSA–2019–0033, or FMCSA–2019–0034) in the keyword box and click “Search.” Next, sort the results by “Posted (Newer-Older).” choose the first notice listed, and click “Browse Comments.” If you do not have access to the internet, you may view the docket online by visiting Dockets Operations on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

B. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption request. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov. As described in the system of records notice DOT/ALL 14 (Federal Docket Management System), which can be reviewed at <https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices>, the comments are searchable by the name of the submitter.

II. Background

On October 5, 2023, FMCSA published a notice announcing its decision to renew exemptions for seven individuals from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8) to operate a CMV in interstate commerce and requested comments from the public (88 FR 69285). The public comment period ended on November 6, 2023, and no comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved by complying with § 391.41(b)(8).

The physical qualification standard for drivers regarding epilepsy found in § 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria¹ to assist medical examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

III. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Conclusion

Based on its evaluation of the seven renewal exemption applications, FMCSA announces its decision to exempt the following drivers from the epilepsy and seizure disorders prohibition in § 391.41(b)(8).

As of October 4, 2023, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following seven individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers (88 FR 69287):

Douglas Day (IN)
Dennis Klamm (MN)
Michael Miller (TX)
Ryan Moore (NC)
William Swann (MD)
Tyler Tilseth (NM)
Adam Wilson (MN)

The drivers were included in docket numbers FMCSA–2014–0214,

FMCSA–2015–0116, FMCSA–2019–0030, FMCSA–2019–0031, FMCSA–2019–0033, or FMCSA–2019–0034. Their exemptions were applicable as of October 4, 2023 and will expire on October 4, 2025.

In accordance with 49 U.S.C. 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) the person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

Larry W. Minor,
Associate Administrator for Policy.
[FR Doc. 2023–25502 Filed 11–16–23; 8:45 am]

BILLING CODE 4910-EX-P

¹ These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. *Epilepsy*: § 391.41(b)(8), paragraphs 3, 4, and 5, which is available on the internet at <https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf>.

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2010–0001]

Petition for Extension of Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that by petitions dated June 22, 2023; August 7, 2023; and September 6, 2023, Santa Cruz, Big Trees & Pacific Railway (SCBG) petitioned the Federal Railroad Administration (FRA) for an extension of a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR parts 215 (Railroad Freight Car Safety Standards) and 224 (Reflectorization of Rail Freight Rolling Stock). FRA assigned the petition Docket Number FRA–2010–0001.

Specifically, SCBG requested a special approval pursuant to 49 CFR 215.203, *Restricted cars*, for a total of 8 flat cars¹ (SCBG 501–504 and SCBG 701–704) that are more than 50 years from the dates of original construction. SCBG also requested continued relief from § 215.303, *Stenciling of restricted cars*, and § 224.101, *General requirements*, to operate the cars in tourist/excursion service. In support of its request, SCBG stated that the cars will only be operated on SCBG track and a one-mile section of Union Pacific Railroad track.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at www.regulations.gov.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted at www.regulations.gov. Follow the online instructions for submitting comments.

Communications are requested by January 16, 2024. Comments received after that date will be considered if

¹ SCBG initially requested special approval and relief for 10 cars, but in its petition dated September 6, 2023, SCBG requested that two cars be removed from the petition.

practicable. FRA reserves the right to extend the existing relief subject to subsequent consideration of any comments submitted to the docket.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), the U.S. Department of Transportation (DOT) solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at <https://www.transportation.gov/privacy>. See also <https://www.regulations.gov/privacy-notice> for the privacy notice of regulations.gov.

Issued in Washington, DC.

John Karl Alexy,

*Associate Administrator for Railroad Safety,
Chief Safety Officer.*

[FR Doc. 2023-25442 Filed 11-16-23; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA-2023-0081]

Petition for Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on September 18, 2023, Metrolink (SCAX); Alstom; Hallcon Corporation; and the International Association of Sheet Metal, Air, Rail and Transportation Workers (collectively, "Petitioners"), petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 240 (Qualification and Certification of Locomotive Engineers) and part 242 (Qualification and Certification of Conductors). FRA assigned the petition Docket Number FRA-2023-0081.

Specifically, Petitioners request relief required to participate in FRA's Confidential Close Call Reporting System (C³RS) Program. Petitioners seek to shield reporting employees from mandatory punitive sanctions that would otherwise arise as provided in §§ 240.117(e)(1)-(4); 240.305(a)(1)-(4) and (a)(6); 240.307; 242.403(b), (c), (e)(1)-(4), (e)(6)-(11), (f)(1)-(2); and

242.407. The C³RS Program encourages certified operating crew members to report close calls and protects the employees and the railroad from discipline or sanctions arising from the incidents reported per the C³RS Implementing Memorandum of Understanding.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at www.regulations.gov.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted at www.regulations.gov. Follow the online instructions for submitting comments.

Communications received by January 16, 2024 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at <https://www.transportation.gov/privacy>. See also <https://www.regulations.gov/privacy-notice> for the privacy notice of regulations.gov.

Issued in Washington, DC.

John Karl Alexy,

*Associate Administrator for Railroad Safety,
Chief Safety Officer.*

[FR Doc. 2023-25444 Filed 11-16-23; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA-2023-0083]

Petition for Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on September 22, 2023, Alabama Gulf Coast Railroad Company with the International Association of Sheet Metal, Air, Rail and Transportation Workers (collectively, "Petitioners"), petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 240 (Qualification and Certification of Locomotive Engineers) and part 242 (Qualification and Certification of Conductors). FRA assigned the petition Docket Number FRA-2023-0083.

Specifically, Petitioners request relief required to participate in FRA's Confidential Close Call Reporting System (C³RS) Program. Petitioners seek to shield reporting employees from mandatory punitive sanctions that would otherwise arise as provided in §§ 240.117(e)(1)-(4); 240.305(a)(1)-(4) and (a)(6); 240.307; 242.403(b), (c), (e)(1)-(4), (e)(6)-(11), (f)(1)-(2); and 242.407. The C³RS Program encourages certified operating crew members to report close calls and protects the employees and the railroad from discipline or sanctions arising from the incidents reported per the C³RS Implementing Memorandum of Understanding.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at www.regulations.gov.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted at www.regulations.gov. Follow the online instructions for submitting comments.

Communications received by January 16, 2024 will be considered by FRA before final action is taken. Comments

received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at <https://www.transportation.gov/privacy>. See also <https://www.regulations.gov/privacy-notice> for the privacy notice of [regulations.gov](https://www.regulations.gov).

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2023-25445 Filed 11-16-23; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA-2010-0032]

Metro-North Commuter Railroad's Request to Amend Its Positive Train Control Safety Plan and Positive Train Control System

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of availability and request for comments.

SUMMARY: This document provides the public with notice that, on November 8, 2023, Metro-North Commuter Railroad (MNR) submitted a request for amendment (RFA) to its FRA-approved Positive Train Control Safety Plan (PTCSP). As this RFA may involve a request for FRA's approval of proposed material modifications to an FRA-certified positive train control (PTC) system, FRA is publishing this notice and inviting public comment on the railroad's RFA to its PTCSP.

DATES: FRA will consider comments received by December 7, 2023. FRA may consider comments received after that date to the extent practicable and without delaying implementation of valuable or necessary modifications to a PTC system.

ADDRESSES: *Comments:* Comments may be submitted by going to [https://](https://www.regulations.gov)

www.regulations.gov and following the online instructions for submitting comments.

Instructions: All submissions must include the agency name and the applicable docket number. The relevant PTC docket number for this host railroad is Docket No. FRA-2010-0032. For convenience, all active PTC dockets are hyperlinked on FRA's website at <https://railroads.dot.gov/research-development/program-areas/train-control/ptc/railroads-ptc-dockets>. All comments received will be posted without change to <https://www.regulations.gov>; this includes any personal information.

FOR FURTHER INFORMATION CONTACT:

Gabe Neal, Staff Director, Signal, Train Control, and Crossings Division, telephone: 816-516-7168, email: Gabe.Neal@dot.gov.

SUPPLEMENTARY INFORMATION: In general, title 49 United States Code (U.S.C.) section 20157(h) requires FRA to certify that a host railroad's PTC system complies with title 49 Code of Federal Regulations (CFR) part 236, subpart I, before the technology may be operated in revenue service. Before making certain changes to an FRA-certified PTC system or the associated FRA-approved PTCSP, a host railroad must submit, and obtain FRA's approval of, an RFA to its PTCSP under 49 CFR 236.1021.

Under 49 CFR 236.1021(e), FRA's regulations provide that FRA will publish a notice in the **Federal Register** and invite public comment in accordance with 49 CFR part 211, if an RFA includes a request for approval of a material modification of a signal or train control system. Accordingly, this notice informs the public that, on November 8, 2023, MNR submitted an RFA to its PTCSP for its Advanced Civil Speed Enforcement System II (ACSES II), which seeks FRA's approval of an upgrade to the M8 fleet PTC Onboard Software provided by MNR's supplier, Alstom, to correct open defects and provide other enhancements. That RFA is available in Docket No. FRA-2010-0032.

Interested parties are invited to comment on MNR's RFA to its PTCSP by submitting written comments or data. During FRA's review of this railroad's RFA, FRA will consider any comments or data submitted within the timeline specified in this notice and to the extent practicable, without delaying implementation of valuable or necessary modifications to a PTC system. See 49 CFR 236.1021; see also 49 CFR 236.1011(e). Under 49 CFR 236.1021, FRA maintains the authority to approve, approve with conditions, or deny a

railroad's RFA to its PTCSP at FRA's sole discretion.

Privacy Act Notice

In accordance with 49 CFR 211.3, FRA solicits comments from the public to better inform its decisions. 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.transportation.gov/privacy>. See <https://www.regulations.gov/privacy-notice> for the privacy notice of [regulations.gov](https://www.regulations.gov). To facilitate comment tracking, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. If you wish to provide comments containing proprietary or confidential information, please contact FRA for alternate submission instructions.

Issued in Washington, DC

Carolyn R. Hayward-Williams,

Director, Office of Railroad Systems and Technology.

[FR Doc. 2023-25420 Filed 11-16-23; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA-2011-0009]

Petition for Extension of Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on October 4, 2023, Nevada Northern Railway (NNRX) petitioned the Federal Railroad Administration (FRA) to extend a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR parts 215 (Railroad Freight Car Safety Standards) and 224 (Reflectorization of Rail Freight Rolling Stock). FRA assigned the petition Docket Number FRA-2011-0009.

Specifically, NNRX requests to extend its existing special approval pursuant to 49 CFR 215.203, *Restricted cars*, for a total of 13 cars (NN 3, NN 22, NN 23, NN 100, NN 1021, NN 1023, NN 1024, NN 1025, WSOR 102, WSOR 128, WSOR 134, WSOR 158, and WSOR 159) that are more than 50 years from the date of original construction. NNRX also seeks relief from § 215.303, *Stenciling of restricted cars*, and § 224.101, *General requirements*, to operate the cars in tourist/excursion service. In support of its request, NNRX states that the cars

will be used as mobile storage and in occasional tourist photographic events. NNRX explains the relief will “maintain the historic integrity of this [non-insular tourist] railroad” and that “the cars always remain on [NNRX] track.”

A copy of the petition, as well as any written communications concerning the petition, is available for review online at www.regulations.gov.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted at www.regulations.gov. Follow the online instructions for submitting comments.

Communications received by January 16, 2024 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable. Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), the U.S. Department of Transportation (DOT) solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at <https://www.transportation.gov/privacy>. See also <https://www.regulations.gov/privacy-notice> for the privacy notice of www.regulations.gov.

Issued in Washington, DC.

John Karl Alexy,

*Associate Administrator for Railroad Safety,
Chief Safety Officer.*

[FR Doc. 2023–25443 Filed 11–16–23; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[FTA Docket No. FTA 2023–0028]

Agency Information Collection Activity under OMB Review: Title VI as It Applies to FTA Grant Programs

AGENCY: Federal Transit Administration, Department of Transportation (DOT).

ACTION: Notice of request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Requirements (ICRs) abstracted below have been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describe the nature of the information collection and their expected burdens.

DATES: Comments must be submitted on or before December 18, 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: 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; the accuracy of the Department’s estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Tia Swain, Office of Administration, Management Planning Division, 1200 New Jersey Avenue SE, Mail Stop TAD-10, Washington, DC 20590 (202) 366–0354 or tia.swain@dot.gov.

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, section 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on

information collection activities before OMB may approve paperwork packages. 44 U.S.C. 3506, 3507; 5 CFR 1320.5, 1320.8(d)(1), 1320.12. On September 18, 2023, FTA published a 60-day notice (88 FR 33963) in the **Federal Register** soliciting comments on the ICR that the agency was seeking OMB approval. FTA received no comments after issuing this 60-day notice. Accordingly, DOT announces that these information collection activities have been re-evaluated and certified under 5 CFR 1320.5(a) and forwarded to OMB for review and approval pursuant to 5 CFR 1320.12(c).

Before OMB decides whether to approve these proposed collections of information, it must provide 30 days for public comment. 44 U.S.C. 3507(b); 5 CFR 1320.12(d). Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507 (b)-(c); 5 CFR 1320.12(d); see also 60 FR 44978, 44983, Aug. 29, 1995. OMB believes that the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect. 5 CFR 1320.12(c); see also 60 FR 44983, Aug. 29, 1995.

The summaries below describe the nature of the information collection requirements (ICRs) and the expected burden. The requirements are being submitted for clearance by OMB as required by the PRA.

Title: Title VI as it Applies to FTA Grant Programs

OMB Control Number: 2132–0540
Background: Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) states: “No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

To achieve this purpose, each Federal department and agency which provides financial assistance for any program or activity is authorized and directed by the Department of Justice (DOJ) to effectuate provisions of title VI for each program or activity by issuing generally applicable regulations or requirements. The Department of Transportation (DOT) has issued its regulations implementing this DOJ mandate.

In this regard, the responsibility of the FTA is to ensure that federally

supported transit services and benefits are distributed by applicants, recipients, and subrecipients of FTA assistance in a manner consistent with title VI. The employment practices of a grant applicant, recipient, or sub-recipient are also covered under title VI if the primary purpose of the FTA-supported program is to provide employment or if those employment practices would result in discrimination against beneficiaries of FTA-assisted services and benefits.

FTA policies and requirements are designed to clarify and strengthen title VI (service equity) procedures for FTA grant recipients by requiring submission of written plans and approval of such plans by the agency. All project sponsors receiving financial assistance pursuant to an FTA-funded project shall not discriminate in the provision of services because of race, color, or national origin. Experience has demonstrated that a program requirement at the application stage is necessary to assure that benefits and services are equitably distributed by grant recipients. The requirements prescribed by the Office of Civil Rights are designed to accomplish this objective and diminish possible vestiges of discrimination among FTA grant recipients. FTA's assessment of the requirements indicated that the formulation and implementation of the title VI Program should occur with a decrease in costs to such applicants and recipients.

Respondents: Transit agencies, States, and Metropolitan Planning Organizations.

Estimated Annual Burden on Respondents: 284 (45 hours for each of the 100 more specific title VI Program submissions; 1 hour for each of the 183 general title VI Program submissions).

Estimated Total Annual Burden: 4,684 hours.

Frequency: Annual.

Nadine Pembleton,

Deputy Associate Administrator, Office of Administration.

[FR Doc. 2023-25415 Filed 11-16-23; 8:45 am]

BILLING CODE 4910-57-P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[FTA Docket No. FTA 2023-0027]

Agency Information Collection Activity under OMB Review: Metropolitan and Statewide and Nonmetropolitan Transportation Planning

AGENCY: Federal Transit Administration, Department of Transportation (DOT).

ACTION: Notice of request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Requirements (ICRs) abstracted below have been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describe the nature of the information collection and their expected burdens.

DATES: Comments must be submitted on or before December 18, 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: 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; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Tia Swain, Office of Administration, Management Planning Division, 1200 New Jersey Avenue SE, Mail Stop TAD-10, Washington, DC 20590 (202) 366-0354 or tia.swain@dot.gov.

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Public Law 104-13, section 2, 109 stat. 163 (1995) (codified as revised at 44 U.S.C. 3501-3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. 44 U.S.C. 3506, 3507; 5 CFR 1320.5, 1320.8(d)(1), 1320.12. On September 18, 2023, FTA published a 60-day notice (88 FR 33963) in the **Federal Register** soliciting comments on the ICR that the agency was seeking OMB approval. FTA received no comments after issuing this 60-day notice. Accordingly, DOT announces that these information

collection activities have been re-evaluated and certified under 5 CFR 1320.5(a) and forwarded to OMB for review and approval pursuant to 5 CFR 1320.12(c).

Before OMB decides whether to approve these proposed collections of information, it must provide 30 days for public comment. 44 U.S.C. 3507(b); 5 CFR 1320.12(d). Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507(b)-(c); 5 CFR 1320.12(d); *see also* 60 FR 44983, 44983, Aug. 29, 1995. OMB believes that the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect. 5 CFR 1320.12(c); *see also* 60 FR 44983, Aug. 29, 1995.

The summaries below describe the nature of the information collection requirements (ICRs) and the expected burden. The requirements are being submitted for clearance by OMB as required by the PRA.

Title: Metropolitan and Statewide and Nonmetropolitan Transportation Planning.

OMB Control Number: 2132-0529.

Background: The FTA and Federal Highway Administration (FHWA) jointly carry out the federal mandate to improve urban and rural transportation. 49 U.S.C. 5303 and 5304 and 23 U.S.C. 134 and 135 authorize the use of federal funds to assist Metropolitan Planning Organizations (MPOs), States, and local public bodies in developing transportation plans and programs to serve the transportation needs of urbanized areas over 50,000 in population and other areas of States outside of urbanized areas. The program provides funding and procedural requirements for multimodal transportation planning in metropolitan areas and states. Planning needs to be cooperative, continuous, and comprehensive, resulting in long-range plans and short-range programs reflecting transportation investment priorities. Eligible respondents include State Departments of Transportation (DOTs) and Metropolitan Planning Organizations (MPOs). Federal planning funds are first apportioned to State DOTs. State DOTs then allocate planning funding to MPOs. Funds are available for planning activities that (A) support the economic vitality of the metropolitan area, especially by

enabling global competitiveness, productivity, and efficiency; (B) increase the safety of the transportation system for motorized and nonmotorized users; (C) increase the security of the transportation system for motorized and nonmotorized users; (D) increase the accessibility and mobility of people and for freight; (E) protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth, housing, and economic development patterns; (F) enhance the integration and connectivity of the transportation system, across and between modes, for people and freight; (G) promote efficient system management and operation; (H) emphasize the preservation of the existing transportation system; and (I) improve the resiliency and reliability of the transportation system. Funds are apportioned to states by a formula that includes each state's urbanized area population in proportion to the total urbanized area population for the nation, as well as other factors. States can receive no less than .5 percent of the amount apportioned. These funds, in turn, are sub-allocated by states to MPOs by a formula that considers each MPO's urbanized area population, their individual planning needs, and a minimum distribution.

Respondents: State Departments of Transportation and MPOs.

Estimated Annual Burden on

Respondents: 11,693 hours for each of the 502 respondents.

Estimated Total Annual Burden: 5,869,921 hours.

Frequency: Annual.

Nadine Pembleton,

Deputy Associate Administrator, Office of Administration.

[FR Doc. 2023–25413 Filed 11–16–23; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[FTA Docket No. FTA 2023–0029]

Agency Information Collection Activity Under OMB Review: Pre-Award, Post Delivery Audit Requirements Under Buy America

AGENCY: Federal Transit Administration, Department of Transportation (DOT).

ACTION: Notice of request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information

Collection Requirements (ICRs) abstracted below have been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describe the nature of the information collection and their expected burdens.

DATES: Comments must be submitted on or before December 18, 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: 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; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Tia Swain, Office of Administration, Management Planning Division, 1200 New Jersey Avenue SE, Mail Stop TAD–10, Washington, DC 20590 (202) 366–0354 or tia.swain@dot.gov.

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, section 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. 44 U.S.C. 3506, 3507; 5 CFR 1320.5, 1320.8(d)(1), 1320.12. On September 18, 2023, FTA published a 60-day notice (88 FR 33963) in the **Federal Register** soliciting comments on the ICR that the agency was seeking OMB approval. FTA received no comments after issuing this 60-day notice. Accordingly, DOT announces that these information collection activities have been re-evaluated and certified under 5 CFR 1320.5(a) and forwarded to OMB for review and approval pursuant to 5 CFR 1320.12(c).

Before OMB decides whether to approve these proposed collections of information, it must provide 30 days for public comment. 44 U.S.C. 3507(b); 5 CFR 1320.12(d). Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507 (b)–(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983, Aug. 29, 1995. OMB believes that the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect. 5 CFR 1320.12(c); *see also* 60 FR 44983, Aug. 29, 1995.

The summaries below describe the nature of the information collection requirements (ICRs) and the expected burden. The requirements are being submitted for clearance by OMB as required by the PRA.

Title: Pre-Award, Post Delivery Audit Requirements Under Buy America.

OMB Control Number: 2132–0544.

Background: Federal Transit Laws, 49 U.S.C. 5323(j) and (m), require that recipients of Federal Transit Administration (FTA) funding comply with certain requirements, including Buy America, maintain on file certifications of compliance by the bidder or offeror, and certify compliance at the pre-award and post-delivery stages of the procurement process for rolling stock purchases under 49 CFR part 663.

Bidders or offerors must submit certificates to assure compliance with Buy America, the purchaser's contract specifications (for rolling stock only), and Federal motor vehicle safety requirements (for rolling stock only). The information collected on the certification forms is necessary for FTA recipients to meet the requirements of 49 U.S.C. 5323(j) and (m). In addition, FTA recipients are required to certify, as part of their annual Certifications and Assurances, that they will comply with pre-award and post-delivery audit requirements for rolling stock under 49 CFR part 663.

Respondents: FTA recipients, including State and local government, and businesses or other for-profit organizations.

Estimated Annual Respondents: 700 respondents.

Estimated Annual Responses: 700 responses.

Estimated Total Annual Burden: 2,786 hours.

Frequency: Annual.

Nadine Pembleton,

*Deputy Associate Administrator, Office of
Administration.*

[FR Doc. 2023-25414 Filed 11-16-23; 8:45 am]

BILLING CODE 4910-57-P

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: Bradley Smith, 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 Sanctions

Enforcement, Compliance & Analysis,
tel.: 202-622-2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional
information concerning OFAC sanctions
programs are available on OFAC's
website (ofac.treasury.gov).

Notice of OFAC Action(s)

On November 14, 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.

Individuals:

BILLING CODE 4810-AL-P

1. CHOUMAN, Nabil Khaled Halil (a.k.a. CHOUMAN, Nabil; a.k.a. SHOMAN, Nabil Khaled Khalil; a.k.a. SHUMAN, Nabil), Moussaitbeh St., Beirut, Lebanon; DOB 01 Sep 1954; nationality Lebanon; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: HAMAS).

Designated pursuant to section 1(a)(iii)(C) of Executive Order 13224 of September 23, 2001, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism," 66 FR 49079, as amended by Executive Order 13886 of September 9, 2019, "Modernizing Sanctions To Combat Terrorism," 84 FR 48041 (E.O. 13224, as amended), for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, HAMAS, a person whose property and interests in property are blocked pursuant to E.O. 13224.

2. CHOUMAN, Khaled (a.k.a. SHOMAN, Khaled Khalil), 529 Moussaitbeh St., Beirut, Lebanon; DOB 02 Apr 1987; nationality Lebanon; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: HAMAS).

Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, HAMAS, a person whose property and interests in property are blocked pursuant to E.O. 13224.

3. KHAMIS, Reda Ali, Al-Halusiyah 34, Tyre, Lebanon; DOB 20 Sep 1967; nationality Lebanon; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; National ID No. 3194104 (Lebanon) (individual) [SDGT] (Linked To: HAMAS).

Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, HAMAS, a person whose property and interests in property are blocked pursuant to E.O. 13224.

4. AL-ATILI, Ma'ad Ibrahim Muhammad Rashid (Arabic: معاد إبراهيم محمد رشيد العتيلي) (a.k.a. IBRAHIM MUHAMMAD RASHID, Ma'ad), West Bank; DOB 15 Mar 1980; nationality Palestinian; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; National ID No. 906168711 (Palestinian) (individual) [SDGT] (Linked To: HAMAS).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, HAMAS, a person whose property and interests in property are blocked pursuant to E.O. 13224.

5. ZAHHAR, Mahmoud Khaled (a.k.a. AL ZAHAR, Mahmoud Khaled; a.k.a. “AL-ZAHAR, Mahmoud”; a.k.a. “ZAHAR, Mahmoud”), Gaza; DOB 1945; POB Gaza Strip; nationality Palestinian; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] [NS-PLC] (Linked To: HAMAS).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, HAMAS, a person whose property and interests in property are blocked pursuant to E.O. 13224.

6. ABU SHARIF, Nasser (Arabic: ناصر ابو شريف) (a.k.a. AL-JAMUS, ‘Abd-al-Nasr Sharif; a.k.a. JAMOOS, Abdal Nasser Sharif Mohammed Said (Arabic: عبد الناصر شريف محمد (سعيد جاموس)), Iran; DOB 14 Jan 1966; POB Tulkarm, West Bank; alt. POB Thennaba, West Bank; nationality Palestinian; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; National ID No. 000083063 (Palestinian) (individual) [SDGT] (Linked To: PALESTINE ISLAMIC JIHAD - SHAQAQI FACTION).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, PALESTINE ISLAMIC JIHAD – SHAQAQI FACTION, a person whose property and interests in property are blocked pursuant to E.O. 13224.

7. ‘ALIYAN, Jamil Yusuf Ahmad (Arabic: جميل يوسف احمد عليان) (a.k.a. ALAYAN, Jamil; a.k.a. ALIAN, Jamil), Gaza; DOB 01 Jan 1955; nationality Palestinian; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; National ID No. 907811152 (Palestinian) (individual) [SDGT] (Linked To: PALESTINE ISLAMIC JIHAD - SHAQAQI FACTION).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, PALESTINE ISLAMIC JIHAD – SHAQAQI FACTION, a person whose property and interests in property are blocked pursuant to E.O. 13224.

Entities:

1. NABIL CHOUMAN & CO (a.k.a. NABIL CHOUMAN AND CO; a.k.a. NABIL SHOMAN AND PARTNERS EXCHANGE COMPANY; a.k.a. SHUMAN CURRENCY EXCHANGE; a.k.a. SUMAN CURRENCY EXCHANGE SARL; a.k.a. “SHUMAN GROUP”), Property Number 351, Al-Hamra Street Strand building ground floor, Ras Beirut, Beirut, Lebanon; Safi Village, Beirut, Lebanon; Nabatieh, Beirut, Lebanon; Tyre, Beirut, Lebanon; Website shuman-exchange.business.site; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 13 Mar 1989; alt. Organization Established Date

1980; Organization Type: Other financial service activities, except insurance and pension funding activities, n.e.c.; C.R. No. 55789 (Lebanon) [SDGT] (Linked To: HAMAS).

Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, HAMAS, a person whose property and interests in property are blocked pursuant to E.O. 13224.

2. MUHJAT ALQUDS FOUNDATION (Arabic: مؤسسة مهجة القدس) (a.k.a. MUHJAT AL-QUDS FOUNDATION FOR MARTYRS, PRISONERS, AND WOUNDED (Arabic: مؤسسة مهجة القدس للشهداء والأسرى والجرحى); a.k.a. MUHJAT AL-QUDS FOUNDATION FOR PRISONERS; a.k.a. MUHJAT AL-QUDS INSTITUTION; a.k.a. "AL-MUHJA"; a.k.a. "JERUSALEM MOVEMENT FOUNDATION FOR THE MARTYRS, PRISONERS, AND WOUNDED"), Gaza; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 2002; Registration Number 8040 (Palestinian) [SDGT] (Linked To: PALESTINE ISLAMIC JIHAD - SHAQAQI FACTION).

Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, PALESTINE ISLAMIC JIHAD – SHAQAQI FACTION, a person whose property and interests in property are blocked pursuant to E.O. 13224.

Dated: November 14, 2023.

Bradley T. Smith,

*Director, Office of Foreign Assets Control,
U.S. Department of the Treasury.*

[FR Doc. 2023-25440 Filed 11-16-23; 8:45 am]

BILLING CODE 4810-AL-C

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Extension of Information Collection Request Submitted for Public Comment; Comment Request Concerning Information Reporting for Form 7210

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 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. Currently, the IRS is soliciting comments concerning new

Form 7210, *Clean Hydrogen Production Credit*.

DATES: Written comments should be received on or before January 16, 2024 to be assured of consideration.

ADDRESSES: Direct all written comments to Andrés Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to pra.comments@irs.gov. Please include, "OMB Number: 1545-New, Form 7210—Public Comment Request Notice" in the Subject line.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to LaNita Van Dyke, at (202) 317-3009, at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet at LaNita.VanDyke@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Clean Hydrogen Production Credit.

OMB Number: 1545-New.

Form Project Number: Form 7210.

Abstract: Section 13204 of the Inflation Reduction Act of 2022 (IRA 2022), Public Law 117-169, created the new clean hydrogen production credit in new Internal Revenue Code section 45V. For 2023 and subsequent years,

new Form 7210 will be used to claim the credit. The clean hydrogen production credit provides a per-kilogram (kg) credit for qualified clean hydrogen produced at a qualified clean hydrogen facility. This form is attached to 2023 tax returns.

Current Actions: This is a request for new OMB approval.

Type of Review: New Form.

Affected Public: Business or other for-profit organizations.

Estimated Number of Responses: 50.

Estimated Time per Respondent: 5.47 hours.

Estimated Total Annual Burden Hours: 274.

The following paragraph applies to all the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Desired Focus of Comments: The Internal Revenue Service (IRS) is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICR for OMB approval of the extension of the information collection; they will also become a matter of public record.

Approved: November 13, 2023.

Molly J Stasko,

Senior Tax Analyst.

[FR Doc. 2023–25377 Filed 11–16–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Requesting Comments on Form 709

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 709, United States Gift (and Generation-Skipping Transfer) Tax Return.

DATES: Written comments should be received on or before January 16, 2024 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. 1545–0020 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 Gift (and Generation-Skipping Transfer) Tax Return.

OMB Number: 1545–0020.

Form Number: Form 709.

Abstract: Form 709 is used by individuals to report transfers subject to the gift and generation-skipping transfer taxes and to compute these taxes. The IRS uses the information to collect and enforce these taxes, to verify that the taxes are properly computed, and to compute the tax base for the estate tax.

Current Actions: There is no change to the existing collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Responses: 224,530.

Estimated Time per Respondent: 6 hours, 12 minutes.

Estimated Total Annual Burden Hours: 1,392,086.

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: November 14, 2023.

Jon R. Callahan,

Senior Tax Analyst.

[FR Doc. 2023–25439 Filed 11–16–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 2005–62

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 Notice 2005–62, Modification of Notice 2005–04; Biodiesel and Aviation-Grade Kerosene.

DATES: Written comments should be received on or before January 16, 2024 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. Please include the OMB Control Number 1545–1915 in the Subject line.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or copies of the Notices should be directed to Sara Covington, at (202) 317–5744, at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet at sara.l.covington@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Modification of Notice 2005–04; Biodiesel and Aviation-Grade Kerosene.
OMB Number: 1545–1915.

Notice Number: Notice 2005–62.

Abstract: Notice 2005–04 provides guidance on certain excise tax Code provisions that were added or effected by the American Jobs Creation Act of 2004. The information will be used by the IRS to verify that the proper amount of tax is reported, excluded, refunded, or credited. This notice is modified and expanded by Notices 2005–24, 2005–62, and 2005–80.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, not-for-profit institutions, farms, Federal, state, local or tribal governments.

Estimated Number of Responses: 157,963.

Estimated Time per Respondent: .48 hours.

Estimated Total Annual Burden Hours: 76,190.

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: October 31, 2023.

Sara L. Covington,
IRS Tax Analyst.

[FR Doc. 2023–25411 Filed 11–16–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Certain Transfers of Domestic Stock or Securities by U.S. Persons to Foreign Corporations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning certain transfers of domestic stock or securities by U.S. persons to foreign corporations.

DATES: Written comments should be received on or before January 16, 2024 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. Please include the OMB Control Number 1545–1478 or TD 8702 in the Subject line.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form should be directed to Kerry Dennis, at (202) 317–5744 or Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at sara.l.covington@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Certain Transfers of Domestic Stock or Securities by U.S. Persons to Foreign Corporations.

OMB Number: 1545–1478.

Regulation Project Number: TD 8702.

Abstract: The regulation relates to certain transfers of stock or securities of domestic corporations pursuant to the corporate organization, reorganization, or liquidation provisions of the internal Revenue Code. Transfers of stock or securities by U.S. persons in tax-free transactions are treated as taxable transactions when the acquirer is a

foreign corporation, unless an exception applies under Code section 367(a). This regulation provides that no U.S. person will qualify for an exception unless the U.S. target company complies with certain reporting requirements.

Current Actions: There are no changes being made to the regulations at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 100.

Estimated Time per Respondent: 10 minutes.

Estimated Total Annual Burden Hours: 1,000.

The following paragraph applies to all the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 31, 2023.

Sara L. Covington,
IRS Tax Analyst.

[FR Doc. 2023–25410 Filed 11–16–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY**Internal Revenue Service****Proposed Extension of Information Collection Request Submitted for Public Comment; Comment Request Relating to Requests for Miscellaneous Determination**

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 public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning requests for Miscellaneous Determination by Organizations Exempt Under section 501(c)(3). Form 8940, *Request for Miscellaneous Determination*, can be filed electronically.

DATES: Written comments should be received on or before January 16, 2024 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. Please reference "OMB Control Number 1545-2211" in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this collection should be directed to Sara Covington, (202) 317-5744 at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at sara.l.covington@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Request for Miscellaneous Determination.

OMB Number: 1545-2211.

Form Number(s): 8940.

Abstract: Organizations exempt under section 501(c)(3) may file Form 8940 for miscellaneous determinations under sections 507, 509(a), 4940, 4942, 4945, and 6033. Nonexempt charitable trusts may also file a Form 8940 for an initial determination under section 509(a)(3).

Current Actions: There is no change to the burden previously approved by OMB. This request is being submitted for renewal purposes.

Type of Review: Extension of a currently approved collection.

Affected Public: Not-for-profit institutions.

Estimated Number of Respondents: 2,100.

Estimated Time per Respondent: 13 hours, 47 min.

Estimated Total Annual Burden Hours: 28,959.

The following paragraph applies to all the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Desired Focus of Comments: The Internal Revenue Service (IRS) is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICR for OMB approval of the extension of the information collection; they will also become a matter of public record.

Approved: October 31, 2023.

Sara L. Covington,
IRS Tax Analyst.

[FR Doc. 2023-25409 Filed 11-16-23; 8:45 am]

BILLING CODE 4830-01-P

ACTION: Notice of reporting requirements.

SUMMARY: By this Notice, the Department of the Treasury is informing the public that it is conducting a mandatory survey of ownership of foreign securities by U.S. residents as of December 31, 2023. This Notice constitutes legal notification to all United States persons (defined below) who meet the reporting requirements set forth in this Notice that they must respond to, and comply with, this survey. The reporting form SHCA (2023) and instructions may be printed from the internet at: <https://home.treasury.gov/data/treasury-international-capital-tic-system-home-page/tic-forms-instructions/forms-shc>.

SUPPLEMENTARY INFORMATION:

Definition: Pursuant to 22 U.S.C. 3102(3) and (4): a person means any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization (whether or not organized under the laws of any State), and any government (including a foreign government, the United States Government, a State or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government-sponsored agency); and a United States person means any person resident in the United States or subject to the jurisdiction of the United States.

Who Must Report: The reporting panel is based upon the data submitted for the 2022 annual survey and the June 2023 TIC report "Aggregate Holdings, Purchases and Sales, and Fair Value Changes of Long-Term Securities by U.S. and Foreign Residents" (TIC SLT). Entities required to report will be contacted individually by the Federal Reserve Bank of New York. Entities not contacted by the Federal Reserve Bank of New York have no reporting responsibilities.

What To Report: This report will collect information on holdings by U.S. residents of foreign securities, including equities, long-term debt securities, and short-term debt securities (including selected money market instruments).

How To Report: Copies of the survey forms and instructions, which contain complete information on reporting procedures and definitions, may be obtained at the website address given above in the Summary. Completed reports can be submitted electronically or via email at SHC.help@ny.frb.org. Inquiries can be made to the survey staff of the Federal Reserve Bank of New York at (212) 720-6300 or email: SHC.help@ny.frb.org. Inquiries can also

DEPARTMENT OF THE TREASURY**Survey of U.S. Ownership of Foreign Securities as of December 31, 2023**

AGENCY: Departmental Offices, Department of the Treasury.

be made to Dwight Wolkow at (202) 622-1276, or email: comments2TIC@do.treas.gov.

When To Report: Data must be submitted to the Federal Reserve Bank of New York, acting as fiscal agent for the Department of the Treasury, by March 1, 2024.

Paperwork Reduction Act Notice: This data collection has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act and assigned control number 1505-0146. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB. The estimated average annual burden associated with this collection of information is 49 hours per respondent for end-investors and custodians that file Schedule 3 reports covering their foreign securities entrusted to U.S. resident custodians, 146 hours per respondent for large end-investors filing Schedule 2 reports, and 546 hours per respondent for large custodians of securities filing Schedule 2 reports. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Department of the Treasury, Attention: Administrator, International Portfolio Investment Data Reporting Systems, Room 1050, Washington, DC 20220, and to OMB, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503. Please also email your comments to Dwight Wolkow at: comments2TIC@do.treas.gov.

Dwight Wolkow,

Administrator, International Portfolio Investment Data Reporting Systems.

[FR Doc. 2023-25501 Filed 11-16-23; 8:45 am]

BILLING CODE 4810-AK-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0636]

Agency Information Collection Activity under OMB Review: Accelerated Payment Verification of Completion Letter

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the

Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden, and it includes the actual data collection instrument.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by clicking on the following link www.reginfo.gov/public/do/PRAMain, select “Currently under Review—Open for Public Comments”, then search the list for the information collection by Title or “OMB Control No. 2900-0636.”

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20420, (202) 266-4688 or email Maribel.aponte@va.gov. Please refer to “OMB Control No. 2900-0636” in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: Public Law 107-103 and Public Law 110-181; 10 U.S.C. 16131a and 38 CFR 21.7154(d)(1).

Title: Accelerated Payment Verification of Completion Letter, VA Form 22-0840.

OMB Control Number: 2900-0636.

Type of Review: Extension of a currently approved collection.

Abstract: Eligible Veterans, Service members, and beneficiaries electing to receive an accelerated payment for educational assistance payments must certify they received such payment and how the payment was used, and the data collected from the VA Form 22-0840 is used to determine the entitlement to the accelerated payment.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register Notice** with a 60-day comment period soliciting comments on this collection of information was published at 88 FR 63674 on Friday, September 15, 2023, Page 63674.

Affected Public: Individuals and Households.

Estimated Annual Burden: 1 hour.

Estimated Average Burden Time per Respondent: 5 minutes.

Frequency of Response: One Time.

Estimated Number of Respondents: 10.

By direction of the Secretary.

Dorothy Glasgow,

VA PRA Clearance Officer, (Alt.) Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023-25503 Filed 11-16-23; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

Scoping Notice for Preparation of a Programmatic Environmental Assessment for the Build-to-Suit Lease Program

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA) is preparing a programmatic environmental assessment (PEA) in accordance with the regulations implementing the procedural provisions of the National Environmental Policy Act of 1969 (NEPA), as implemented by the Council on Environmental Quality regulations, and VA's NEPA Implementing Regulations.

DATES: Comments must be received on or before December 18, 2023. VA anticipates releasing the draft PEA for a 30-day public review and comment period in the first quarter of fiscal year 2024. VA will notify stakeholders via email/mail, publish a notice of availability of the draft PEA in the **Federal Register** and solicit comments at that time. The draft PEA will be available for review via the VA website: www.cfm.va.gov/environmental/.

ADDRESSES: Comments must be submitted through www.regulations.gov. Except as provided below, comments received before the close of the comment period will be available at www.regulations.gov for public viewing, inspection, or copying, including any personally identifiable or confidential business information that is included in a comment. We post the comments received before the close of the comment period on the following website as soon as possible after they have been received: <http://www.regulations.gov>. VA will not post on [Regulations.gov](http://www.regulations.gov) public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm the individual. VA encourages individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments. Any public comment received after the comment

period's closing date is considered late and will not be considered.

FOR FURTHER INFORMATION CONTACT: Mr. Jason Sturm, Environmental Engineer, Office of Construction & Facilities Management (003C2), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington DC 20420, (224) 628-1946 (this is not a toll-free number), Jason.Sturm@va.gov. Reference "Build-to-Suit Lease PEA" in your correspondence.

SUPPLEMENTARY INFORMATION: The VA Office of Construction and Facilities Management, Office of Real Property supports VA's mission by, among other functions, leasing space for the construction of medical and medically related facilities to care for the Nation's Veterans.

The PEA will analyze the proposed construction, renovation, repair and operation of community-based outpatient clinics, community living centers and other similar leased medical facilities identified under the VA Office of Construction & Facilities Management, Office of Real Property build-to-suit program. The geographic scope of the PEA is all 50 states, the District of Columbia, the U.S. Virgin

Islands, the Commonwealth of Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, American Samoa and Tribal Lands. The PEA aims to provide a streamlined NEPA compliance process for those recurring, predictable, and low-impact construction, renovation or repair projects that would result in less than significant impacts.

This notice initiates the scoping process for the PEA and invites the public, government agencies and other interested persons and organizations to provide comments on the scope of issues for analysis, input on potential alternatives, or information/analyses relevant to the proposed action.

Use of the PEA would decrease the time and cost associated with having to prepare stand-alone NEPA documentation for those future build-to-suit lease projects that would meet the conditions of the PEA. VA would complete additional NEPA compliance as required on projects outside the parameters of the PEA.

The purpose of the proposed action is to provide eligible Veterans common medical services, assisted living care and related services. The proposed

action is needed to address current and future projected health care gaps and operational inefficiencies, especially in rural areas where access to common medical services offered by Veterans Affairs Medical Centers is not an easily accessible option.

The PEA will evaluate the potential direct and indirect impacts on the human environment from the proposed action and alternatives. VA will make the Draft PEA available for a public comment period following its completion.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved and signed this document on November 13, 2023, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Jeffrey M. Martin,

Assistant Director, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

[FR Doc. 2023-25416 Filed 11-16-23; 8:45 am]

BILLING CODE 8320-01-P



FEDERAL REGISTER

Vol. 88

Friday,

No. 221

November 17, 2023

Part II

Department of Homeland Security

8 CFR Parts 214 and 274a

Department of Labor

Employment and Training Administration

20 CFR Part 655

Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2024 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers; Temporary Rule

DEPARTMENT OF HOMELAND SECURITY**8 CFR Parts 214 and 274a**

[CIS No. 2764–24]

RIN 1615–AC89

DEPARTMENT OF LABOR**Employment and Training Administration****20 CFR Part 655**

[DOL Docket No. ETA–2023–0005]

RIN 1205–AC18

Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2024 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers

AGENCY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS), and Employment and Training Administration and Wage and Hour Division, U.S. Department of Labor (DOL).

ACTION: Temporary rule.

SUMMARY: DHS, in consultation with DOL, is exercising time-limited Fiscal Year (FY) 2024 authority and increasing the total number of noncitizens who may receive an H–2B nonimmigrant visa by up to 64,716 for the entirety of FY 2024. These supplemental visas will be distributed in several allocations. 20,000 visas made available in this rule will be reserved for nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica. All visas will be available only to businesses that are suffering or will suffer impending irreparable harm, as attested by the employer. In addition, DHS is again providing temporary portability flexibility.

DATES: *Effective dates:* The amendments at instructions 1, 3, and 5 are effective November 17, 2023; at instructions 2 and 4 amending 8 CFR 214.2 and 274a.12, respectively, are effective from November 17, 2023, through November 17, 2026; at instruction 6, adding 20 CFR 655.64, is effective from November 17, 2023, through September 30, 2024; and at instruction 7, adding 20 CFR 655.65, is effective from November 17, 2023, through September 30, 2027.

Petition dates: DHS will not accept any H–2B petitions under provisions related to the FY 2024 supplemental numerical allocations after September 16, 2024, and will not approve any such

H–2B petitions after September 30, 2024. The provisions related to portability are only available to petitioners and H–2B nonimmigrant workers initiating employment through the end of January 24, 2025.

Comments on the Information Collection: The Office of Foreign Labor Certification within the U.S. Department of Labor will accept comments in connection with the new information collection Form ETA–9142B–CAA–8 associated with this rule until January 16, 2024. The electronic Federal Docket Management System will accept comments prior to midnight eastern time at the end of that day.

ADDRESSES: You may submit written comments on the new information collection Form ETA–9142B–CAA–8, identified by Regulatory Information Number (RIN) 1205–AC18, electronically by the following method: *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions on the website for submitting comments.

Instructions: Include the agency's name and the RIN 1205–AC18 in your submission. All comments received will become a matter of public record and will be posted without change to <https://www.regulations.gov>. Please do not include any personally identifiable information or confidential business information you do not want publicly disclosed.

FOR FURTHER INFORMATION CONTACT:

Regarding 8 CFR parts 214 and 274a: Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20746; telephone 240–721–3000 (this is not a toll-free number).

Regarding 20 CFR part 655 and Form ETA–9142B–CAA–8: Brian D. Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Ave NW, Room N–5311, Washington, DC 20210, telephone (202) 693–8200 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD).

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- A. Statutory Determination

- B. Numerical Increase and Allocations for Fiscal Year 2024

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- D. 20,000 Allocation for Nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica

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- H. DHS Petition Procedures

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I. Executive Summary*FY 2024 H–2B Supplemental Cap*

With this temporary final rule (TFR), the Secretary of Homeland Security, following consultation with the Secretary of Labor, is authorizing the release of an additional 64,716 H–2B visas for FY 2024, subject to certain conditions. The 64,716 visas are divided into the following allocations:

- For the first half of FY 2024: 20,716 immediately available visas limited to returning workers, in other words, those workers who were issued H–2B visas or held H–2B status in fiscal years 2021, 2022, or 2023, regardless of country of nationality. These petitions must request employment start dates on or before March 31, 2024;

- For the early second half of FY 2024 (April 1 to May 14): 19,000 visas limited to returning workers, in other words, those workers who were issued H–2B visas or held H–2B status in fiscal years 2021, 2022, or 2023 regardless of country of nationality. These early second half of FY 2024 petitions must request employment start dates from April 1, 2024, to May 14, 2024. Furthermore, employers must file these petitions no earlier than 15 days after

the second half statutory cap¹ is reached;

- For the late second half of FY 2024: (May 15 to September 30): 5,000 visas limited to returning workers, in other words, those workers who were issued H-2B visas or held H-2B status in fiscal years 2021, 2022, or 2023 regardless of country of nationality. These late second half of FY 2024 petitions must request employment start dates from May 15, 2024, to September 30, 2024. Furthermore, employers must file these petitions no earlier than 45 days after the second half statutory cap is reached; and

- For the entirety of FY 2024: 20,000 visas reserved for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica (country-specific allocation) as attested by the petitioner (regardless of whether such nationals are returning workers). Employers requesting an employment start date in the first half of FY 2024 may file such petitions immediately after the publication of this TFR. Employers requesting an employment start date in the second half of FY 2024 must file such petitions no earlier than 15 days after the second half statutory cap is reached.

To qualify for the FY 2024 supplemental caps provided by this temporary final rule, eligible petitioners must:

- Meet all existing H-2B eligibility requirements, including obtaining an approved temporary labor certification (TLC) from DOL before filing the Form I-129, Petition for a Nonimmigrant Worker, with USCIS;
- Properly file the Form I-129, Petition for a Nonimmigrant Worker, with USCIS at its Texas Service Center on or before September 16, 2024;
- Submit an attestation affirming, under penalty of perjury, that the employer is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H-2B workers requested on the petition, and that they are seeking to employ returning workers only, unless the H-2B worker is a Salvadoran, Guatemalan, Honduran, Haitian, Colombian, Ecuadorian, or Costa Rican national and counted towards the 20,000 cap exempt from the returning worker requirement; and
- Prepare and retain a detailed written statement describing how the employer is suffering irreparable harm or will suffer impending irreparable harm and how evidence demonstrates

irreparable harm and supports their application.

Employers filing an H-2B petition 30 or more days after the certified start date on the TLC, must attest to engaging in the following additional steps to recruit U.S. workers:

- No later than 1 business day after filing the petition, place a new job order with the relevant State Workforce Agency (SWA) for at least 15 calendar days;

- Contact the nearest American Job Center serving the geographic area where work will commence and request staff assistance in recruiting qualified U.S. workers;

- Contact the employer's former U.S. workers, including those the employer furloughed or laid off beginning on January 1, 2022, and until the date the H-2B petition is filed, disclose the terms of the job order and solicit their return to the job;

- Provide written notification of the job opportunity to the bargaining representative for the employer's employees in the occupation and area of employment, or post notice of the job opportunity at the anticipated worksite if there is no bargaining representative;

- Where the occupation is traditionally or customarily unionized, provide written notification of the job opportunity to the nearest American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) office covering the area of intended employment, by providing a copy of the job order and requesting assistance in recruiting qualified U.S. workers for the job opportunity;

- Contact in writing and in a language understood by the worker, all U.S. workers currently employed at the place of employment, disclose the terms of the job order, and request assistance in recruiting qualified U.S. workers for the job;

- Where the employer maintains a website for its business operations, post the job opportunity in a conspicuous location on the employer's website; and

- Hire any qualified U.S. worker who applies or is referred for the job opportunity until the later of either (1) the date on which the last H-2B worker departs for the place of employment, or (2) 30 days after the last date of the SWA job order posting.

Petitioners filing H-2B petitions under this FY 2024 supplemental cap must retain documentation of compliance with the attestation requirements for 3 years from the date DOL approved the TLC, and must provide the documents and records upon the request of DHS or DOL, as well

as fully cooperate with any compliance reviews such as audits.

Through audits and investigations, both Departments have received evidence of employer non-compliance with the terms and conditions of the H-2B program, as well as violations of other labor and employment laws. DOL Office of Foreign Labor Certification (OFLC), DOL Wage and Hour Division (WHD), and USCIS Fraud Detection and National Security (FDNS) personnel have encountered non-compliance issues such as failure to pay the promised wage, failure to employ returning workers, failure to demonstrate irreparable harm, failure to conduct the additional recruitment steps, and failure to accurately disclose the beneficiary's work location(s).

Such non-compliance can harm U.S. workers by undermining wages and working conditions. It also directly harms H-2B workers. Further, H-2B workers depend on ongoing employment with the petitioning employer to maintain status in the United States. This dependence creates a power imbalance between the employer and H-2B worker, making the H-2B worker particularly vulnerable to exploitation and violations. In recognition of the substantial impact that non-compliance can have on both U.S. workers and H-2B workers, DHS and DOL again intend to conduct a significant number of audits focusing on irreparable harm and other worker protection provisions. And as it did as part of the FY 2022 second half H-2B supplemental cap TFR and the FY 2023 H-2B supplemental cap TFR, DHS will again subject employers that have committed labor law violations in the H-2B program to additional scrutiny in the supplemental cap petition process.² DHS intends for this additional scrutiny to help ensure compliance with H-2B program requirements and obligations.

Specifically, falsifying information in H-2B program attestation(s) can result not only in penalties relating to perjury, but also in, among other things, a finding of fraud or willful misrepresentation; denial or revocation of the H-2B petition requesting supplemental workers; and debarment by DOL and DHS from the H-2B program and any other foreign labor

² See *Exercise of Time-Limited Authority To Increase the Numerical Limitation for Second Half of FY 2022 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking to Change Employers*, 87 FR 30334, 30335 (May 18, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking to Change Employers*, 87 FR 76816, 76818 (Dec. 15, 2022).

¹ The term "statutory cap" refers to the 66,000 cap set forth at INA section 214(g)(1)(B) or the 33,300 semiannual caps at INA section 214(g)(10).

programs administered by DOL. Falsifying information also may subject a petitioner/employer to other criminal and/or civil penalties.

DHS will not approve H–2B petitions filed in connection with the FY 2024 supplemental cap authority on or after October 1, 2024.

H–2B Portability

In addition to exercising its time-limited authority to make additional FY 2024 H–2B visas available, DHS is again providing additional flexibilities to H–2B petitioners under its general programmatic authority by allowing nonimmigrant workers in the United States³ in valid H–2B status and who are beneficiaries of non-frivolous H–2B petitions received on or after January 25, 2024, or who are the beneficiaries of non-frivolous H–2B petitions that are pending as of January 25, 2024, to begin work with a new employer after an H–2B petition (supported by a valid TLC) is filed and before the petition is approved, generally for a period of up to 60 days. However, such employment authorization would end 15 days after USCIS denies the H–2B petition or such petition is withdrawn. This H–2B portability ends one year after the provision's effective date of January 25, 2024, in other words, at the end of January 24, 2025.⁴

II. Background

A. Legal Framework

The Immigration and Nationality Act (INA), as amended, establishes the H–2B nonimmigrant classification for a nonagricultural temporary worker “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.” INA section 101(a)(15)(H)(ii)(b), 8 U.S.C.

1101(a)(15)(H)(ii)(b). Employers must petition DHS for classification of prospective temporary workers as H–2B nonimmigrants. INA section 214(c)(1), 8 U.S.C. 1184(c)(1). Generally, DHS must approve this petition before the beneficiary can be considered eligible for an H–2B visa. In addition, the INA requires that “[t]he question of importing any alien as [an H–2B] nonimmigrant . . . in any specific case or specific cases shall be determined by [DHS],⁵ after consultation with appropriate agencies of the Government.” INA section 214(c)(1), 8 U.S.C. 1184(c)(1). The INA generally charges the Secretary of Homeland Security with the administration and enforcement of the immigration laws, and provides that the Secretary “shall establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority” under the INA. *See* INA section 103(a)(1), (3), 8 U.S.C. 1103(a)(1), (3); *see also* 6 U.S.C. 202(4) (charging the Secretary with “[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission . . . to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States”). With respect to nonimmigrants in particular, the INA provides that “[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary] may by regulations prescribe.” INA section 214(a)(1), 8 U.S.C. 1184(a)(1); *see also* INA section 274A(a)(1) and (h)(3), 8 U.S.C. 1324a(a)(1) and (h)(3) (prohibiting employment of noncitizens⁶ not authorized for employment). The Secretary may designate officers or employees to take and consider evidence concerning any matter that is material or relevant to the enforcement of the INA. INA sections 287(a)(1), (b), 8 U.S.C. 1357(a)(1), (b) and INA section 235(d)(3), 8 U.S.C. 1225(d)(3).

Finally, under section 101 of the HSA, 6 U.S.C. 111(b)(1)(F), a primary mission of DHS is to “ensure that the overall

economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.”

DHS regulations provide that an approved TLC from the U.S. Department of Labor (DOL), issued pursuant to regulations established at 20 CFR part 655, or from the Guam Department of Labor if the workers will be employed on Guam, must accompany an H–2B petition for temporary employment in the United States. 8 CFR 214.2(h)(6)(iii)(A) and (C) through (E), (h)(6)(iv)(A); *see also* INA section 103(a)(6), 8 U.S.C. 1103(a)(6). The TLC serves as DHS’s consultation with DOL with respect to whether a qualified U.S. worker is available to fill the petitioning H–2B employer’s job opportunity and whether a foreign worker’s employment in the job opportunity will adversely affect the wages and working conditions of similarly-employed U.S. workers. *See* INA section 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(6)(iii)(A) and (D).

To determine whether to issue a TLC, the Departments have established regulatory procedures under which DOL certifies whether a qualified U.S. worker is available to fill the job opportunity described in the employer’s petition for a temporary nonagricultural worker, and whether a foreign worker’s employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. *See* 20 CFR part 655, subpart A. The regulations establish the process by which employers obtain a TLC and rights and obligations of workers and employers.

Once the petition is approved, under the INA and current DHS regulations, H–2B workers do not have employment authorization outside of the validity period listed on the approved petition unless otherwise authorized, and the workers are limited to employment with the H–2B petitioner. *See* 8 U.S.C. 1184(c)(1), 8 CFR 274a.12(b)(9). An employer or U.S. agent generally may submit a new H–2B petition, with a new, approved TLC, to USCIS to request an extension of H–2B nonimmigrant status for the validity of the TLC or for a period of up to 1 year. 8 CFR 214.2(h)(15)(ii)(C). Except as provided for in the preceding H–2B supplemental cap TFRs⁷ and in this rule, and except

³ The term “United States” includes the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands. INA section 101(a)(38), 8 U.S.C. 1101(a)(38).

⁴ On September 20, 2023, DHS issued a Modernizing H–2 Program Requirements, Oversight, and Worker Protections Notice of Proposed Rulemaking (NPRM), 88 FR 65040, 65066, with a 60-day public comment period that ends on November 20, 2023. In that NPRM, DHS proposed to extend portability to H–2A and H–2B workers on a permanent basis. The Department’s proposal does not interfere with the portability provision of this rule, however, should DHS publish a final rule making H–2 portability permanent, any such provision would not expire on a specific date, unlike the portability provision made effective by this temporary final rule.

⁵ As of March 1, 2003, in accordance with section 1517 of Title XV of the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, any reference to the Attorney General in a provision of the Immigration and Nationality Act describing functions which were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA “shall be deemed to refer to the Secretary” of Homeland Security. *See* 6 U.S.C. 557 (2003) (codifying HSA, Title XV, sec. 1517); 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

⁶ For purposes of this discussion, the Departments use the term “noncitizen” colloquially to be synonymous with the term “alien” as it is used in the Immigration and Nationality Act.

⁷ For instance, the FY 2023 H–2B supplemental cap TFR included a portability provision at 8 CFR 214.2(h)(29)(iii)(A)(1)–(2), which remains in effect through January 24, 2024. *See e.g., Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability*

for certain professional athletes being traded among organizations,⁸ H-2B workers seeking to extend their status with a new employer may not begin employment with the new employer until the new H-2B petition is approved.

The INA also authorizes DHS to impose appropriate remedies against an employer for a substantial failure to meet the terms and conditions of employing an H-2B nonimmigrant worker, or for a willful misrepresentation of a material fact in a petition for an H-2B nonimmigrant worker. INA section 214(c)(14)(A), 8 U.S.C. 1184(c)(14)(A). The INA expressly authorizes DHS to delegate certain enforcement authority to DOL. INA section 214(c)(14)(B), 8 U.S.C. 1184(c)(14)(B); *see also* INA section 103(a)(6), 8 U.S.C. 1103(a)(6). DHS has delegated its authority under INA section 214(c)(14)(A)(i), 8 U.S.C. 1184(c)(14)(A)(i), to DOL. *See* DHS, Delegation of Authority to DOL under Section 214(c)(14)(A) of the INA (Jan. 16, 2009); *see also* 8 CFR 214.2(h)(6)(ix) (stating that DOL may investigate employers to enforce compliance with the conditions of an H-2B petition and a DOL-approved TLC). This enforcement authority has been delegated within DOL to the Wage and Hour Division (WHD), and is governed by regulations at 29 CFR part 503.

B. H-2B Numerical Limitations Under the INA

The maximum annual number (“statutory cap”) of noncitizens who may be issued H-2B visas or otherwise provided H-2B nonimmigrant status to perform temporary nonagricultural work is 66,000, distributed semiannually beginning in October and April. *See* INA sections 214(g)(1)(B) and (g)(10), 8 U.S.C. 1184(g)(1)(B) and (g)(10). Accordingly, with certain exceptions as described below, up to 33,000 noncitizens may be issued H-2B visas or provided H-2B nonimmigrant status in the first half of a fiscal year, and the remaining annual allocation, including any unused nonimmigrant H-2B visas from the first half of a fiscal year, are available for employers seeking to hire H-2B workers during the second half of the fiscal year.⁹ If the number of petitions approved by DHS is

insufficient to use all H-2B numbers in a given fiscal year, DHS cannot carry over the unused numbers for petition approvals for employment start dates beginning on or after the start of the next fiscal year.

In FYs 2005, 2006, 2007, and 2016, Congress exempted H-2B workers identified as returning workers from the annual H-2B cap of 66,000.¹⁰ A returning worker is an H-2B worker who was previously counted against the annual H-2B cap during a designated period of time.¹¹ For example, Congress designated that returning workers for FY 2016 needed to have been counted against the cap during FY 2013, 2014, or 2015 to qualify for the exemption.¹² DHS and the Department of State (DOS) worked together to confirm that all workers requested under the returning worker provision in fact were eligible for exemption from the annual cap (in other words, were issued an H-2B visa or provided H-2B status during one of the prior 3 fiscal years) and were otherwise eligible for H-2B classification.

Because of the strong demand for H-2B visas in recent years, the statutorily-limited semiannual visa allocation, the DOL regulatory requirement that employers apply for a TLC 75 to 90 days before the start date of work,¹³ and the DHS regulatory requirement that an approved TLC accompany all H-2B petitions,¹⁴ employers that wish to obtain visas for their workers under the semiannual allotment must act early to receive a TLC and file a petition with U.S. Citizenship and Immigration Services (USCIS). As a result, the date on which USCIS has reached sufficient H-2B petitions to reach the first half of the fiscal year statutory cap has generally trended earlier in recent years.¹⁵ For FY 2022, for the first time

in more than a decade, USCIS received sufficient H-2B petitions to reach the first half of the fiscal year statutory cap before the start of the fiscal year.¹⁶ This occurred even earlier in FY 2023, when USCIS received enough H-2B petitions to reach the FY 2023 first-half statutory cap on September 12, 2022.¹⁷ For FY 2024, USCIS received sufficient H-2B petitions to reach the first half of the fiscal year statutory cap on October 11, 2023.¹⁸ While this date was slightly later than the prior two years, the Departments note that DOL received 2,157 applications for the first half of the FY 2024 statutory cap during the initial three-day filing window of July 3–5, 2023, covering 40,947 worker positions; a 59% increase in TLC workload when compared to the same time period in 2022.¹⁹ This trend in recent years of increased demand for H-

www.uscis.gov/archive/uscis-reaches-h-2b-cap-for-first-half-of-fy-2018 (Dec. 21, 2017); USCIS, *USCIS Reaches H-2B Cap for the First Half of Fiscal Year 2019*, <https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2019> (Dec. 12, 2018); USCIS, *USCIS Reaches H-2B Cap for the First Half of Fiscal Year 2020*, <https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2020> (Nov. 20, 2019); USCIS, *USCIS Reaches H-2B Cap for the First Half of Fiscal Year 2021*, <https://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2021> (Nov. 18, 2020).

¹⁶ On October 12, 2021, USCIS announced that it had received sufficient petitions to reach the congressionally mandated cap on H-2B visas for temporary nonagricultural workers for the first half of fiscal year 2022, and that September 30, 2021 was the final receipt date for new cap-subject H-2B worker petitions requesting an employment start date before April 1, 2022. *See* USCIS, *USCIS Reaches H-2B Cap for the First Half of Fiscal Year 2022*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2022> (Oct 12, 2021).

¹⁷ On September 14, 2022, USCIS announced that it had received sufficient petitions to reach the congressionally mandated cap on H-2B visas for temporary nonagricultural workers for the first half of fiscal year 2023, and that September 12, 2022 was the final receipt date for new cap-subject H-2B worker petitions requesting an employment start date before April 1, 2023. *See* USCIS, *USCIS Reaches H-2B Cap for the First Half of Fiscal Year 2023*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2023> (Sept. 14, 2022).

¹⁸ On October 13, 2023, USCIS announced that it had received sufficient petitions to reach the congressionally mandated cap on H-2B visas for temporary nonagricultural workers for the first half of fiscal year 2024, and that October 11, 2023 was the final receipt date for new cap-subject H-2B worker petitions requesting an employment start date before April 1, 2024. *See* USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2024*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2024> (October 13, 2023).

¹⁹ *See* DOL, *OFLC Publishes List of Randomized H-2B Applications Submitted July 3–5, 2023, for Employers Seeking H-2B Workers Starting October 1, 2023*, <https://www.dol.gov/agencies/eta/foreign-labor/news> (July 10, 2023).

¹⁰ *See* INA section 214(g)(9)(A), 8 U.S.C. 1184(g)(9)(A), *see also* Consolidated Appropriations Act, 2016, Public Law 114–113, div. F, tit. V, sec. 565; John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109–364, div. A, tit. X, sec. 1074, (2006); Save Our Small and Seasonal Businesses Act of 2005, Public Law 109–13, div. B, tit. IV, sec. 402.

¹¹ *See* INA section 214(g)(9)(A), 8 U.S.C. 1184(g)(9)(A).

¹² *See* Consolidated Appropriations Act, 2016, Public Law 114–113, div. F, tit. V, sec. 565.

¹³ *See* 20 CFR 655.15(b).

¹⁴ *See* 8 CFR 214.2(h)(6)(vi)(A).

¹⁵ In fiscal years 2017 through 2021, USCIS received a sufficient number of H-2B petitions to reach or exceed the relevant first half statutory cap on January 10, 2017, December 15, 2017, December 6, 2018, November 15, 2019, and November 16, 2020, respectively. *See* USCIS, *USCIS Reaches the H-2B Cap for the First Half of Fiscal Year 2017*, <https://www.uscis.gov/archive/uscis-reaches-the-h-2b-cap-for-the-first-half-of-fiscal-year-2017> (Jan. 13, 2017); USCIS, *USCIS Reaches H-2B Cap for the First Half of Fiscal Year 2018*, <https://www.uscis.gov/archive/uscis-reaches-h-2b-cap-for-first-half-of-fy-2018>, <https://www.uscis.gov/archive/uscis-reaches-h-2b-cap-for-first-half-of-fy-2018>.

Flexibility for H-2B Workers Seeking To Change Employers, 87 FR 76816 (Dec. 15, 2022).

⁸ *See* 8 CFR 214.2(h)(6)(vii) and 8 CFR 274a.12(b)(9).

⁹ The Federal Government’s fiscal year runs from October 1 of the prior year through September 30 of the year being described. For example, fiscal year 2024 is from October 1, 2023, through September 30, 2024.

2B workers is even more apparent in the second half of the fiscal year.²⁰

Congress, in recognition of historical and current demand has, for the last several fiscal years, authorized supplemental caps.²¹ The authorization for the current supplemental cap is under sections 101(6) and 106 of Division A of Public Law 118–15, Continuing Appropriations Act, 2024 and Other Extensions Act (FY 2024 authority), which extended the authorization previously provided in section 303 of Division O of the Consolidated Appropriations Act, 2023, Public Law 117–328 (FY 2023 Omnibus), as discussed below.

C. FY 2023 Omnibus and FY 2024 Public Law 118–15

On December 29, 2022, President Joseph Biden signed the FY 2023 Omnibus, which contains a provision, section 303 of Division O, Title III, permitting the Secretary of Homeland Security, under certain circumstances and after consultation with the Secretary of Labor, to increase the number of H–2B visas available to U.S. employers, notwithstanding the otherwise-established statutory numerical limitation set forth in the INA.²² Specifically, section 303

provides that “the Secretary of Homeland Security, after consultation with the Secretary of Labor, and upon determining that the needs of American businesses cannot be satisfied in [FY] 2023 with United States workers who are willing, qualified, and able to perform temporary nonagricultural labor,” may increase the total number of noncitizens who may receive an H–2B visa in FY 2023 by the highest number of H–2B nonimmigrants who participated in the H–2B returning worker program in any fiscal year in which returning workers were exempt from the H–2B numerical limitation.

On September 30, 2023, Congress passed Public Law 118–15, which extends authorization under the same terms and conditions provided in section 303 of Division O of the FY 2023 Omnibus permitting the Secretary of Homeland Security to increase the number of H–2B visas available to U.S. employers in FY 2024.²³ In other words, Public Law 118–15 permits the Secretary of Homeland Security, after consultation with the Secretary of Labor, to provide up to 64,716 additional H–2B visas for FY 2024, notwithstanding the otherwise-established statutory numerical limitation set forth in the INA, for eligible employers whose employment needs for FY 2024 cannot be met.²⁴ Under the Public Law 118–15 authority, DHS and DOL are jointly publishing this temporary final rule to authorize the issuance of no more than 64,716 additional visas for FY 2024 to those businesses that are suffering irreparable harm or will suffer impending

irreparable harm, as attested by the employer on a new attestation form. The authority to approve H–2B petitions under this FY 2024 supplemental cap expires at the end of that fiscal year. Therefore, USCIS will not approve H–2B petitions filed in connection with this FY 2024 supplemental cap authority on or after October 1, 2024.

As noted above, since FY 2017, Congress has enacted a series of public laws providing the Secretary of Homeland Security with the discretionary authority to increase the H–2B cap beyond the annual numerical limitation set forth in section 214 of the INA. The previous statutory provisions were materially identical to section 303 of the FY 2023 Omnibus, which is the same authority provided for FY 2024 by the recent continuing resolution. During each fiscal year from FY 2017 through FY 2019, and FY 2021 through FY 2023, the Secretary of Homeland Security, after consulting with the Secretary of Labor, determined that some American businesses could not satisfy their needs in such year with U.S. workers who were willing, qualified, and able to perform temporary nonagricultural labor. On the basis of these determinations, on July 19, 2017, and May 31, 2018, DHS and DOL jointly published temporary final rules for FY 2017 and FY 2018, respectively, each of which allowed an increase of up to 15,000 additional H–2B visas for those businesses that attested that if they did not receive all of the workers requested on the Petition for a Nonimmigrant Worker (Form I–129), they were likely to suffer irreparable harm, in other words, suffer a permanent and severe financial loss.²⁵ USCIS approved a total of 12,294 workers for H–2B classification under petitions filed pursuant to the FY 2017 supplemental cap increase.²⁶ In FY 2018, USCIS received petitions for more than 15,000 beneficiaries during the first 5 business days of filing for the supplemental cap and held a lottery on June 7, 2018. The total number of H–2B workers approved toward the FY 2018 supplemental cap increase was 15,788.²⁷ The vast majority

²⁰ In recent years, DOL has received an increasing number of TLC applications for an increasing number of H–2B workers with April 1 start dates: DOL received 4,500 applications on January 1, 2018, covering more than 81,600 worker positions; DOL received 5,276 applications by January 8, 2019, covering more than 96,400 worker positions; DOL received 5,677 applications during the initial three-day filing window in 2020 covering 99,362 worker positions; DOL received 5,377 applications during the initial three-day filing window in 2021 covering 96,641 worker positions; DOL received 7,875 applications by January 7, 2022, covering 136,555 worker positions; and DOL received 8,693 applications during the initial three-day filing window in 2023, covering 142,796 worker positions. See DOL, *Announcements*, <https://www.dol.gov/agencies/eta/foreign-labor/news>.

²¹ See section 543 of Division F of the Consolidated Appropriations Act, 2017, Public Law 115–31 (FY 2017 Omnibus); section 205 of Division M of the Consolidated Appropriations Act, 2018, Public Law 115–141 (FY 2018 Omnibus); section 105 of Division H of the Consolidated Appropriations Act, 2019, Public Law 116–6 (FY 2019 Omnibus); section 105 of Division I of the Further Consolidated Appropriations Act, 2020, Public Law 116–94 (FY 2020 Omnibus); section 105 of Division O of the Consolidated Appropriations Act, 2021, FY 2021 Omnibus, sections 101 and 106(3) of Division A of Public Law 117–43, Continuing Appropriations Act, 2022, and section 101 of Division A of Public Law 117–70, Further Continuing Appropriations Act, 2022 through February 18, 2022 (together, FY 2022 authority); and section 204 of Division O of the Consolidated Appropriations Act, 2022, Public Law 117–103 (FY 2022 Omnibus).

²² The Department of Homeland Security Appropriations Act, 2023, Public Law 117–328 (Dec. 29, 2022).

²³ See Public Law 118–15, Continuing Appropriations Act, 2024 and Other Extensions Act, Division A, sections 101(6) and 106 (extending into 2024 DHS funding and other authorities, including the authority to issue supplemental H–2B visas that was provided under title III of Division O of Pub. L. 117–328, through November 17, 2023).

²⁴ Appropriations and authorities provided by the continuing resolutions are available for the needs of the entire fiscal year to which the continuing resolution applies, although DHS’s ability to obligate funds or exercise such authorities may lapse at the sunset of such resolution. See, e.g., Comments on Due Date and Amount of District of Columbia’s Contributions to Special Employee Retirement Funds, B–271304 (Comp. Gen. Mar. 19, 1996) (explaining that “a continuing resolution appropriates the full annual amount regardless of its period of duration Standard continuing resolution language makes it clear that the appropriations are available to the extent and in the manner which would be provided by the pertinent appropriations act that has yet to be enacted (unless otherwise provided in the continuing resolution).”). Consistent with this principle, DHS interprets the current continuing resolution to provide DHS with the ability to authorize additional H–2B visa numbers with respect to all of FY 2024 subject to the same terms and conditions as the FY 2023 authority at any time before the continuing resolution expires, notwithstanding the reference to FY 2023 in the FY 2023 Omnibus.

²⁵ See *Exercise of Time-Limited Authority To Increase the Fiscal Year 2017 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program*, 82 FR 32987, 32998 (July 19, 2017); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2018 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program*, 83 FR 24905, 24917 (May 31, 2018).

²⁶ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2022, TRK 10625.

²⁷ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS

of the H-2B petitions received under the FY 2017 and FY 2018 supplemental caps requested premium processing (Form I-907)²⁸ and were adjudicated within 15 calendar days.

On May 8, 2019, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 30,000 additional H-2B visas for the remainder of FY 2019.²⁹ The additional visas were limited to returning workers who had been counted against the H-2B cap or were otherwise granted H-2B status in the previous three fiscal years, and for those businesses that attested to a level of need such that, if they did not receive all of the workers requested on the Form I-129, they were likely to suffer irreparable harm, in other words, suffer a permanent and severe financial loss.³⁰ The Secretary determined that limiting returning workers to those who were issued an H-2B visa or granted H-2B status in the past 3 fiscal years was appropriate, as it mirrored the standard that Congress designated in previous returning worker provisions. On June 5, 2019, approximately 30 days after the supplemental visas became available, USCIS announced that it received sufficient petitions filed pursuant to the FY 2019 supplemental cap increase. USCIS did not conduct a lottery for the FY 2019 supplemental cap increase. The total number of H-2B workers approved towards the FY 2019 supplemental cap increase was 32,680.³¹ The vast majority of these petitions requested premium processing and were adjudicated within 15 calendar days.

Although Congress provided the Secretary of Homeland Security with the discretionary authority to increase the H-2B cap in FY 2020, the Secretary did not exercise that authority. DHS initially intended to exercise its authority and, on March 4, 2020,

announced that it would make available 35,000 supplemental H-2B visas for the second half of the fiscal year.³² On March 13, 2020, then-President Trump declared a National Emergency concerning COVID-19, a communicable disease caused by the coronavirus SARS-CoV-2.³³ On April 2, 2020, DHS announced that the rule to increase the H-2B cap was on hold due to economic circumstances, and that DHS would not release additional H-2B visas until further notice.³⁴ DHS also noted that the Department of State had suspended routine visa services.³⁵

In FY 2021, DHS in consultation with DOL determined it was appropriate to increase the H-2B cap for FY 2021 coupled with additional protections (for example, post-adjudication audits, investigations, and compliance checks), based on the demand for H-2B workers in the second half of FY 2021, continuing economic growth, the improving job market, and increased visa processing capacity by the Department of State. Accordingly, on May 25, 2021, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 22,000 additional H-2B visas for the remainder of FY 2021.³⁶ The supplemental visas were available only to employers that attested they were likely to suffer irreparable harm without the additional workers. The allocation of 22,000 additional H-2B visas under that rule consisted of 16,000 visas available only to H-2B returning workers from one of the last three fiscal years (FY 2018, 2019, or 2020) and 6,000 visas that were initially reserved for nationals of the Northern Central American countries of El Salvador, Guatemala, and Honduras, who were exempt from the returning worker requirement. By August 13, 2021, USCIS had received enough petitions for returning workers to reach the additional 22,000 H-2B visas made available under the FY 2021 H-2B supplemental visa temporary final

rule.³⁷ The total number of H-2B workers approved towards the FY 2021 supplemental cap increase was 30,707.³⁸ This total number included approved H-2B petitions for 23,937 returning workers, as well as 6,805 beneficiaries from the Northern Central American countries.³⁹

On January 28, 2022, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 20,000 additional H-2B visas for FY 2022 positions with start dates on or before March 31, 2022.⁴⁰ These supplemental visas were available only to employers that attested they were suffering or would suffer impending irreparable harm without the additional workers. The allocation of 20,000 additional H-2B visas under that rule consisted of 13,500 visas available only to H-2B returning workers from one of the last three fiscal years (FY 2019, 2020, or 2021) and 6,500 visas reserved for Salvadoran, Guatemalan, Honduran, and Haitian nationals, who were exempted from the returning worker requirement. USCIS data show that the total number of H-2B workers approved towards the first half FY 2022 supplemental cap increase was 17,381, including 14,150 workers under the returning worker allocation, as well as 3,231 workers approved towards the Haitian/Northern Central American allocation.⁴¹

For the second half of FY 2022, DHS in consultation with DOL determined it was appropriate to increase the H-2B cap for FY 2022 positions with start dates beginning on April 1, 2022

³⁷ See USCIS, *Cap Reached for Remaining H-2B Visas for Returning Workers for FY 2021*, <https://www.uscis.gov/news/alerts/cap-reached-for-remaining-h-2b-visas-for-returning-workers-for-fy-2021> (Aug. 19, 2021).

³⁸ The number of approved workers exceeded the number of additional visas authorized for FY 2021 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2023, TRK 13122, H-2B Visa Issuance Report September 30, 2023.

³⁹ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2023, TRK 13122, H-2B Visa Issuance Report September 30, 2023.

⁴⁰ See *Exercise of Time-Limited Authority To Increase the Fiscal Year 2022 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 87 FR 4722 (Jan. 28, 2022); 87 FR 6017 (Feb. 3, 2022) (correction).

⁴¹ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2023, TRK 13122, H-2B Visa Issuance Report September 30, 2023.

Visa Issuance Data queried 10/2022, TRK 10625. The number of approved workers exceeded the number of additional visas authorized for FY 2018 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States.

²⁸ Premium processing allows for expedited processing for an additional fee. See INA 286(u), 8 U.S.C. 1356(u).

²⁹ See *Exercise of Time-Limited Authority To Increase the Fiscal Year 2019 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program*, 84 FR 20005, 20021 (May 8, 2019).

³⁰ See 84 FR at 20021.

³¹ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2022, TRK 10625. The number of approved workers exceeded the number of additional visas authorized for FY 2019 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States.

³² See DHS, *DHS to Improve Integrity of Visa Program for Foreign Workers* (March 5, 2020), <https://www.dhs.gov/news/2020/03/05/dhs-improve-integrity-visa-program-foreign-workers>.

³³ See Proclamation 9994 of Mar. 13, 2020, *Declaring a National Emergency Concerning the Coronavirus Disease (COVID-19) Outbreak*, 85 FR 15337 (Mar. 18, 2020).

³⁴ See <https://twitter.com/DHSgov/status/1245745115458568192?s=20>.

³⁵ See <https://twitter.com/DHSgov/status/1245745116528156673>.

³⁶ See *Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 86 FR 28198 (May 25, 2021).

through September 30, 2022, based on the continued demand for H-2B workers for the remainder of FY 2022, continuing economic growth, increased labor demand, and increased visa processing capacity by the Department of State. Accordingly, on May 18, 2022, DHS and DOL jointly published a temporary final rule authorizing an increase of no more than 35,000 additional H-2B visas for the second half of FY 2022.⁴² As in the January 2022 TFR, the supplemental visas were available only to employers that attested they were suffering or would suffer impending irreparable harm without the additional workers. The allocation of 35,000 additional H-2B visas under the rule applicable to the second half of FY 2022 consisted of 23,500 visas available only to H-2B returning workers from one of the last three fiscal years (FY 2019, 2020, or 2021) and 11,500 visas reserved for Salvadoran, Guatemalan, Honduran, and Haitian nationals, who were exempted from the returning worker requirement. By May 25, 2022, USCIS had received enough petitions for returning workers to reach the additional 23,500 H-2B visas made available under the second half FY 2022 H-2B supplemental visa temporary final rule.⁴³ USCIS data show that the total number of H-2B workers approved towards the second half FY 2022 supplemental cap increase was 43,798, including 31,480 workers under the returning worker allocation, as well as 12,318 workers approved towards the Haitian/Northern Central American allocation.⁴⁴

Finally, on December 15, 2022, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 64,716 additional H-2B visas for the entirety of FY 2023. As in the FY 2022 TFRs, the additional visas were available only to employers that attested they were suffering or would suffer impending irreparable harm without the

additional workers.⁴⁵ The 64,716 additional visas included 44,716 reserved for returning workers from one of the last three fiscal years (FY 2020, 2021, or 2022), which were distributed in several allocations based on date of employer need: 18,216 for employers with requested employment start dates on or before March 31, 2023; 16,500 for employers with requested employment start dates from April 1, 2023, to May 14, 2023 (early second half allocation); and 10,000 for employers with requested employment start dates from May 15, 2023, to Sept. 30, 2023 (late second half allocation). The remaining 20,000 visas were available for the entirety of FY 2023, and were set aside for nationals of El Salvador, Guatemala, Honduras, and Haiti, who were exempt from the returning worker requirement. By January 30, 2023, USCIS received enough petitions to reach the cap for the additional 18,216 H-2B visas made available for returning workers for the first half of fiscal year, and by March 30, 2023, USCIS received enough petitions to reach the cap for the additional 16,500 H-2B visas made available for returning workers for the early second half of fiscal year.⁴⁶ USCIS data show that the total number of H-2B workers approved towards the FY 2023 supplemental cap increase was 78,302, including 54,470 workers under the returning worker allocation, as well as 23,832 workers approved towards the Haitian/Northern Central American allocation.⁴⁷

Once again, DHS in consultation with DOL believes that it is appropriate to increase the H-2B cap for FY 2024 based on the demand for H-2B workers in the first half of FY 2024, anticipated demand for the second half of FY 2024, recent economic growth, and strong

labor demand.⁴⁸ Similar to the preceding temporary rule, DHS and DOL also believe that it is appropriate and important to couple this cap increase with additional worker protections, as described below.

D. Joint Issuance of the Final Rule

As in FY 2017, FY 2018, FY 2019, FY 2021, FY 2022, and FY 2023, DHS and DOL (the Departments) have determined that it is appropriate to jointly issue this temporary final rule.⁴⁹ The determination to issue the temporary final rule jointly follows conflicting court decisions concerning DOL's authority to independently issue legislative rules to carry out its consultative and delegated functions pertaining to the H-2B program under the INA.⁵⁰ Although DHS and DOL each have authority to independently issue rules implementing their respective duties under the H-2B program,⁵¹ the Departments are implementing the numerical increase in this manner to ensure there can be no question about the authority underlying the

⁴⁸ The term "strong labor demand" in this context relies on the most recently released figure from a Bureau of Labor Statistics (BLS) survey at the time this TFR was written. The BLS Job Openings and Labor Turnover Survey (JOLTS) reports 9.6 million job openings in August 2023. See DOL, BLS, Job Openings and Labor Turnover—August 2023, https://www.bls.gov/news.release/archives/jolts_10032023.htm.

⁴⁹ See *Exercise of Time-Limited Authority To Increase the Fiscal Year 2017 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program*, 82 FR 32987 (Jul. 19, 2017); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2018 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program*, 83 FR 24905 (May 31, 2018); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2019 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program*, 84 FR 20005 (May 8, 2019); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 86 FR 28198 (May 25, 2021); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2022 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 87 FR 4722 (Jan. 28, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for Second Half of FY 2022 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 87 FR 30334 (May 18, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 87 FR 76816 (Dec. 15, 2022).

⁵⁰ See *Outdoor Amusement Bus. Ass'n v. Dep't of Homeland Sec.*, 983 F.3d 671 (4th Cir. 2020), cert. denied, 142 S. Ct. 425 (2021); see also *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 80 FR 24041, 24045 (Apr. 29, 2015).

⁵¹ See *Outdoor Amusement Bus. Ass'n*, 983 F.3d at 684–89.

⁴² See *Temporary Final Rule, Exercise of Time-Limited Authority To Increase the Numerical Limitation for Second Half of FY 2022 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 87 FR 30334 (May 18, 2022).

⁴³ See USCIS, *Cap Reached for Additional Returning Worker H-2B Visas for Second Half of FY 2022*, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-second-half-of-fy-2022> (May 31, 2022).

⁴⁴ The number of approved workers exceeded the number of additional visas authorized for the second half of FY 2022 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, C3 Consolidated, queried 10/2023, TRK 13122, H-2B Visa Issuance Report September 30, 2023.

⁴⁵ See *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 87 FR 76816 (Dec. 15, 2022); 87 FR 77979 (Dec. 21, 2022).

⁴⁶ See USCIS, *Cap Reached for Additional Returning Worker H-2B Visas for the First Half of FY 2023*, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-first-half-of-fy-2023> (Jan. 31, 2023); USCIS, *Cap Reached for Additional Returning Worker H-2B Visas for the Early Second Half of FY 2023*, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-early-second-half-of-fy-2023> (Mar. 31, 2023).

⁴⁷ The number of approved workers exceeded the number of additional visas authorized for FY 2023 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. See DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, H-2B Visa Issuance Report September 30, 2023.

administration and enforcement of the temporary cap increase. This approach is consistent with rules implementing DOL's general consultative role under INA section 214(c)(1), 8 U.S.C. 1184(c)(1), and delegated functions under INA sections 103(a)(6) and 214(c)(14)(B), 8 U.S.C. 1103(a)(6), 1184(c)(14)(B).⁵²

E. Comments and Responses to Comments on the FY 2023 TFR

In connection with the FY 2023 TFR, the Departments solicited public comments for 60 days. During that comment period, the Departments received 10 substantive comments. In the following discussion, the Departments discuss and respond to those comments by topic.

Timing and Distribution of Visas

Comment: Several commenters expressed support for the Departments' release of the maximum number of visas authorized by Congress. In addition, these commenters indicated appreciation for the earlier release of supplemental visas in 2023 than in prior years, noting that the FY 2023 TFR offered certainty that was beneficial to employers. The commenters encouraged the Departments to similarly make future supplemental visas available early in the relevant fiscal year.

Response: The Departments thank the commenters for their feedback. The Departments are again making the maximum number of visas available for FY 2024 and worked diligently to release these visas as early as possible.

Comment: One commenter stated that the number of supplemental visas was not sufficiently justified by labor market conditions. The commenter asserted that the United States is not experiencing a labor shortage and disagreed with the Departments' usage of official unemployment rate data to justify the decision to release 64,716 supplemental visas for FY 2023. The comment centers on a critique of official government statistics produced by the Department of Labor. More specifically, the comment noted the long-term decline in the labor force participation rate and, further, alleges that the official unemployment rate is flawed because it excludes persons who are considered to no longer be in the labor force.

Response: The Departments appreciate the comment regarding justification for the number of supplemental visas. However, the Departments disagree that the rule did not sufficiently justify the number of

supplemental visas. Specifically, the Departments disagree with the assertion that official government statistics are incorrect or inadequate. Furthermore, the Departments (as branches of the Federal Government) believe that it is reasonable to rely on official labor market statistics produced by subject-matter experts within the U.S.

Government when assessing the labor market. Additionally, the Departments note that did they not rely on any single statistic to determine either the general need for supplemental visas or the specific number of supplemental visas, but rather considered a number of factors including demand for H-2B workers (in the form of TLC data) and labor market conditions (in the form of multiple labor market statistics).

Finally, the Departments believe that aspects of this comment, specifically the discussion regarding long-term labor force trends that (by the commenter's description) are impacted by multiple variables other than short-term labor needs, are out of the scope of the FY 2023 Temporary Final Rule.

Comment: Some commenters expressed support for the Departments' FY 2023 distribution of the supplemental H-2B visas in multiple seasonal allocations including two allocations for the second half of the fiscal year. These commenters noted that this distribution was beneficial to employers who hire later in the fiscal year.

Response: The Departments thank the commenters for their feedback and will again make multiple allocations available including two allocations for the second half of FY 2024.

Comment: One commenter requested that the Departments consider combining the supplemental allocations for the second half of the fiscal year into a single allocation in future TFRs. The commenter stated that administering multiple allocations creates more work for the Departments when they are already struggling to process applications and petitions in a timely manner. The commenter also stated that the allocations for the second half of the fiscal year were "woefully insufficient" to meet employer demand.

Response: The Departments have again decided to reserve supplemental visas for the late second half of FY 2024. As noted by the commenter, administering multiple allocations involves some level of additional work. This includes both the work performed by USCIS in the actual administration of each allocation cap, as well as a potential increase in DOL workload as TLC requests may increase. However, the Departments have attempted to

balance such workload challenges with the importance of addressing the needs of U.S. employers, including those late season employers who otherwise may not have the opportunity to file for cap-subject H-2B workers. As explained in last year's TFR and again in this TFR, the intense competition for employers requesting an April 1 start date has resulted in H-2B visas being effectively unavailable for many employers who need workers to start late in the season, and thus the late season allocation is intended to directly assist those employers.⁵³ For FY 2024, as in FY 2023, the Departments believe that there is sufficient demand and need for the late second half to justify the additional work and potential impact on processing times.

Regarding the claim that the total allocation for the second half of FY 2023 was inadequate, the Departments reiterate that the 33,000 cap was statutory, and the second half's total returning worker supplemental allocation of 26,500 visas was more than the first half's returning worker allocation of 18,216. In addition, while the 20,000 allocation for nationals of El Salvador, Guatemala, Honduras, and Haiti was available for start dates throughout FY 2023, the majority of visas issued under that allocation went to workers with second half start dates.⁵⁴ As with the FY 2023 TFR, the Departments will continue to make more total visas available for the second half of FY 2024 than the first half.

Comment: One commenter recommended reallocating unused visas from one sub-allocation to another if there were unused visas, such as unused visas from the allocation for nationals of El Salvador, Guatemala, Honduras, and Haiti, to the returning worker allocation. Another commenter more specifically suggested that the Departments coordinate with DOS to verify all visas under the first half allocation are actually used and roll over any supplemental visas that were "used" (counted on a petition) but not issued (by DOS) from the first half cap to the second half cap, or from the early

⁵³ *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 87 FR 76816, 76830 (Dec. 15, 2022).

⁵⁴ Under the FY 2023 TFR allocation for nationals of Northern Central America and Haiti, a total of over 16,700 visas were issued, with around 5,000 of those visas issued to workers with first half start dates and the remainder issued to workers with second half start dates. See DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, FY 2023 H-2B Northern Central American Cap Approvals by Validity Start Date Month.

⁵² See 8 CFR 214.2(h)(6)(iii)(A) and (C), (h)(6)(iv)(A).

second half cap to the late second half cap.

Response: The Departments again decline to roll over any unused visas. As explained in this and the prior TFR, calculating and administering a process to carry over unused visas would significantly increase operational burdens. Also, not permitting rollover from the allocation for nationals of certain countries into the returning worker allocation provides employers seeking to hire workers from these countries with more time to petition for, and bring in those workers and encourages full use of the 20,000 allocation.⁵⁵ This, in turn, contributes to the United States Government's efforts to promote and improve safety, security and economic stability in these countries to help stem the flow of irregular migration to the United States. Further, DHS anticipates that the issuance of this rule early in the fiscal year, the fact that this is the fourth year that DHS will make a specific allocation available for workers from the Northern Central American countries and Haiti, as well as the inclusion of nationals from Ecuador, Colombia, and Costa Rica, will contribute to even greater utilization of available visas under this allocation during FY 2024 such that a rollover would not be beneficial or necessary. Similarly, it is the Departments' expectation that there will be sufficient demand from employers with first half and early second half start dates to use the entirety of these allocations in FY 2024, rendering rollover unnecessary.

With respect to the suggestion to roll over any supplemental visas that were "used" but not issued by DOS, the Departments note that DHS already accounts for visa usage rates (among other factors) in its administration of the caps by using projections of the number of petitions necessary to achieve the numerical limit of approvals. *See* new 8 CFR 214.2(h)(6)(xiv)(D). Further, any

rollover process would be operationally burdensome as noted above.

Comment: A commenter requested the Departments to prioritize the allocation of late second half visas to essential and critical infrastructure employers, including seafood processors, as designated by DHS. Another commenter similarly requested the Departments to prioritize critical and essential infrastructure seafood industry jobs.

Response: The Departments decline the suggestion to prioritize certain industries or jobs in the allocation of supplemental cap visas. As noted in the FY 2023 TFR and this TFR, the Departments interpret the use of the phrase "the needs of American businesses" in the relevant statutory authority for the supplemental caps as providing discretion to identify the business needs that are most relevant, while bearing in mind the need to protect U.S. workers. The Departments have implemented the irreparable harm standard in order to prioritize the most pressing business needs. Prioritizing certain industries as "essential and critical," separate from the irreparable harm consideration already in use, could also harm industries DHS does not designate as such. The Departments believe considering the irreparable harm to individual employers better addresses the needs of employers than designating entire industries for prioritization. In addition, the Departments do not believe such prioritization is necessary as the decision to provide a late second half allocation again for FY 2024 should provide some relief to seafood processors (one of the industries highlighted in the comments) and other similar companies facing a need for additional workers in the late second half.

FY 23 Allocation for Nationals of El Salvador, Guatemala, Honduras, and Haiti

Comment: Two commenters expressed general opposition to the allocation of supplemental visas for nationals of El Salvador, Guatemala, Honduras, and Haiti. These commenters opined that the H-2B program is not an appropriate strategy for addressing humanitarian needs and that the H-2B program would not provide permanent, durable solutions for these countries' nationals.

Response: The country-specific allocation within the H-2B program is an important part of the administration's overall strategy to expand access to lawful pathways for individuals from these countries to stem irregular migration. These allocations are just one of the additional lawful

pathways offered to these nationals and others, including new family reunification parole processes for certain nationals of El Salvador,⁵⁶ Guatemala,⁵⁷ Honduras,⁵⁸ Colombia,⁵⁹ and Ecuador,⁶⁰ and modernized family reunification parole processes for certain nationals of Haiti⁶¹ and Cuba.⁶²

The root causes of migration from these regions are multifold. Political instability and insecurity, poverty and economic inequality, pervasive crime and corruption, and other factors all contribute to irregular migration.⁶³ The diversity of the root causes of irregular migration requires a multi-pronged strategy, as employed by this administration, to address them. As such, this rule and the allocation for certain countries provide an additional lawful pathway for individuals seeking an economic opportunity in the United States who would eventually return to contribute to the development of their own community and country. However, the Departments recognize other programs and efforts are also needed to

⁵⁶ *Implementation of a Family Reunification Parole Process for Salvadorans*, 88 FR 43611 (July 10, 2023).

⁵⁷ *Implementation of a Family Reunification Parole Process for Guatemalans*, 88 FR 43581 (July 10, 2023).

⁵⁸ *Implementation of a Family Reunification Parole Process for Hondurans*, 88 FR 43601 (July 10, 2023).

⁵⁹ *Implementation of a Family Reunification Parole Process for Colombians*, 88 FR 43591 (July 10, 2023).

⁶⁰ DHS announced a forthcoming family reunification parole program for Ecuador on October 18, 2023. DHS, *DHS Announces Family Reunification Parole Process for Ecuador* (Oct. 18, 2023), <https://www.uscis.gov/newsroom/news-releases/dhs-announces-family-reunification-parole-process-for-ecuador> (announcing that the **Federal Register** notice for this process will be published soon). As of October 27, 2023, the program is not yet active.

⁶¹ *Implementation of Changes to the Haitian Family Reunification Parole Process*, 88 FR 54635 (Aug. 11, 2023).

⁶² *Implementation of Changes to the Cuban Family Reunification Parole Process*, 88 FR 54639 (Aug. 11, 2023).

⁶³ *See* National Security Council, *U.S. Strategy for Addressing the Root Causes of Migration in Central America*, at 4 (Jul. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf> (Poverty and economic inequality, among other factors, contribute to irregular migration). *See also* The White House, *Fact Sheet: Update on the U.S. Strategy for Addressing the Root Causes of Migration in Central America* (Feb. 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/06/fact-sheet-update-on-the-u-s-strategy-for-addressing-the-root-causes-of-migration-in-central-america-2/> (economic challenges is one of the drivers of irregular migration); Diana Roy and Amelia Cheatham, *Central America's Turbulent Northern Triangle* (July 13, 2023), Council on Foreign Relations, <https://www.cfr.org/background/central-americas-turbulent-northern-triangle> ("Many interrelated factors drive people from the Northern Triangle, including lack of economic opportunity. . . .").

⁵⁵ In FY 2021, 3,079 visas out of 6,000 authorized were issued under the allocation for nationals of Northern Central America in the FY 2021 TFR, which published on May 25, 2021—to use a visa under this allocation the petition had to have been received by July 8, 2021. In FY 2022, 2,481 visas out of 6,500 authorized were issued under the allocation for nationals of Northern Central America and Haiti in the first half FY 2022 TFR, which published on January 22, 2022; 7,405 visas out of 11,500 authorized were issued under the allocation for nationals of Northern Central America and Haiti in the second half FY 2022 TFR, which published on May 18, 2022; and 16,713 visas were issued out of 20,000 authorized under the allocation for nationals of Northern Central America and Haiti in the FY 2023 TFR, which published on December 15, 2022. *See* DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, H-2B Visa Issuance Report September 30, 2023.

address other drivers to irregular migration.

Comment: A commenter stated that the allocation of supplemental visas for nationals of El Salvador, Guatemala, Honduras, and Haiti was too high for H-2B employers to take full advantage of this set aside. The commenter stated that visa processing times in those countries cause employers to fear that they will not be able to obtain H-2B workers from these countries efficiently.

Response: The Departments disagree that the 20,000 allocation for nationals of El Salvador, Guatemala, Honduras, and Haiti was too high. The Departments have again decided to set aside 20,000 supplemental visas for nationals of certain countries and believe all 20,000 visas will be utilized in FY 2024 for the following reasons. First, H-2B visa issuance growth data for nationals of these countries for the past several years supports the Departments' decision. Under the dedicated allocations in prior TFRs, H-2B visas were issued to 3,079 out of 6,000 authorized for nationals of Northern Central America under the FY 2021 TFR; 9,886 out of 11,500 authorized for nationals of Northern Central America and Haiti under the two FY 2022 TFRs; and 16,713 out of 20,000 authorized for nationals of Northern Central America and Haiti under the FY 2023 TFR.⁶⁴ These numbers show a steady increase in utilization over time. In addition, the issuance of this rule early in the fiscal year and the fact that this is the fourth year that DHS will make a specific allocation available for workers from the Northern Central American countries and Haiti, as well as the inclusion of nationals from Colombia, Ecuador, and Costa Rica, will increase the likelihood that all 20,000 set-aside visas for FY 2024 will be used.

Comment: A commenter requested including nationals of Ukraine in the same priority allocation as nationals of El Salvador, Guatemala, Honduras, and Haiti.

Response: The Departments thank the commenter but will decline this suggestion. While DHS is committed to providing support to Ukrainian nationals, the allocation for Northern Central American/Haitian nationals was intended to support the administration's efforts to reduce irregular migration and expand lawful pathways from across the Western Hemisphere, and the Departments are making a similar

separate allocation for nationals of specified countries this year for the same reasons. DHS continues to support Ukrainian nationals through other processes, such as Uniting for Ukraine.⁶⁵ The Departments further note that, historically, Ukrainian nationals have received relatively high numbers of H-2B visas compared to nationals of other countries.⁶⁶ Including Ukrainian nationals in the 20,000 allocation would take away from the number of supplemental visas available to help achieve the administration's overall goal of expanding lawful pathways from the Americas.

Data Transparency

Comment: Several commenters requested the Departments disclose more data about the H-2B program. Specifically, commenters requested that DHS post "close to real time" data about jobs for which employers are seeking H-2B workers including the employer name, wages and working conditions and dates of need; provide more information through the USCIS H-2B Employer Data Hub including information on cap-exempt petitions; and provide additional information on usage of the allocation for Northern Central American and Haitian nationals, including the number of visas that were issued to nationals from each country, as well as which industries, employers and recruiters were involved. With regard to suggestions for DOL, commenters recommended enhancing the *seasonaljobs.gov* website's utility, including by ensuring that workers know in real time when an employer is actively hiring.

Response: The Departments appreciate these comments and note that transparency and access to data and

information continue to be among our priorities.⁶⁷ DHS/USCIS has sought to increase transparency in employment-based visa programs, including through the USCIS H-2B Employer Data Hub which provides detailed information on H-2B petitions including employer name, state, worksite state, industry, occupation, and wage levels.⁶⁸ Notably, the goal of improving data transparency is among the objectives included in a recently published report by the H-2B Worker Protection Taskforce.⁶⁹ Specifically, one of the action items described in the report is the leveraging of existing data to increase transparency and reduce the vulnerability of H-2B and H-2A workers, including by improving interagency data sharing; improving publicly available data to inform outreach and advocacy efforts, including through new anonymized quarterly data reports and on DHS's H-2B Data Hub; and by publishing anonymized, aggregated data by gender, sector, and occupation to provide an additional transparency to the H-2 programs and aid efforts to prevent gender discrimination.

In addition, USCIS included some data about visas allocated under the FY 2022 allocation for nationals of Northern Central American countries and Haiti in its most recent report to Congress (which is available to the public) about characteristics of the H-2B program.⁷⁰ The Departments will consider the suggestions provided by these commenters as they seek to improve clarity and transparency of data for the public. However, the Departments believe that many of the

⁶⁷ USCIS, *Annual Statistical Report FY 2022*, https://www.uscis.gov/sites/default/files/document/reports/FY2022_Annual_Statistical_Report.pdf. Since FY 2008, DOL continues to publish selected statistical factsheets and individual TLC case record data cumulated on a quarterly and annual basis useful to a wide range of stakeholders and the general public at <https://www.dol.gov/agencies/eta/foreign-labor/performance>.

⁶⁸ USCIS, *H-2B Employer Data Hub*, <https://www.uscis.gov/tools/reports-and-studies/h-2b-employer-data-hub> (last visited Oct. 17, 2023). The data in the H-2B Employer Data Hub comes from fields on an employer's Form I-129, from USCIS' adjudicative decisions, and from the DOL H-2B Application for Temporary Employment Certification (Form ETA-9142B). USCIS, *Understanding our H-2B Employer Data Hub*, <https://www.uscis.gov/tools/reports-and-studies/h-2b-employer-data-hub/understanding-our-h-2b-employer-data-hub> (last visited Oct. 17, 2023).

⁶⁹ See The White House, *Strengthening Protections for H-2B Temporary Workers*, Report of the H-2B Worker Protection Taskforce, <https://www.whitehouse.gov/wp-content/uploads/2023/10/Final-H-2B-Worker-Protection-Taskforce-Report.pdf> (Oct. 19, 2023).

⁷⁰ USCIS, *Characteristics of H-2B Nonagricultural Temporary Workers Fiscal Year 2022 Report to Congress*, https://www.uscis.gov/sites/default/files/document/data/USCIS_H2B_FY22_Characteristics_Report.pdf (Feb. 14, 2023).

⁶⁴ See DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, H-2B Visa Issuance Report September 30, 2023.

⁶⁵ USCIS, *Uniting for Ukraine*, <https://www.uscis.gov/ukraine>; DHS, *Fact Sheet: DHS Efforts to Assist Ukrainian Nationals*, <https://www.dhs.gov/news/2022/03/31/fact-sheet-dhs-efforts-assist-ukrainian-nationals> (last visited Oct. 31, 2023).

⁶⁶ Ukraine was among the top ten H-2B visa issuance countries in FY 2022 and among the top five H-2B visa issuance countries in FY 2021 and FY 2020. See USCIS, *Characteristics of H-2B Nonagricultural Temporary Workers Fiscal Year 2022 Report to Congress*, https://www.uscis.gov/sites/default/files/document/data/USCIS_H2B_FY22_Characteristics_Report.pdf (Feb. 14, 2023) (Ukrainian nationals were issued 1,085 H-2B visas in FY22); *Characteristics of H-2B Nonagricultural Temporary Workers Fiscal Year 2021 Report to Congress*, <https://www.uscis.gov/sites/default/files/document/reports/H-2B-FY21-Characteristics-Report.pdf> (Mar. 10, 2022) (Ukrainian nationals were issued 2,222 H-2B visas in FY21); *Characteristics of H-2B Nonagricultural Temporary Workers Fiscal Year 2020 Report to Congress*, <https://www.uscis.gov/sites/default/files/document/reports/H-2B-FY20-Characteristics-Report.pdf> (Feb. 22, 2021) (Ukrainian nationals were issued 1,585 H-2B visas in FY20).

suggestions, as well as other data enhancements, can be accomplished outside of the regulatory process. Therefore, DHS declines to adopt these suggestions as part of this temporary final rule.

Irreparable Harm Standard

Comment: Two commenters expressed concerns related to the irreparable harm standard as articulated. One commenter stated that the standard is unclear, overly burdensome, applied inconsistently by the Departments, and disruptive to business operations. The commenter felt that, if the standard is retained, the Departments should provide clearer guidance on what specific documents are required and sufficient, and recommended that the Departments issue step-by-step instructions for participating in the program to assist employers with understanding their obligations and reducing the risk of noncompliance.

Response: As discussed in greater detail below, because the authority to increase the statutory cap is tied to the needs of businesses, the Departments think it is reasonable for employers to attest that they are suffering irreparable harm or that they will suffer impending irreparable harm without the ability to employ all of the H-2B workers requested on their petition and to retain and be able to produce (upon request) documentation of that harm as well as a statement describing the harm and explaining the relevance of the documentation. The Departments also think that the standard is sufficiently clear to allow compliance, and that listing out specific documents that must be provided in each case is not an appropriate approach. Each determination of irreparable harm is made on a case-by-case basis. This inherently means that some documentation presented in one case may not be sufficient in another case presenting a different set of facts. In addition, not listing specific documents provides more flexibility for employers across occupations and industries to provide documentation that is relevant to their types of businesses.

Recruitment Requirements

Comment: One commenter stated that the additional recruitment requirements included in the TFR create an undue burden for participating employers. Specifically, the commenter stated that the requirement to provide a copy of the job notice to the AFL-CIO is unnecessary, and “purely duplicative, given the steps already required of petitioners to recruit U.S. workers.” The commenter also asserted that the

requirement failed to acknowledge the rate at which workers are unionized, noting the low rate of unionization in the residential construction industry, and suggested that in some areas alternative organizations—such as state and local trade associations or workforce boards—may be better positioned to conduct recruitment efforts in place of the AFL-CIO.

Response: As discussed in the FY 2023 TFR and below, while the Departments recognize that the recruitment requirements create some burden on employers, the Departments believe they are necessary to ensure that the employer’s recruitment has not become stale and that there are no U.S. workers available for the relevant job opportunity. The Departments reiterate that the additional recruitment requirements are only applicable if an employer files their I-129 petition 30 or more days after their certified start dates of work. The Departments, as discussed in the FY 2023 TFR and below, believe that the requirement to provide a copy of the job notice to the AFL-CIO is complementary to, rather than duplicative of, the other recruitment requirements for several reasons. For example, the Departments explained in the prior TFR that the State Federations of Labor and local unions to which SWAs would circulate relevant job orders, based on their knowledge of the local labor market, are composed of various union organizations and may not always include the AFL-CIO. At the same time, the requirement to contact the AFL-CIO increases outreach to qualified U.S. workers as H-2B job opportunities in traditionally or customarily unionized occupations tend to fall within those industries most likely to be organized or represented by AFL-CIO member unions. *See* 87 FR 76816, 76844–45. The Departments disagree that they have not taken the rate of unionization into account as the Departments previously provided, and will continue to provide, a list of occupations that they believe are typically or customarily unionized. *See, e.g.,* 87 FR 76816, 76844 n.145 (noting the occupations or industries listed are ones in which the Department has typically observed substantial union presence). Finally, the Departments agree that other organizations in addition to the AFL-CIO are well positioned to assist employers with recruitment activities as demonstrated by the requirement to post a new job order with the SWA and to engage with the local AJC to assist with recruitment.

Attestation Form

Comment: One commenter stated that the attestation form that is required “to demonstrate irreparable harm” under the TFR is “overly burdensome and may discourage employer participation when noncitizen workers are needed to address labor shortages,” and urged the Departments to exclude the attestation form from subsequent rulemakings. The commenter indicated the Departments should recognize that a petitioner’s investment of resources into seeking a TLC and filing Form I-129 with accompanying documentation shows “the implied need for H-2B workers.”

Response: The Departments disagree with this comment. The attestation form contains information needed to establish eligibility for supplemental H-2B visas that is not captured on other forms. It also contains information that the Departments need to properly administer the allocations under this rule. For example, among other things, the petitioner must indicate which allocation they are requesting workers under, attest that they are suffering or will suffer impending irreparable harm and indicate the types of evidence that they have retained to demonstrate irreparable harm. The Departments believe that the additional attestation is the least burdensome way to collect information needed to establish eligibility and to properly administer the supplemental visa allocations. The Departments also disagree that the attestation form is overly burdensome as DOL estimated that the total time burden for the ETA-9142-B-CAA-7 is 1 hour.⁷¹ It is unlikely that an employer would be discouraged from seeking H-2B workers because of this 1 hour burden, especially if the employer is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ those workers.

Legal Issues

Comment: One commenter stated that DHS violated the National Environmental Policy Act (NEPA) by failing to provide any analysis to justify its assertion that adding up to 64,716 visas would not result in “meaningful, calculable change in environment effect,” or to justify its conclusion that the FY 2023 TFR therefore fits within a categorical exclusion.

Response: The Departments disagree with the commenter regarding the sufficiency of the NEPA analysis in the FY 2023 TFR. As explained in the FY

⁷¹ The Departments are retaining the attestation form requirement, and the total time burden for the FY 2024 attestation form, ETA-9142-B-CAA-8, remains 1 hour.

2023 TFR, an additional 64,716 H–2B nonimmigrant visas will not result in any meaningful, calculable change in environmental effect with respect to the current H–2B limit or in the context of a current U.S. population exceeding 331,893,745, which represents a maximum temporary increase of 0.0195 percent. As further explained, the FY 2023 TFR is a stand-alone temporary authorization and not a part of any larger action and presents no extraordinary circumstances creating the potential for significant environmental effects.

Comment: While a commenter agreed with DHS that there was good cause to immediately increase the cap, the commenter opined that there was not good cause for the other “ancillary policy provisions,” particularly the requirement to “affirmatively contact” the nearest AFL–CIO office and provide written notice of the job order placed with the SWA when the employment is in a traditionally or customarily unionized occupation or industry. Accordingly, the commenter urged the Departments to reissue the FY 2023 TFR as two separate rules, a final rule to release the supplemental visas and a proposed rule that contains the other provisions.

Response: The Departments maintain there was good cause to couple the release of supplemental visas with additional provisions, such as the additional recruitment requirements, in a temporary final rule. The Departments provided their rationale for the recruitment requirements in the FY 2023 TFR⁷² and articulated sufficient good cause to forgo notice and comment rulemaking for all aspects of the temporary final rule. As indicated in the FY 2023 temporary final rule, the duration of the authorization to make supplemental cap visas available, combined with the urgent need of American businesses for H–2B workers did not provide sufficient time to conduct pre-promulgation notice and comment rulemaking on any aspect of the TFRs, including additional recruitment requirements.

Suggestions Outside the Departments’ Authority

Comment: Two commenters urged the administration to consider an “Alternative Model for Labor Migration” that would give workers in the H–2B visa program, and more

broadly in all work visa programs, more control over their visas by allowing them to self-petition and be matched with employers via a government database, and would enable workers to petition for citizenship. The commenters set forth a detailed plan regarding how the model would function, including specific DOL and USCIS procedures, and they provided an analysis of the benefits of the alternative model relative to the current program.

The commenters asserted that the supplemental cap TFR represents an opportunity for the Departments to “partially implement” the model described. Specifically, the commenters suggested that the Departments could implement a lottery open to all returning workers by which they could apply to be assigned a priority ranking. Employers approved through the TLC and petition processes would be required to post the number of open H–2B positions and procedures for applying publicly on seasonaljobs.dol.gov, and any returning H–2B worker would be eligible to apply directly to the employer or the employer’s designated agent. If the applications from returning H–2B workers exceeded the vacancies, workers’ priority would be based on their assigned lottery rank.

Response: As implicitly acknowledged by the commenters in their suggestions that the proposed model could be “partially” implemented by regulation, many aspects of the commenters’ proposed “Alternative Model for Labor Migration,” such as enabling workers to self-petition and to pursue citizenship, are clearly outside the Departments authority under the current statutory scheme. It is unclear whether the Departments have authority to otherwise “partially implement” the model as suggested. Regardless, even assuming such authority, the Departments note that the proposal would not be feasible in the context of a temporary and time-limited statutory authority and rule such as the current TFR, due to the level of changes to existing processes and the development of new systems and processes that would be required for implementation.

Broader Program Reforms

Some commenters made suggestions for broader program reforms that would require Congressional action. For example, commenters made suggestions relating to permanently increasing the H–2B annual statutory cap, exempting certain workers from that cap, and increasing funding for DOL’s H–2B

enforcement. However, the Departments decline to further detail and respond to these comments, as the recommendations are all outside of the Departments’ authority to accomplish.

In addition to the issues discussed above, the public comments included numerous suggestions for the Departments to make permanent changes to the H–2B program, with several commenters expressing that the Departments should not exercise their authority to increase the number of H–2B visas unless and until the program is more broadly reformed. The recommendations for permanent program reforms included suggestions for both DHS and DOL regarding ways to increase protections for both foreign and U.S. workers, and to improve the overall integrity and efficiency of the program. Specifically, commenters suggested that one or both Departments should implement the following changes to the H–2B program before or instead of authorizing supplemental visas:

- Provide a grace period with employment authorization so workers can leave employers for any reason;
- Notify beneficiaries about their own immigration status;
- Provide workers access to information about their rights and about available resources to enforce those rights;
- Improve access to deferred action for H–2 workers who experience or witness labor rights violations, including an expedited process for issuance of statements of interest from government entities;
- Fully implement the existing provision at 8 CFR 214.2(h)(17)(iii) to protect workers who leave abusive employers from accruing unlawful presence;
- Do more to prevent discrimination and discriminatory hiring practices in the H–2B program;
- Collect and release more and better data about the H–2B program;⁷³
- Provide increased real-time information about available job opportunities;
- Require employers to give priority to anyone in the U.S. with employment authorization (including “individuals with unexpired valid H–2B visas”) for any open unfilled position for which an employer sought or obtained H–2B labor certification;
- Prioritize petitions for industries with the lowest unemployment rate(s) instead of using a lottery system;

⁷² Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers, 87 FR 76816, 76842–47 (Dec. 15, 2022).

⁷³ See above comment and response under the heading “Data Transparency” for further discussion on this topic.

- Allocate visas to employers who pay the highest wages instead of using a random lottery system;

- Do not issue H-2B visas to employers who are engaged in labor disputes, and only issue visas to direct employers and end outsourcing and labor contractors;⁷⁴

- Grant work authorization to spouses of H-2 nonimmigrants;

- Impose greater employer accountability for actions of contractors, recruiters, and agents;

- Seek ways to enforce the ban on recruitment fees without penalizing workers;

- Allow H-2B workers to pursue permanent labor certification or “other applications for permanent residence;”

- Prohibit the imposition of unnecessary requirements for entry-level positions;

- Improve health and safety standards at H-2B workplaces;

- Require employers to undertake both local and national recruitment efforts before looking abroad;

- Require employers to pay for housing and daily transportation to and from the worksite for both U.S. and H-2B workers;

- Require full contract compliance, including all hours promised;

- Cease issuance of H-2B labor certifications for work in certain areas, such as “labor surplus areas or occupations” or “high unemployment regions and industries;”

- Create a streamlined process for reporting program violations;

- Create an avenue for stakeholders, including U.S. workers, to raise concerns about job orders and labor certifications;

- Reinstate the Interagency Working Group for the Consistent Enforcement of Federal Labor, Employment and Immigration Laws to strengthen deconfliction efforts between key agencies and support affirmative protections for immigrant and nonimmigrant workers;

- Create a civil society advisory group to promote decent work in the Central American regional strategy;

- Update the H-2B prevailing wage methodology in various ways;

- Implement the additional U.S. recruitment requirements;

- Improve language access for workers;

- Keep job postings active until all positions are actually filled, and require employers to update the job postings with new information;

- Keep labor violators out of the program, including by creating an employer screening and/or registration program;

- Establish a formal registration process for international recruiters, as well as U.S. agents;

- Require employers to disclose every person authorized to engage in recruitment on their behalf;

- Work with Department of State to enhance consulates’ H-2B job verification services by verifying recruiters associated with the job order;

- Increase enforcement in various ways, such as by debarring all recruiters that engage in any prohibited practice, creating stiffer penalties for employer violations, and/or instituting processing fees at sufficient levels to fund robust enforcement;

- Change the visa allocation procedures for the statutory 66,000 cap, including allocation in 4 different increments, and using less than 33,000 visas during the first half of the fiscal year;

- Modify the current process for randomizing H-2B TLC applications in such a manner as to give H-2B employers opportunities to participate without regard to the date specified as the first date for employment;

- Reduce the period a worker is required to be outside the United States following 3 years in H-2B status to 60 days;

- Provide notice of seasonal job openings to unions representing workers in relevant occupations so that they may dispatch members in response;

- Limit the duration of H-2B eligible job orders to 7 months;

- Cap at 100 the number of visas that any single employer can receive;

The permanent changes to the H-2B program that commenters have suggested are not appropriate for inclusion in a rule of temporary duration such as the current TFR, and the Departments therefore decline to discuss each of these suggestions with further specificity. The Departments appreciate the thoughtful recommendations for permanent program reforms, however, and note that they are actively engaged in reform efforts outside of this rulemaking, including efforts to address some of the issues discussed in the suggestions.

Notably, on September 20, 2023, DHS published a notice of proposed rulemaking (NPRM) to modernize and improve both the H-2B and H-2A programs by providing greater flexibility and protections for participating workers, and improving the program’s

efficiency.⁷⁵ The NPRM contains discussions and proposals related to some of the reform concepts included in the commenters’ suggestions including, for example, providing grace periods during which an H-2 worker can leave work to seek new employment, ensuring greater accountability for employers and recruiters with past violations, reducing the required amount of time to be spent outside the United States after reaching 3 years in H-2B status, and allowing workers to take steps toward permanent residence without violating their nonimmigrant status on that basis. DHS is currently accepting public comments specific to the NPRM through November 20, 2023, and will consider all such comments in developing a subsequent final rule. In addition, both Departments are involved in an H-2B Worker Protection Taskforce, convened by the White House, which focuses on threats to H-2B program integrity, H-2B workers’ fundamental vulnerabilities, and the impermissible use of the program to avoid hiring U.S. workers.⁷⁶ On October 19, 2023, the H-2B Worker Protection Taskforce published a report announcing new actions to be taken by four federal agencies—DHS, DOL, DOS, and the U.S. Agency for International Development (USAID)—to strengthen protections for vulnerable workers.⁷⁷

With regard to commenters’ specific recommendation that the Departments decline to provide supplemental H-2B visas unless and until the program is broadly reformed, the Departments disagree with that recommendation. While permanent reforms to the relevant DHS regulations are being considered outside of this rulemaking as noted above, the Departments have determined, as discussed in greater detail below, that an increase in H-2B visas for businesses facing irreparable harm is warranted and justified under the authority provided in section 303 of the FY 2023 Omnibus, as extended by Public Law 118–15.

⁷⁵ *Modernizing H-2 Program Requirements, Oversight, and Worker Protections*, 88 FR 65040 (Sep. 20, 2023).

⁷⁶ See DHS, *DHS to Supplement H-2B Cap with Nearly 65,000 Additional Visas for Fiscal Year 2023* (Oct. 12, 2022), <https://www.dhs.gov/news/2022/10/12/dhs-supplement-h-2b-cap-nearly-65000-additional-visas-fiscal-year-2023> (announcing the creation of the H-2B Worker Protection Taskforce).

⁷⁷ See The White House, *Strengthening Protections for H-2B Temporary Workers, Report of the H-2B Worker Protection Taskforce*, <https://www.whitehouse.gov/wp-content/uploads/2023/10/Final-H-2B-Worker-Protection-Taskforce-Report.pdf> (Oct. 19, 2023).

⁷⁴ These recommendations were specifically for USCIS, however, the Departments note that visas are issued by the Department of State.

III. Discussion

A. Statutory Determination

Following consultation with the Secretary of Labor, the Secretary of Homeland Security has determined that some U.S. employers cannot satisfy their needs in FY 2024 with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor. In accordance with the FY 2024 continuing resolution extending the authority provided in section 303 of the FY 2023 Omnibus, the Secretary of Homeland Security has determined that it is appropriate, for the reasons stated below, to raise the numerical limitation on H–2B nonimmigrant visas through the end of FY 2024 by up to 64,716 additional visas for those American businesses that attest that they are suffering irreparable harm or will suffer impending irreparable harm, in other words, a permanent and severe financial loss, without the ability to employ all of the H–2B workers requested on their petition. These businesses must retain documentation, as described below, supporting this attestation.

As in connection with the FY 2021, FY 2022, and FY 2023 H–2B supplemental visa temporary final rules, and consistent with existing authority, DHS and DOL intend to conduct a significant number of audits with respect to petitions filed under this TFR requesting supplemental H–2B visas during the period of temporary need. The Departments will use their discretion to select which petitions to audit, and the Departments will use the audits to verify compliance with H–2B program requirements, including the irreparable harm standard as well as other key worker protection provisions implemented through this rule. If the Departments find that an employer's documentation does not meet the irreparable harm standard, or that the employer fails to provide evidence demonstrating irreparable harm or comply with the audit process, the Departments may consider it to be a substantial violation resulting in an adverse agency action against the employer, including revocation of the petition and/or TLC or program debarment. Of the audits completed so far, some audits conducted of employers that received visas under the supplemental caps in FY 2021, FY 2022, and FY 2023 revealed concerns surrounding payment of the promised wage, employment of returning workers, documentation of irreparable harm, and employment at the listed location, which may warrant further review and action.

As he did in FY 2021, FY 2022, and FY 2023, the Secretary of Homeland Security has also again determined, following consultation with the Secretary of Labor, that for certain employers, additional recruitment steps are necessary to confirm that there are no qualified U.S. workers available for the positions. In addition, the Secretary of Homeland Security has determined, following consultation with the Secretary of Labor, that the supplemental visas will be limited to returning workers, with the exception that up to 20,000 of the 64,716 visas will be exempt from the returning worker requirement and will be reserved for H–2B workers who are nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica.⁷⁸ DHS is reserving these 20,000 H–2B visas for nationals of these countries to further the United States' objectives in the Western Hemisphere to manage irregular migration through various lines of efforts including increasing and expanding access to lawful pathways for nationals of countries that have extensively collaborated with the United States on migration issues, such as through endorsing the Los Angeles Declaration on Migration and Protection (L.A. Declaration),⁷⁹ joining the United States to ramp up efforts to address the irregular migration flows through the Darien,⁸⁰ and hosting Safe Mobility Offices so that migrants do not trek north to the U.S. Southwest Border.⁸¹

⁷⁸ These conditions and limitations are not inconsistent with sections 214(g)(3) ("first in, first out" H–2B processing) and (g)(10) (fiscal year H–2B allocations) because noncitizens covered by the special allocation under section 303 of the FY 2023 Omnibus are not "subject to the numerical limitations of [section 214(g)(1)]." See, e.g., INA section 214(g)(3); INA section 214(g)(10); Continuing Appropriations Act, 2024, div. A, sec. 101(6) (extending the authority provided in FY 2023 Omnibus div. O, sec. 303 ("Notwithstanding the numerical limitation set forth in section 214(g)(1)(B) of the [INA]")).

⁷⁹ The White House, *Los Angeles Declaration on Migration and Protection*, June 10, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/>.

⁸⁰ *Trilateral Joint Statement*, April 11, 2023, <https://www.dhs.gov/news/2023/04/11/trilateral-joint-statement>.

⁸¹ The White House, *Joint Statement from the United States and Guatemala on Migration* (June 1, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/01/joint-statement-from-the-united-states-and-guatemala-on-migration/>; United States Department of State, *U.S.-Colombia Joint Commitment to Address the Hemispheric Challenge of Irregular Migration* (June 4, 2023), <https://www.state.gov/u-s-colombia-joint-commitment-to-address-the-hemispheric-challenge-of-irregular-migration/>; The White House, *Readout of Principal Deputy National Security Advisor Jon Finer's Meeting with Colombian Foreign Minister Alvaro Leyva* (June 11, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/11/readout-of-principal-deputy-national-security-advisor-jon-finer-meeting-with-colombian-foreign-minister-alvaro-leyva/>; United States Department of State, *U.S.-Costa Rica Joint Commitment to Address the Hemispheric Challenge of Irregular Migration* (June 12, 2023), <https://www.state.gov/u-s-costa-rica-joint-commitment-to-address-the-hemispheric-challenge-of-irregular-migration/>; United States Department of State, *Announcement of Safe Mobility Office in Ecuador* (October 19, 2023), <https://www.state.gov/announcement-of-safe-mobility-office-in-ecuador/#:~:text=The%20United%20States%20is%20pleased,authorized%20channels%20of%20lawful%20migration.>

The 20,000 set-aside will also deliver on the objectives of E.O. 14010, which, among other initiatives, instructs the Secretary of Homeland Security and the Secretary of State to implement measures to enhance access to visa programs for nationals of the Northern Central American countries.⁸² DHS is also allocating these visas to specific countries to further promote development and economic stability of these countries to reduce irregular migration throughout the Western Hemisphere.⁸³

DHS observed robust employer interest in response to the FY 2021 H–2B supplemental visa allocation for Salvadoran, Guatemalan, and Honduran nationals and the FY 2022 and FY 2023 supplemental visa allocations for Salvadoran, Guatemalan, Honduran, and Haitian nationals, with USCIS

⁸² See Section 3(c) of E.O. 14010, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, signed February 2, 2021, <https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02561.pdf>. E.O. 14010 referred to the three countries of El Salvador, Guatemala, and Honduras as the "Northern Triangle," but this rule refers to these countries collectively as the Northern Central American countries.

⁸³ See https://twitter.com/DHSGov/status/1580310211931144194?ref_src=twsrc%5Etfw (this supplemental allocation to workers from Haiti, Honduras, Guatemala, and El Salvador "advances the Biden Administration's pledge, under the L.A. Declaration to expand legal pathways as an alternative to irregular migration"); The White House, *Fact Sheet: The Los Angeles Declaration on Migration and Protection U.S. Government and Foreign Partner Deliverables*, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/fact-sheet-the-los-angeles-declaration-on-migration-and-protection-u-s-government-and-foreign-partner-deliverables/> (addressing several measures, including the H–2B allocation for nationals of Haiti, as part of "the President's commitment to support the people of Haiti."). We also note Congress' recent statement, in a provision within the FY 2022 Omnibus, that it is the policy of the United States to support the sustainable rebuilding and development of Haiti. See Section 102 of Division V of the Consolidated Appropriations Act, 2022, Public Law 117–103. See also DHS, *Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H–2A and H–2B Nonimmigrant Worker Programs*, 86 FR 62562 (Nov. 10, 2021) (sustainable development and the stability of Haiti is vital to the interests of the United States as a close partner and neighbor).

approving petitions on behalf of 6,805 beneficiaries under the FY 2021 allocation,⁸⁴ 3,231 beneficiaries under the FY 2022 first half supplemental allocation,⁸⁵ 12,318 beneficiaries for the second half of the fiscal year FY 2022, and 23,832 beneficiaries under the FY 2023 allocation.⁸⁶ In addition, DHS and the Biden administration have continued to conduct outreach efforts promoting the H-2B program as, among other things, a lawful pathway for nationals of El Salvador, Guatemala, Honduras, and Haiti to work in the United States.⁸⁷

DHS will not accept and will reject petitions submitted for the country-specific allocation with a date of need on or after April 1, 2024 that are received earlier than 15 days after the INA section 214(g) cap for the second half of FY 2024 is met or are received

after the applicable numerical limitation has been reached or after September 16, 2024. Requiring petitioners to wait to submit H-2B supplemental cap petitions with start dates of need on or after April 1, 2024 is consistent with the supplemental cap authority in section 303, as extended to FY 2024 by Public Law 118-15, Continuing Appropriations Act, 2023 and Other Extensions Act, and will facilitate the orderly intake and processing of supplemental cap petitions for the country-specific allocation. As discussed above, similar limitations apply to the intake and processing of returning worker petitions with start dates of need on or after April 1, 2024.

Similar to the previous temporary final rules for the FY 2019, FY 2021, FY 2022, and FY 2023 supplemental caps, the Secretary of Homeland Security has also determined to limit the supplemental visas to H-2B returning workers,⁸⁸ unless the employer indicates on the new attestation form that it is requesting workers who are nationals of one of the specified countries and who are therefore counted towards the 20,000 country-specific allocation regardless of whether they are new or returning workers. If the 20,000 country-specific allocation is reached and visas remain available under the returning worker cap, USCIS would reject a petition seeking workers under the 20,000 allocation and return any fees submitted to the petitioner. In such a case, a petitioner may continue to request workers who are nationals of one of these countries, but the petitioner must file a new Form I-129 petition, with fee, and attest that these noncitizens will be returning workers, in other words, workers who were issued H-2B visas or were otherwise granted H-2B status in FY 2021, 2022, or 2023.⁸⁹ Like the temporary final rules for the first half and for the second half of FY 2022 and FY 2023, if the 20,000 returning worker exemption cap for specific nationals remains unfilled, DHS will *not* make unfilled visas reserved for these nationals available to the general

returning worker cap. The DHS decision not to make available unfilled visas from the country-specific allocation to the general supplemental cap for returning workers is consistent with the administration's goal of providing a lawful pathway for such nationals to temporarily work in the United States. To that end, not permitting rollover into the returning worker allocation provides employers with more time to petition for, and bring in, workers from these countries and encourages full use of the 20,000 country-specific allocation to meet employer needs. This, in turn, contributes to our country's efforts to promote and improve safety, security and economic stability in these countries to help stem the flow of irregular migration to the United States.

The Secretary of Homeland Security's determination to increase the numerical limitation is based, in part, on the conclusion that some businesses are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H-2B workers requested on their petition. In recent years, members of Congress have informed the Secretaries of Homeland Security and Labor about the needs of some U.S. businesses for H-2B workers (after the statutory cap for the relevant half of the fiscal year has been reached) and about the potentially negative impact on state and local economies if the cap is not increased.⁹⁰ U.S. businesses, chambers of commerce, employer organizations, and state and local elected officials have also expressed concerns in recent years to the DHS and Labor Secretaries regarding the unavailability of H-2B visas after the statutory cap was reached.⁹¹ In addition, several commenters on the FY 2023 TFR supported the Departments' decision to publish one rule covering the entire fiscal year for 2023, and urged the Departments to once again publish one rule covering the entire fiscal year for 2024 in order to save time in the second half of the fiscal year, conserve limited agency resources, and reduce uncertainty for employers.⁹²

After considering the full range of evidence and diverse points of view, the Secretary of Homeland Security has deemed it appropriate to take action to prevent further severe and permanent financial loss for those employers currently suffering irreparable harm and to avoid impending irreparable harm for other employers unable to obtain H-2B

⁸⁴ While USCIS approved a greater number of beneficiaries from the Northern Central American countries than the 6,000 visas allocated under the FY 2021 supplemental cap for those countries, the Department of State issued 3,079 visas to nationals from those countries. See DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, H-2B Visa Issuance Report September 30, 2023. This discrepancy can be attributed to adverse impacts on consular processing caused by the COVID-19 pandemic, travel restrictions, as well as lack of readily available processes to efficiently match workers from Northern Central American countries with U.S. recruiters/employers on an expedited timeline.

⁸⁵ See DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, H-2B Visa Issuance Report September 30, 2023.

⁸⁶ See DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, H-2B Visa Issuance Report September 30, 2023. While USCIS approved a greater number of beneficiaries from the Northern Central American countries and Haiti than the 11,500 visas allocated under the FY 2022 second half supplemental cap for those countries, the Department of State issued approximately 7,405 visas to nationals from those countries. Similarly, while USCIS approved a greater number of beneficiaries from the Northern Central American countries and Haiti than the 20,000 visas allocated under the FY 2023 supplemental cap for those countries, the Department of State issued approximately 16,713 visas to nationals from those countries. DHS anticipates that the issuance of this rule early in the fiscal year, the fact that this is the fourth year that DHS will make a specific allocation available for workers from the Northern Central American countries, as well as the inclusion of nationals from several additional countries, will contribute to even greater utilization of available visas under this allocation during FY 2024.

⁸⁷ See, e.g., USAID, *Administrator Samantha Power at the Summit of the Americas Fair Recruitment and H-2 Visa Side Event*, <https://www.usaid.gov/news-information/speeches/jun-9-2022-administrator-samantha-power-summit-americas-fair-recruitment-and-h-2-visa> (June 9, 2022) ("Our combined efforts [with the labor ministries in Honduras and Guatemala, and the Foreign Ministry in El Salvador] . . . resulted in a record number of H-2 visas issued in 2021, including a nearly forty percent increase over the pre-pandemic levels in H-2B visas issued across all three countries.").

⁸⁸ For purposes of this rule, these returning workers could have been H-2B cap exempt or extended H-2B status in FY 2021, 2022, or 2023. Additionally they may have been previously counted against the annual H-2B cap of 66,000 visas during FY 2021, 2022, or 2023, or the supplemental caps in FY 2021, 2022, or 2023.

⁸⁹ The returning worker allocations are for workers who were issued H-2B visas or held H-2B status in fiscal years 2021, 2022, or 2023, regardless of country of nationality. Therefore, a petitioner may choose to petition for Salvadoran, Guatemalan, Honduran, Haitian, Colombian, Ecuadorian, or Costa Rican nationals who meet this requirement under an available returning worker allocation, regardless of whether the separate 20,000 allocation for these nationals has been reached.

⁹⁰ See the docket for this rulemaking for access to these letters.

⁹¹ See the docket for this rulemaking for access to these letters.

⁹² See the docket for this rulemaking for access to these comments.

workers under the statutory cap, including potential wage and job losses by their U.S. workers, as well as other adverse downstream economic effects.⁹³ At the same time, the Secretary of Homeland Security believes it is appropriate to condition receipt of supplemental visas on adherence to additional worker protections, as discussed below.

The decision to afford the benefits of this temporary cap increase to U.S. businesses that need H-2B workers because they are suffering irreparable harm already or will suffer impending irreparable harm, and that will comply with additional worker protections, rather than applying the cap increase to any and all businesses seeking temporary workers, is consistent with DHS's time-limited authority to increase the cap, as explained below. The Secretary of Homeland Security, in implementing section 303, as extended by Public Law 118–15, and determining the scope of any such increase, has broad discretion, following consultation with the Secretary of Labor, to identify the business needs that are most relevant, while bearing in mind the need to protect U.S. workers. Within that context, for the below reasons, the Secretary of Homeland Security has determined to allow an overall increase of up to 64,716 additional visas solely for the businesses facing permanent, severe financial loss or those who will face such loss in the near future.

First, DHS interprets the reference to “the needs of American businesses” in section 303, as extended by Public Law 118–15, as describing a need different from the need ordinarily required of employers in petitioning for an H-2B worker. Under the generally applicable H-2B program, each individual H-2B employer must demonstrate that it has a temporary need for the services or labor for which it seeks to hire H-2B workers. *See* 8 CFR 214.2(h)(6)(ii); 20 CFR 655.6. The use of the phrase “needs of American businesses,” which is not found in INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b), or the regulations governing the standard H-2B cap, authorizes the Secretary of Homeland Security in allocating additional H-2B

visas under section 303, as extended by Public Law 118–15, to require that employers establish a need above and beyond the normal standard under the H-2B program, that is, an inability to find sufficient qualified U.S. workers willing and available to perform temporary services or labor and that the employment of the H-2B worker will not adversely affect the wages and working conditions of U.S. workers, *see* 8 CFR 214.2(h)(6)(i)(A). DOL concurs with this interpretation. Accordingly, the Secretaries have determined that it is appropriate, within the limits discussed below, to tailor the availability of this temporary cap increase to those businesses that are suffering irreparable harm or will suffer impending irreparable harm, in other words, those facing permanent and severe financial loss.

Second, the approach set forth in this rule, which is similar to the implementation of the supplemental caps in previous fiscal years, provides protections against adverse effects on U.S. workers that may result from a cap increase, including, as in previous rules, requiring employers seeking H-2B workers under the supplemental cap to engage in additional recruitment efforts for U.S. workers.

In sum, this rule increases the numerical limitation by up to 64,716 additional H-2B visas for the entirety of FY 2024, but also restricts the availability of those additional visas by prioritizing only the most significant business needs, and limiting eligibility to H-2B returning workers, unless the worker is a national of one of the countries included in the 20,000 country-specific allocation that is exempt from the returning worker limitation. This rule also distributes the supplemental visas in several allocations to assist U.S. businesses that need workers to begin work on different start dates. These provisions are each described in turn below.

B. Numerical Increase and Allocations for Fiscal Year 2024

Making the Maximum Number of Visas Available

The increase of up to 64,716 visas will help address the urgent needs of eligible employers for additional H-2B workers for those employers with employment needs in fiscal year 2024.⁹⁴ The

determination to allow up to 64,716 additional H-2B visas reflects a balancing of a number of factors including: the demand for H-2B visas during the first half of FY 2024 and expected demand for the second half of FY 2024; current labor market conditions; the general trend of increased demand for H-2B visas from FY 2017 to FY 2023; H-2B returning worker data; the amount of time for employers to hire and obtain H-2B workers in this fiscal year; and the objectives of E.O. 14010 and the L.A. Declaration. DHS believes the numerical increase both addresses the needs of U.S. businesses and, as explained in more detail below, furthers the foreign policy interests of the United States.

Section 303 of the FY 2023 Omnibus, as extended by Public Law 118–15, sets the highest number of H-2B returning workers who were exempt from the cap in certain previous years as the maximum limit for any increase in the H-2B numerical limitation for FY 2024.⁹⁵ Consistent with the statute's reference to H-2B returning workers, in determining the appropriate number by which to increase the H-2B numerical limitation, the Secretary of Homeland Security focused on the number of visas allocated to such workers in years in which Congress enacted returning worker exemptions from the H-2B numerical limitation. During each of the years the returning worker provision was in force, U.S. employers' standard business needs for H-2B workers exceeded the statutory 66,000 cap. The highest number of H-2B returning workers approved was 64,716 in FY 2007. In setting the number of

are accorded [H-2B] status” (emphasis added), section 303 only authorizes DHS to increase the number of available H-2B visas. Accordingly, DHS will not permit individuals authorized for H-2B status pursuant to an H-2B petition approved under section 303 to change to H-2B status from another nonimmigrant status. *See* INA section 248, 8 U.S.C. 1258; *see also* 8 CFR part 248. If a petitioner files a petition seeking H-2B workers in accordance with this rule and requests a change of status on behalf of someone in the United States, the change of status request will be denied, but the petition will be adjudicated in accordance with applicable DHS regulations. Any noncitizen authorized for H-2B status under the approved petition would need to obtain the necessary H-2B visa at a consular post abroad and then seek admission to the United States in H-2B status at a port of entry.

⁹⁵ During fiscal years 2005 to 2007, and 2016, Congress enacted “returning worker” exemptions to the H-2B visa cap, allowing workers who were counted against the H-2B cap in one of the three preceding fiscal years not to be counted against the upcoming fiscal year cap. *Save Our Small and Seasonal Businesses Act of 2005*, Public Law 109–13, Sec. 402 (May 11, 2005); *John Warner National Defense Authorization Act*, Public Law 109–364, Sec. 1074 (Oct. 17, 2006); *Consolidated Appropriations Act of 2016*, Public Law 114–113, Sec. 565 (Dec. 18, 2015).

⁹³ *See, e.g., Impacts of the H-2B Visa Program for Seasonal Workers on Maryland's Seafood Industry and Economy*, Maryland Department of Agriculture Seafood Marketing Program and Chesapeake Bay Seafood Industry Association (March 2, 2020), available at <https://mda.maryland.gov/documents/2020-H2B-Impact-Study.pdf> (last visited Sept. 29, 2023); *Hospitality Employment Rose in May, But Hoteliers Report Lingering Labor Woes*, Hotel Dive (Jun. 7, 2023), <https://www.hoteldive.com/news/hotel-employment-labor-shortage-increased-wage/652308/> (last visited Oct. 2, 2023).

⁹⁴ In contrast with section 214(g)(1) of the INA, 8 U.S.C. 1184(g)(1), which establishes a cap on the number of individuals who may be issued visas or otherwise provided H-2B status (emphasis added), and section 214(g)(10) of the INA, 8 U.S.C. 1184(g)(10), which imposes a first half of the fiscal year cap on H-2B issuance with respect to the number of individuals who may be issued visas or

additional H-2B visas to be made available for FY 2024, DHS considered this number, overall indications of increased need, and the availability of U.S. workers, as discussed below. On the basis of these considerations, DHS determined that it is appropriate to make available up to 64,716 additional visas, which is the maximum allowed, under the FY 2024 supplemental cap authority. The Secretary further considered the objectives of E.O. 14010 and the L.A. Declaration, both of which focus in part on addressing the root causes of irregular migration and managing migration through lawful pathways. Accordingly, the Secretary determined that it is appropriate to reserve up to 20,000 of the up to 64,716 additional visas and exempt this number from the returning worker requirement for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, or Costa Rica.

In past years, the number of beneficiaries covered by H-2B petitions filed exceeded the number of additional visas allocated under recent supplemental caps. In FY 2018, USCIS received petitions for approximately 29,000 beneficiaries during the first 5 business days of filing for the 15,000 supplemental cap. USCIS therefore conducted a lottery on June 7, 2018, to randomly select petitions that it would accept under the supplemental cap. Of the selected petitions, USCIS issued approvals for 15,672 beneficiaries.⁹⁶ In FY 2019, USCIS received sufficient petitions for the 30,000 supplemental cap on June 5, 2019, but did not conduct a lottery to randomly select petitions that it would accept under the supplemental cap. Of the petitions received, USCIS issued approvals for 32,717 beneficiaries. In FY 2021, USCIS received a sufficient number of petitions for the 22,000 supplemental cap on August 13, 2021, including a significant number for workers from Northern Central American countries.⁹⁷ Of the

⁹⁶ USCIS recognizes it may have received petitions for more than 29,000 supplemental H-2B workers if the cap had not been exceeded within the first 5 days of opening. However, DHS estimates that not all of the 29,000 workers requested under the FY 2018 supplemental cap would have been approved and/or issued visas. For instance, although DHS approved petitions for 15,672 beneficiaries under the FY 2018 cap increase, the Department of State data shows that as of January 15, 2019, it issued only 12,243 visas under that cap increase. Similarly, DHS approved petitions for 12,294 beneficiaries under the FY 2017 cap increase, but the Department of State data shows that it issued only 9,160 visas.

⁹⁷ On June 3, 2021, USCIS announced that it had received enough petitions to reach the cap for the additional 16,000 H-2B visas made available for returning workers only, but that it would continue accepting petitions for the additional 6,000 visas

petitions received, USCIS issued approvals for 30,707 beneficiaries, including approvals for 6,805 beneficiaries under the allocation for the nationals of the Northern Central American countries.⁹⁸

In FY 2022, DHS made the supplemental cap available twice, once in January 2022 and again in May 2022. Under the earlier FY 2022 supplemental cap for petitions with start dates in the first half of FY 2022, USCIS had issued approvals for 17,381 beneficiaries, including approvals for 3,231 beneficiaries under the allocation for nationals of the Northern Central American countries and Haiti.⁹⁹ For the second half of FY 2022, within the first five business days of filing, USCIS received petitions for more beneficiaries than the additional 23,500 supplemental visas made available for returning workers, thus necessitating a random selection of petitions to meet the returning worker allotment.¹⁰⁰ Of the petitions received for the second half of FY 2022, USCIS issued approvals for 43,798 beneficiaries, including approvals for 12,318 beneficiaries under the allocation for nationals of the Northern Central American countries and Haiti.¹⁰¹

allotted for nationals of the Northern Central American countries. See USCIS, *Cap Reached for Additional Returning Worker H-2B Visas for FY 2021*, <https://www.uscis.gov/news/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-fy-2021> (Jun. 3, 2021). On July 23, 2021, USCIS announced that, because it did not receive enough petitions to reach the allocation for the Northern Central American countries by the July 8 filing deadline, the remaining visas were available to H-2B returning workers regardless of their country of origin. See USCIS, *Employers May File H-2B Petitions for Returning Workers for FY 2021*, <https://www.uscis.gov/news/alerts/employers-may-file-h-2b-petitions-for-returning-workers-for-fy-2021> (Jul. 23, 2021).

⁹⁸ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2023, TRK 13122. The number of approved workers exceeded the number of additional visas authorized for FY 2018, FY 2019, as well as for FY 2021 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. Unlike these past supplemental cap TFRs, petitions filed under the first half FY 2022 TFR did not exceed the additional allocation of 20,000 H-2B visas provided by that rule.

⁹⁹ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2023, TRK 13122.

¹⁰⁰ See USCIS, *Cap Reached for Additional Returning Worker H-2B Visas for Second Half of FY 2022*, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-second-half-of-fy-2022> (May 31, 2022).

¹⁰¹ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, C3 Consolidated, queried 10/2023, TRK 13122. The number of approved workers exceeded the number of additional visas

In FY 2023, USCIS received enough petitions to reach the cap for the additional 18,216 H-2B visas made available for returning workers for the first half of fiscal year by January 30, 2023, and USCIS received enough petitions to reach the cap for the additional 16,500 H-2B visas made available for returning workers for the early second half of fiscal year by March 30, 2023.¹⁰² Of the petitions for supplemental H-2B visas in FY 2023, USCIS issued approvals for 78,302 beneficiaries, including 7,157 beneficiaries under the allocation of 10,000 visas made available for returning workers for the late second half of the fiscal year and 23,832 beneficiaries under the allocation of 20,000 visas reserved for nationals of the Northern Central American countries and Haiti.¹⁰³

Data for the first half of FY 2024 clearly indicate an immediate need for additional supplemental H-2B visas for employers with start dates on or before March 31, 2024. USCIS received a sufficient number of H-2B petitions to reach the first half of the FY 2024 fiscal year statutory cap on October 11, 2023.¹⁰⁴ Further, the date on which USCIS received sufficient H-2B petitions to reach the first half semiannual statutory cap has generally trended earlier in recent years. In fiscal years 2017 through 2024, USCIS received a sufficient number of H-2B petitions to reach or exceed the relevant first half statutory cap on January 10, 2017, December 15, 2017, December 6, 2018, November 15, 2019, November 16, 2020, September 30, 2021, September

authorized for the second half of FY 2022 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States.

¹⁰² See USCIS, *Cap Reached for Additional Returning Worker H-2B Visas for the First Half of FY 2023*, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-first-half-of-fy-2023> (Jan. 31, 2023); USCIS, *Cap Reached for Additional Returning Worker H-2B Visas for the Early Second Half of FY 2023*, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-early-second-half-of-fy-2023> (Mar. 31, 2023).

¹⁰³ See DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122. H-2B Visa Issuance Report September 30, 2023. The number of approved workers exceeded the number of additional visas authorized for FY 2023 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States.

¹⁰⁴ See USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2024*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2024> (Oct. 13, 2023).

12, 2022, and October 11, 2023, respectively.¹⁰⁵

Through the third quarter of FY 2023, approximately 85.2 percent of H-2B filings were for positions within just 5 sectors.¹⁰⁶ NAICS 56 (Administrative and Support and Waste Management and Remediation Services) accounted for 39.5% of filings, NAICS 71

(Accommodation and Food Services) accounted for 11.2%, NAICS 72 (Arts, Entertainment, and Recreation) accounted for 18.00%, NAICS 23 (Construction) accounted for 12.4%, and NAICS 11 (Agriculture, Forestry, Fishing and Hunting) accounted for 4.1% of filings.

Within these industries, DOL data show higher labor demand relative to recent history. More specifically, industry unemployment data from the Bureau of Labor Statistics (BLS) show that the industry unemployment rate in each of these industries is lower than the long term (10-year) average.¹⁰⁷

10-year Average of Industry Unemployment Rate				
NAICS 11	NAICS 23	NAICS 56*	NAICS 71	NAICS 72
7.76	6.43	5.01	8.35	8.23
*Supersector is used as a proxy, see footnote 102.				

August 2023 Industry Unemployment Rate				
NAICS 11	NAICS 23	NAICS 56*	NAICS 71	NAICS 72
5.8	3.9	3.7	4.5	6.1
*Supersector is used as a proxy, see footnote 102.				

In August 2023, the industry unemployment for NAICS 56¹⁰⁸ was 3.7 percent, which is 1.31 points lower than its 10-year average of 5.01 percent, while the industry unemployment rate for NAICS 71 was 4.5 percent which is 3.85 points lower than its 10-year average of 8.35 percent. The August 2023 industry unemployment rate for NAICS 72 (6.10 percent) was 2.13 points lower than its 10-year average of 8.23 percent while the rate for NAICS 23 (3.9 percent) was 2.53 points lower than its 10-year average of 6.43 percent. The industry unemployment rate for NAICS 11 (5.80 percent) was 1.96 points lower than its 10-year average of 7.76 percent. The relatively low unemployment rate across these industries is a clear

indication of a strong labor demand within these industries. The Departments believe that the supplemental allocation of H-2B visas described in this temporary final rule will help to meet demand in these industries.

Economy-wide data also indicate that labor-market tightness continues to exist. The most recent Employment Situation released by the Bureau of Labor Statistics (BLS) stated that the unemployment rate was 3.8 percent in September 2023.¹⁰⁹ Historically, the availability of H-2B visas addressed a need in the labor market during periods of lower unemployment. Chart 1¹¹⁰ shows that the H-2B visa allocations for Fiscal Year 2024¹¹¹ made by this rule

are slightly higher than the historical trend but are generally consistent with what the current unemployment rate alone would predict. Additionally, when the unemployment rate is below 6 percent, there is greater variance in the total number of H-2B visas issued in a given year; for example, in years 2022, 2007 and 2006, when the unemployment rate ranged from approximately 3.5 percent to 4.6 percent, the total number of H-2B visas issued were comparable to what is planned for 2024. The data presented in chart 1 is meant to provide additional context and to demonstrate that the total allocation of H-2B visas is reasonable given labor market conditions.

¹⁰⁵ See USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2017*, <https://www.uscis.gov/archive/uscis-reaches-the-h-2b-cap-for-the-first-half-of-fiscal-year-2017> (Jan. 13, 2017); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2018*, <https://www.uscis.gov/archive/uscis-reaches-h-2b-cap-for-first-half-of-fy-2018> (Dec. 21, 2017); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2019*, <https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2019> (Dec. 12, 2018); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2020*, <https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2020> (Nov. 20, 2019); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2021*, <https://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2021> (Nov. 18, 2020); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2022*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2022> (Oct. 12, 2021); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2023*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2023> (Sept. 14, 2022); USCIS, *USCIS Reaches H-2B*

Cap for First Half of FY 2024, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2024> (Oct. 13, 2023).

¹⁰⁶ USCIS analysis of DOL OLFC Performance data.

¹⁰⁷ USCIS has elected to use a long-term average as a reference point so as to minimize the impact that the Covid-19 pandemic has on the comparison of the industry employment rate. All data are taken from the respective BLS "Industry at a Glance" pages. See <https://www.bls.gov/iag/tgs/iag11.htm>, <https://www.bls.gov/iag/tgs/iag23.htm>, <https://www.bls.gov/iag/tgs/iag60.htm>, <https://www.bls.gov/iag/tgs/iag71.htm>, <https://www.bls.gov/iag/tgs/iag72.htm>. All data accessed September 20, 2023.

¹⁰⁸ Data presented here are for the Professional and Business Services Supersector, which is comprised of NAICS 54, NAICS 55 and NAICS 56. See <https://www.bls.gov/iag/tgs/iag60.htm>. As such, the data presented here should be understood to be the best possible proxy for changes in NAICS 56 and not a direct measurement of any specific change in the actual underlying sectors. The latest

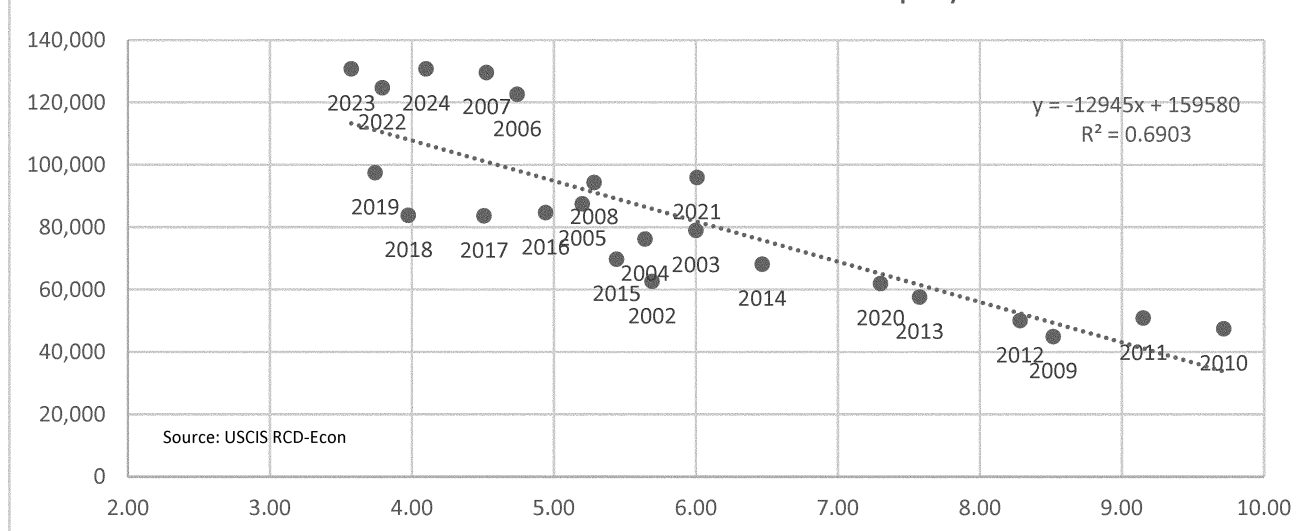
data available, for July, 2023 from the Department of Labor's Current Employment Statistics program indicates that NAICS 56 accounted for just under 42% of employment in Professional Business Services. All data accessed September 27, 2023.

¹⁰⁹ See DOL, BLS, *The Employment Situation—September 2023*, <https://www.bls.gov/news.release/archives/empst10062023.pdf> (Oct. 6, 2023).

¹¹⁰ Annual data presented here is on a fiscal year basis. Fiscal year averages were calculated by taking the average of the monthly unemployment rate for the months in each respective fiscal year (October-September). Data for fiscal year 2023 are for October 2022-August 2023. Unemployment rate for 2024 is based on median Federal Reserve projections See <https://www.federalreserve.gov/monetarypolicy/fomcprojtabl20230920.htm> (accessed September 29, 2023).

¹¹¹ The number of estimated visas issued for Fiscal Year 2024 is based on the sum of the fiscal year statutory cap for H-2B workers (66,000) and the supplemental allocation for this rule (64,716), for a total H-2B visa allocation of 130,716.

Chart 1: H-2B Visa Issuance vs National Unemployment Rate



Given the level of demand for H-2B workers, the continued economic recovery, and continued job growth, DHS believes it is appropriate to release the maximum amount of additional visas at this time.

Making Allocations for All of FY 2024 in a Single Rule

As in FY 2023, DHS believes that it is appropriate to issue a single rule for the entire fiscal year for multiple reasons.¹¹² First, DHS expects that there is demand for supplemental visas in the first half of FY 2024. As previously discussed, USCIS already received enough petitions to reach the congressionally mandated cap on H-2B visas for temporary nonagricultural workers for the first half of FY 2024.¹¹³ Further, the date on which USCIS received sufficient H-2B petitions to reach the first half semiannual statutory caps has generally trended earlier in recent years. In fiscal years 2017 through 2024, USCIS received a sufficient number of H-2B petitions to reach or exceed the relevant first half statutory cap on January 10, 2017, December 15, 2017, December 6, 2018, November 15, 2019, November 16, 2020, September 30, 2021, September 12, 2022, and October 11, 2023, respectively.¹¹⁴

¹¹² Further, DHS believes that 64,716 is an appropriate number of supplemental visas to make available, as this rule will cover both the first and second half of FY 2024.

¹¹³ See USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2024*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2024> (Oct. 13, 2023).

¹¹⁴ See USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2017*, <https://www.uscis.gov/archive/uscis-reaches-the-h-2b-cap-for-the-first-half-of-fiscal-year-2017> (Jan. 13, 2017); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2018*, <https://www.uscis.gov/archive/uscis-reaches-h-2b-cap-for-first-half-of-fy-2018> (Dec. 21, 2017); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2019*, <https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2019> (Dec. 12, 2018); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2020*, <https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2020> (Nov. 20, 2019); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2021*, <https://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2021> (Nov. 18, 2020); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2022*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2022> (Oct. 12, 2021); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2023*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2023> (Sept. 14, 2022); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2024*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2024> (Oct. 13, 2023).

Second, based on relevant data, DHS expects that USCIS will reach the statutory cap for the second half of FY 2024 and that there will accordingly be demand for supplemental visas in the second half of FY 2024. For example, in fiscal years 2017 through 2023, USCIS received a sufficient number of H-2B petitions to reach or exceed the relevant second half statutory cap on March 13, 2017, February 27, 2018, February 19, 2019, February 18, 2020, February 12, 2021, February 25, 2022, and February 27, 2023.¹¹⁵ In addition, DOL data

fiscal-year-2017 (Jan. 13, 2017); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2018*, <https://www.uscis.gov/archive/uscis-reaches-h-2b-cap-for-first-half-of-fy-2018> (Dec. 21, 2017); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2019*, <https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2019> (Dec. 12, 2018); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2020*, <https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2020> (Nov. 20, 2019); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2021*, <https://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2021> (Nov. 18, 2020); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2022*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2022> (Oct. 12, 2021); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2023*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2023> (Sept. 14, 2022); USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2024*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2024> (Oct. 13, 2023).

¹¹⁵ See USCIS, *USCIS Reaches the H-2B Cap for Fiscal Year 2017*, <https://www.uscis.gov/archive/alerts/uscis-reaches-the-h-2b-cap-for-fiscal-year-2017> (Mar. 16, 2017); USCIS, *USCIS Completes Random Selection Process for H-2B Visa Cap for Second Half of FY 2018*, <https://www.uscis.gov/archive/uscis-completes-random-selection-process-for-h-2b-visa-cap-for-second-half-of-fy-2018> (Mar. 1, 2018); USCIS, *H-2B Cap Reached for FY 2019*, <https://www.uscis.gov/archive/h-2b-cap-reached-for-fy-2019> (Feb. 22, 2019); USCIS, *H-2B Cap Reached for Second Half of FY 2020*, <https://www.dol.gov/agencies/eta/foreign-labor/news>.

shows consistently high demand in recent years, particularly during the second half of the fiscal year. In recent years, DOL has received an increasing number of TLC applications for an increasing number of H-2B workers with April 1 start dates: DOL received 4,500 applications on January 1, 2018, covering more than 81,600 worker positions; DOL received 5,276 applications by January 8, 2019, covering more than 96,400 worker positions; DOL received 5,677 applications during the initial three-day filing window in 2020 covering 99,362 worker positions; DOL received 5,377 applications during the initial three-day filing window in 2021 covering 96,641 worker positions; DOL received 7,875 applications by January 7, 2022, covering 136,555 worker positions; and DOL received 8,693 applications during the initial three-day filing window in 2023, covering 142,796 worker positions.¹¹⁶

Finally, publishing one rule that addresses all the visas available for FY 2024 benefits the regulated public by giving more notice and certainty of what will become available for the second

www.uscis.gov/news/alerts/h-2b-cap-reached-for-second-half-of-fy2020 (Feb. 26, 2020); USCIS, *H-2B Cap Reached for Second Half of FY 2021*, <https://www.uscis.gov/news/alerts/h-2b-cap-reached-for-second-half-of-fy-2021> (Feb. 24, 2021); USCIS, *H-2B Cap Reached for Second Half of FY 2022*, <https://www.uscis.gov/newsroom/alerts/h-2b-cap-reached-for-second-half-of-fy-2022> (Mar. 1, 2022); USCIS, *USCIS Reaches H-2B Cap for Second Half of FY 2023 and Announces Filing Dates for the Second Half of FY 2023 Supplemental Visas*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-second-half-of-fy-2023-and-announces-filing-dates-for-the-second-half-of> (Mar. 2, 2023).

¹¹⁶ See DOL, *Announcements*, <https://www.dol.gov/agencies/eta/foreign-labor/news>.

half. As noted in comments received in response to the FY 2023 TFR, this approach allows businesses to better plan ahead for their seasonal workforce needs.¹¹⁷

Filing Deadline of September 16, 2024 for All Petitions

The authority to approve H-2B petitions under this FY 2024 supplemental cap expires at the end of the fiscal year, *i.e.*, the end of September 30, 2024. Therefore, DHS is requiring employers requesting any supplemental visas under this TFR, regardless of the employment start date(s), to properly file their H-2B petition with USCIS no later than September 16, 2024. USCIS will reject any cases that are received after September 16, 2024. *See* new 8 CFR 214.2(h)(6)(xiv)(C). Because DHS believes that 15 days from the end of the fiscal year is generally the minimum time needed for petitions to be adjudicated, but also to account for the fact that September 15, 2024 falls on a Sunday,¹¹⁸ DHS has set September 16, 2024 as the last day to file in order to provide USCIS with adequate time for petition processing before the expiration of the authority at the end of the fiscal year, although USCIS cannot guarantee the time period will be sufficient for adjudication of petitions in all cases.

In addition, the filing deadline will be earlier than September 16, 2024 if the applicable numerical limit for the relevant supplemental visa allocation is reached before that date. *See* new 8 CFR 214.2(h)(6)(xiv)(C). In such a case, USCIS will also reject any cases that are received after the applicable numerical limitation has been reached.

Returning Worker Allocation for the First Half of FY 2024 (October 1, 2023 Through March 31, 2024)

For the first half of FY 2024, DHS will make 20,716 visas immediately available upon publication of this TFR that are limited to returning workers, in other words, those workers who were issued H-2B visas or held H-2B status in fiscal years 2021, 2022, or 2023, regardless of country of nationality. These petitions must request a date of need starting on or before March 31, 2024. *See* new 8 CFR 214.2(h)(6)(xiv)(C).

DHS anticipates that employers will use all of the first half allocation for returning workers, given how quickly USCIS reached the FY 2024 first half statutory cap and the first half supplemental allocation for FY 2023. As noted previously, USCIS received enough H-2B petitions to reach the FY 2024 first half statutory cap on October 11, 2023.¹¹⁹ Under the FY 2023 TFR, which published on December 15, 2022, USCIS received enough petitions to reach the 18,216 first half allocation by January 31, 2023.¹²⁰ Similarly, the relatively early publication of this rule will provide interested employers more time to prepare their petitions, increasing the likelihood that the first half allocation for returning workers will be used.¹²¹ To the extent that the first half allocation for returning workers is used, this TFR may provide affected employers with some relief by making available a separate allocation of visas for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica, which will be available for the entirety of FY 2024.

In the event that USCIS approves insufficient petitions to use all 20,716 visas, the unused numbers will not carry over for the second half allocation because DHS believes that the operational burdens of calculating and administering a process to carry over unused visas, combined with the potential confusion for the public and adjudicators that could result from having different filing cutoff dates for the different allocations, would outweigh the benefits. In order to make any unused first half visas available for employers with second half start dates, DHS would need to set a filing cutoff date prior to September 16, 2024 for the first half allocation, upon which it would stop accepting such petitions and make a calculation of how many visas should be re-released for second half employers. Calculating visas to be re-released could also entail an additional cap allocation, additional announcements to the public, and potentially an additional lottery, all of which would significantly increase

operational burdens. In addition to increasing operational burdens, DHS believes that the opening, closing, and potential re-opening of this allocation (and/or other cap allocations) could cause confusion for the public and adjudicators. Furthermore, not setting a filing cutoff date prior to September 16, 2024 will maximize employers' opportunity to avail themselves of the first half allocation. While DHS acknowledges that this approach could potentially result in some employers with a demonstrated business need in the second half of the fiscal year losing the opportunity to receive a supplemental visa, it is DHS's expectation that there will be sufficient demand from employers with first half start dates to use the entire allocation.

Initial Returning Worker Allocation for the Early Second Half (April 1, 2024, Through May 14, 2024)

For the second half of FY 2024, DHS will initially make available 19,000 visas limited to returning workers, in other words, those workers who were issued H-2B visas or held H-2B status in fiscal years 2021, 2022, or 2023, regardless of country of nationality. These petitions must request a date of need starting on or after April 1, 2024, through and including May 14, 2024. Limiting this allocation to employers with employment start dates on or before May 14, 2024 reflects DHS's intentions to give employers with needs later in the season a better opportunity to access the H-2B program, and to prevent employers from petitioning under both of the second-half allocations to fill the same need.

To mitigate complications from concurrent administration of the statutory second half cap, these petitions must be filed no earlier than 15 days after the second half statutory cap is reached, a date that USCIS will identify in a public announcement.¹²² When USCIS announces that it has received a sufficient number of petitions to reach the second half statutory cap, it will also announce the earliest possible filing date (15 days after the second half statutory cap) for this allocation. Concurrent administration of the second half statutory cap with the second half supplemental cap would pose significant operational challenges, particularly considering the volume of H-2B petitions USCIS would have to

¹¹⁷ See the docket for this rulemaking for access to these comments.

¹¹⁸ In prior rules, USCIS used September 15th as the cutoff date for accepting petitions filed under the supplemental cap. However, in FY 2024, September 15th is on a Sunday when USCIS does not accept petitions. DHS has revised this date accordingly to avoid potential confusion and frustration from petitioners who might have otherwise expected their petitions to be received on the 15th but would instead face rejection.

¹¹⁹ *See* USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2024*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2024> (Oct. 13, 2023).

¹²⁰ USCIS, *Cap Reached for Additional Returning Worker H-2B Visas for the First Half of FY 2023*, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-first-half-of-fy-2023> (Jan. 31, 2023).

¹²¹ Compare the publication date of this rule with December 15, 2022, the date the FY 2023 TFR was first published, and January 28, 2022, the date the temporary final rule making available additional H-2B visas for the first half of FY 2022 was first published.

¹²² Pursuant to new 8 CFR 214.2(h)(6)(xiv)(C)(2), USCIS will reject petitions filed pursuant to paragraph (h)(6)(xiv)(A)(i)(ii) of this section requesting employment start dates from April 1, 2024 to May 14, 2024 that are received earlier than 15 days after the INA section 214(g) cap for the second half FY 2024 has been met.

process at the same time. A cushion of 15 days after the second half statutory cap is reached should provide USCIS with sufficient time to process H-2B petitions filed under the second half statutory cap and prepare to process petitions under this supplemental cap, and should also provide petitioners not selected under the statutory cap with enough time to refile under this supplemental cap. Furthermore, making this allocation available *after* the second half statutory cap has been reached builds in flexibility to account for variations in the timing of that cap being reached. DHS cannot predict with certainty when the FY 2024 second half statutory cap will be reached (or if it will be reached), and therefore, did not specify a date for when to first allow petitioners to file for FY 2024 second half supplemental visas. In the event that the statutory second half FY 2024 cap is not reached, the supplemental allocation for returning workers for the second half of FY 2024 will not become available.

Based on historical data showing increasingly high demand for H-2B workers with April 1 start dates, DHS expects all 19,000 visas to be used quickly once the supplemental allocation becomes available. However, in the event that USCIS approves insufficient petitions to use all 19,000 visas, the unused numbers will not carry over for petition approvals for employment start dates beginning on or after May 15, 2024. DHS chose to limit these 19,000 visas to start dates on or before May 14, 2024, without the ability for these visas to be carried over into the next allocation. As previously stated, DHS believes that the operational burdens of calculating and administering a process to carry over unused visas, combined with the potential confusion for the public and adjudicators that could result from having different filing cutoff dates for the different allocations, would outweigh the benefits. In order to make any unused visas from this allocation available for late second half of FY 2024 petitions, DHS would need to set a filing cutoff date that would be after the cutoff for the first half allocation but prior to any cutoff for late second half of FY 2024 petitions and prior to September 16, 2024, upon which it would stop accepting petitions and make a calculation of how many visas should be re-released for late second half employers. Calculating visas to be re-released could also entail an additional cap allocation, additional announcements to the public, and potentially an additional lottery, all of

which would significantly increase operational burdens. In addition to increasing operational burdens, DHS believes that the opening, closing, and potential re-opening of this allocation (and/or other cap allocations) could cause confusion for the public and adjudicators. Furthermore, not setting a filing cutoff date prior to September 16, 2024, will maximize employers' opportunity to avail themselves of the early second half allocation. While DHS acknowledges that this approach could result in employers in the late second half losing the opportunity to receive a supplemental visa, it is DHS's expectation that there will be sufficient demand from employers to use this entire allocation.

Additional Returning Worker Allocation for the Late Second Half (on or After May 15, 2024, Through September 30, 2024)

For the late second half of FY 2024, DHS will make available an additional allocation of 5,000 visas limited to returning workers, in other words, those workers who were issued H-2B visas or held H-2B status in fiscal years 2021, 2022, or 2023, regardless of country of nationality. To assist employers needing workers to begin work during the late spring and summer seasons in the fiscal year (also referred to as "late season employers"), these petitions must request a date of need starting on or after May 15, 2024. These petitions must be filed no sooner than 45 days after the second half statutory cap is reached, a date that USCIS will identify in a public announcement.¹²³ When USCIS announces that it has received a sufficient number of petitions to reach the second half statutory cap, it will also announce the earliest possible filing date (45 days after the second half statutory cap) for this allocation. The cushion of 45 days after the second half statutory cap is reached is intended to provide USCIS with sufficient time to process H-2B petitions filed under the second half statutory cap that remain pending, as well as to process the expected influx of petitions under the early second half supplemental cap that will begin 15 days after the second half statutory cap is reached.¹²⁴ By allowing

¹²³ Pursuant to new 8 CFR 214.2(h)(6)(xiv)(C)(3), USCIS will reject petitions filed pursuant to paragraph (h)(6)(xiv)(A)(1)(iii) of this section requesting employment start dates from May 15, 2024 to September 30, 2024, that are received earlier than 45 days after the INA section 214(g) cap for the second half FY 2024 has been met.

¹²⁴ While petitioners may continue to submit petitions under the early second half supplemental cap through September 16, DHS expects the heaviest filing to occur soon after the visas become available. This expectation is based on historical

USCIS to manage its workload in this way, the 45-day period will help USCIS prepare to process petitions under the late second half supplemental cap and mitigate the complications from concurrent administration of these various caps.

This is the second supplemental cap reserved for late season employers that need workers to begin work during the late spring and summer seasons in the fiscal year.¹²⁵ By regulation, employers may only apply for a TLC 75 to 90 days before the start date of need,¹²⁶ and, as such, employers needing workers to begin work on or after May 15 are not eligible to file TLC applications until on or after February 15. As noted in the FY 2023 TFR, in past years, because of this requirement and the strong demand for & workers in recent years to begin work on the earliest employment start date (*i.e.*, April 1), late season employers were unable to receive cap-subject H-2B workers because they did not have an opportunity to file visa petitions for cap-subject H-2B workers before the second semiannual statutory cap was reached. Since, based on recent years' data,¹²⁷ USCIS has typically received sufficient H-2B petitions to meet the statutory cap for the second half of the fiscal year around mid-February, many of these late season employers may have decided to not file a TLC application.

DHS, in consultation with DOL, has again determined that it is appropriate to make a separate allocation available for late season employers whose late season labor needs may have put them at a disadvantage in accessing H-2B workers in recent years. While there was significant demand for the late second half allocation in FY 2023, the full allocation of 10,000 visas was not reached. As of October 6, 2023, DOS has issued 5,071 visas towards the late second half allocation, while USCIS approved 7,157 beneficiaries towards the late second half allocation.¹²⁸

filing patterns, as well as an assumption that employers will try act quickly to secure workers consistent with their dates of need.

¹²⁵ See *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 87 FR 76816 (Dec. 15, 2022).

¹²⁶ See 20 CFR 655.15(b).

¹²⁷ As noted above, in fiscal years 2017 through 2023, USCIS received a sufficient number of H-2B petitions to reach or exceed the relevant second half statutory cap on March 13, 2017, February 27, 2018, February 19, 2019, February 18, 2020, February 12, 2021, February 25, 2022, and February 27, 2023 respectively.

¹²⁸ Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2023, TRK 13122, H-2B Visa Issuance Report September 30, 2023.

Therefore, in order to meet the employer demand in the late second half of FY 2024, while still maximizing the overall usage of supplemental visas, DHS has determined it is appropriate to limit the late second half allocation for FY 2024 to up to 5,000 visas. DHS, in consultation with DOL, has determined that authorizing two allocations for the second half of FY 2024 based on an employer's start date of need, in addition to requiring that the employer's start date of need on the Form I-129 match the start date of need on the approved TLC,¹²⁹ will provide employers with late season needs a better opportunity to receive H-2B workers to avoid irreparable harm. Specifically, employers with early season needs that need work to begin on or after April 1 will have the opportunity to file H-2B petitions under both the statutory cap and the first allocation of the supplemental cap, while employers with late season needs do not have that opportunity.

To mitigate complications from concurrent administration of the additional returning worker allocation for the second half of the fiscal year for late season employers and either the statutory second half cap or the initial supplemental allocation for returning workers for the second half of the fiscal year (or both), these petitions must be filed no earlier than 45 days after the second half statutory cap is reached. When USCIS announces that it has received a sufficient number of petitions to reach the second half statutory, it will also announce the earliest possible filing date (45 days after the second half statutory cap) for this allocation. In the event that the statutory second half FY 2024 cap is not reached, this supplemental allocation for late season filers workers will not become available. Furthermore, in the event that USCIS does not approve sufficient petitions to use all 5,000 visas for late season employers, DHS will not carry over the unused numbers for petition approvals for any other allocation. For example, any unused numbers would not carry over to petitions under the country-specific allocation. As noted above, DHS believes the operational burdens of calculating and administering a process to carry over unused visas would outweigh the benefits because of the potential confusion for the public and adjudicators that could result from having different filing cutoff dates for the different allocations. A process to

carry over unused visas could also entail an additional cap allocation, additional announcements to the public, and potentially an additional lottery, all of which significantly increase operational burdens and may add further confusion to the public and adjudicators.

Allocation for Nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica

DHS will make available 20,000 additional visas that are reserved for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica, as attested by the petitioner (regardless of whether such nationals are returning workers). These 20,000 visas will be available for petitioners requesting an employment start date before the end of FY 2024, up to and including September 30, 2024.

While prior fiscal years' allocations for nationals of the Northern Central American countries and Haiti have not been reached, DHS anticipates a higher likelihood that the 20,000 visas allocated for certain nationals by this rule will be reached by the end of this fiscal year. As discussed above, DHS observed robust employer interest in response to the FY 2021 H-2B supplemental visa allocation for Salvadoran, Guatemalan, and Honduran nationals and the FY 2022 and FY 2023 supplemental visa allocations for Salvadoran, Guatemalan, Honduran, and Haitian nationals, and the data show a trend of increased participation by Haitian, Salvadoran, Guatemalan, and Honduran workers in the H-2B program.¹³⁰ Furthermore, the inclusion of nationals from the additional countries of Colombia, Ecuador, and Costa Rica also increases the likelihood that the 20,000 visas will be used.

Employers requesting workers under the country-specific allocation with an employment start date in the first half of FY 2024 may file their petitions immediately after the publication of this TFR. Employers requesting workers under the country-specific allocation with an employment start date in the second half of FY 2024 must file their petitions no earlier than 15 days after the second half statutory cap is reached. The requirement to file the petition no earlier than 15 days after the second half

statutory cap is reached is consistent with the approach taken for the initial returning worker allocation for the early second half of the fiscal year, and is in line with the Departments' interpretation of their authority to make available supplemental (or in other words, additional) visas as contingent upon the exhaustion of visas under the statutory cap.¹³¹

As in FY 2023, the Departments have decided not to further divide the 20,000 visas for workers from specific countries into separate allocations for the first and second half of the fiscal year. The Departments intend for this additional flexibility of allowing any employment start date within FY 2024 to encourage U.S. employers that are suffering irreparable harm or will suffer impending irreparable harm to seek out workers from such countries, and, at the same time, increase interest among nationals of the Northern Central American countries, Haiti, Colombia, Ecuador, and Costa Rica seeking a legal pathway for temporary employment in the United States. While this approach could potentially result in employers with start dates in the first half of FY 2024 using all 20,000 visas for nationals of the specified countries, and consequently, employers with start dates in the second half of FY 2024 losing the opportunity to utilize this particular allocation, DHS believes that the benefits of increasing the flexibility of this allocation outweighs the potential risk. Moreover, employers with start dates in the second half of FY 2024 seeking to employ nationals under the country-specific allocation may request a visa under one of the two second half supplemental allocations which are available for returning workers regardless of country of nationality.

In the event that USCIS does not approve sufficient petitions to use all 20,000 visas under the country-specific allocation by the end of FY 2024, DHS will not carry over the unused numbers for petition approvals for any other allocation. For example, any unused numbers would not carry over to petitions for returning workers with employment start dates in the second half of FY 2024. As noted above, DHS believes the operational burdens of calculating and administering a process to carry over unused visas would outweigh the benefits because of the potential confusion for the public and

¹²⁹ See 8 CFR 214.2(h)(6)(iv)(D) ("an H-2B petition must state an employment start date that is the same as the date of need stated on the approved temporary labor certification").

¹³⁰ As previously noted, USCIS approved petitions on behalf of 6,805 beneficiaries under the FY 2021 allocation, 3,231 beneficiaries under the FY 2022 first half supplemental allocation, 12,318 beneficiaries for the second half of the fiscal year FY 2022, and 23,832 beneficiaries under the FY 2023 allocation. See DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, H-2B Visa Issuance Report September 30, 2023.

¹³¹ Pursuant to new 8 CFR 214.2(h)(6)(xiv)(C)(4), USCIS will reject petitions filed pursuant to paragraph (h)(6)(xiv)(A)(2) of this section that have a date of need on or after April 1, 2024 and are received earlier than 15 days after the INA section 214(g) cap for the second half of FY 2024 is met.

adjudicators that could result from having different filing cutoff dates for the different allocations. A process to carry over unused visas could also entail an additional cap allocation, additional announcements to the public, and potentially an additional lottery, all of which significantly increase operational burdens and may add further confusion to the public and adjudicators. Further, this single filing cutoff approach provides employers with incentive and more time to petition for, and bring in, workers from El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica to meet employer needs, consistent with the administration's efforts and outreach to promote and improve safety, security, and economic stability in these countries.

Process if Cap Allocations Are Reached

Finally, recognizing the high demand for H-2B visas, it is plausible that the additional H-2B supplemental allocations provided in this rule will be reached prior to September 16, 2024. Specifically, the following scenarios may still occur:

- The 20,716 supplemental cap visas limited to returning workers that will be immediately available for employers with dates of need on or after October 1, 2023, through March 31, 2024, will be reached before September 16, 2024;
- The 19,000 supplemental cap visas limited to returning workers that will be available for employers with dates of need starting on or after April 1, 2024, through May 14, 2024, will be reached before September 16, 2024;
- The 5,000 supplemental cap visas limited to returning workers that will be available for late season employers with dates of need on or after May 15, 2024, through September 30, 2024, will be reached before September 16, 2024; or
- The 20,000 supplemental cap visas limited to nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica will be reached before September 16, 2024.

Under this rule, new 8 CFR 214.2(h)(6)(xiv)(D) reaffirms the existing processes that are in place when H-2B numerical limitations under INA section 214(g)(1)(B) or (g)(10), 8 U.S.C. 1184(g)(1)(B) or (g)(10), are reached,¹³² as applicable to each of the scenarios described above that involve numerical limitations of the supplemental cap. Specifically, for each of the scenarios mentioned above, DHS will monitor petitions received, and make projections of the number of petitions necessary to achieve the projected numerical limit of

approvals. USCIS will also notify the public of the dates that USCIS has received the necessary number of petitions (the "final receipt dates") for each of these scenarios. The day the public is notified will not control the final receipt dates. Moreover, USCIS may randomly select, via computer-generated selection, from among the petitions received on the final receipt date the remaining number of petitions deemed necessary to generate the numerical limit of approvals for each of the scenarios involving numerical limitations to the supplemental cap. USCIS may, but will not necessarily, conduct a lottery if: the 20,716 supplemental cap visas limited to returning workers that will be immediately available for employers with dates of need on or after October 1, 2023, through March 31, 2024, is reached before September 16, 2024; the 19,000 supplemental cap visas limited to returning workers that will be available for employers with dates of need on or after April 1, 2024, through May 14, 2024, is reached before September 16, 2024; the 5,000 supplemental cap visas limited to returning workers that will be available for late season employers with dates of need on or after May 15, 2024, through September 30, 2024, is reached before September 16, 2024; or the 20,000 visas limited to certain nationals is reached before September 16, 2024. Similar to the processes applicable to the H-2B semiannual statutory cap, if the final receipt date is any of the first 5 business days on which petitions subject to the applicable numerical limit may be received (in other words, if the numerical limit is reached on any one of the first 5 business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those 5 business days.

C. Returning Workers

As noted above, to address the increased and, in some cases, impending need for H-2B workers in this fiscal year, the Secretary of Homeland Security, in consultation with the Secretary of Labor, has determined that employers may petition for supplemental visas on behalf of up to 44,716 workers who were issued an H-2B visa or were otherwise granted H-2B status in FY 2021, 2022, or 2023. This temporal limitation mirrors the prior fiscal year's temporal limitation in the returning worker definition¹³³ and

the temporal limitation Congress imposed in previous returning worker statutes.¹³⁴ Such workers (in other words, those who recently participated in the H-2B program and who now seek a new H-2B visa from DOS) may obtain their new visas through DOS and begin work more expeditiously because they have previously obtained H-2B visas and therefore have been vetted by DOS and would have departed the United States as generally required by the terms of their nonimmigrant admission.¹³⁵ DOS has informed DHS that, in general, H-2B visa applicants who are able to demonstrate clearly that they have previously abided by the terms of their status granted by DHS have a higher visa issuance rate when applying to renew their H-2B visas, as compared with the overall visa applicant pool from a given country. Furthermore, consular officers are authorized to waive the in-person interview requirement for certain nonimmigrant visa applicants, including certain H-2B applicants renewing visas in the same classification within 48 months of the prior visa's expiration, who otherwise meet the strict limitations set out under INA section 222(h), 8 U.S.C. 1202(h).¹³⁶ Limiting the supplemental cap to returning workers is beneficial because these workers have generally followed immigration law in good faith and demonstrated their willingness to return home when they have completed their temporary labor or services or their

Program and Portability Flexibility for H-2B Workers Seeking To Change Employers, 87 FR 76816 (Dec. 15, 2022) (defining "returning workers" as those who were issued H-2B visas or held H-2B status in fiscal years 2020, 2021, or 2022).

¹³⁴ See INA section 214(g)(9)(A), 8 U.S.C. 1184(g)(9)(A); Consolidated Appropriations Act, 2016, Public Law 114-113, div. F, tit. V, sec. 565; John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364, div. A, tit. X, sec. 1074, (2006); Save Our Small and Seasonal Businesses Act of 2005, Public Law. 109-13, div. B, tit. IV, sec. 402.

¹³⁵ The previous review of an applicant's qualifications and current evidence of lawful travel to the United States will generally lead to a shorter processing time of a renewal application.

¹³⁶ The interview waiver authority for certain H-2B applicants renewing visas in the same classification within 48 months of the prior visa's expiration has no sunset date. Currently, certain first-time H-2B visa applicants or certain H-2B visa applicants previously issued any type of visa within the last 48 months may be eligible for an interview waiver; however, the authority for these interview waivers is set to expire on December 31, 2023. See DOS, *Important Announcement on Waivers of the Interview Requirement for Certain Nonimmigrant Visas*, <https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-waivers-of-the-interview-requirement-for-certain-nonimmigrant-visas.html> (last updated Dec. 23, 2022); DOS, *Extension of Interview Waivers for Certain Nonimmigrant Visa Applicants*, <https://www.state.gov/extension-of-interview-waivers-for-certain-nonimmigrant-visa-applicants/> (last updated Dec. 23, 2022).

¹³³ See e.g., *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporal Nonagricultural Worker*

¹³² See 8 CFR 214.2(h)(8)(vii).

period of authorized stay, which is a condition of H–2B status. The returning worker condition therefore provides a basis to believe that H–2B workers under this cap increase will again abide by the terms and conditions of their visa or nonimmigrant status.

The returning worker condition also benefits employers that seek to re-hire known and trusted workers who have a proven positive employment track record while previously employed as workers in this country. While the Departments recognize that the returning worker requirement may limit to an extent the flexibility of employers that might wish to hire non-returning workers, the requirement provides an important safeguard against H–2B abuse, which DHS considers to be a significant consideration.

To ensure compliance with the requirement that additional visas only be made available to returning workers, DHS will require petitioners seeking H–2B workers under the supplemental cap to attest that each employee requested or instructed to apply for a visa under the FY 2024 supplemental cap was issued an H–2B visa or otherwise granted H–2B status in FY 2021, 2022, or 2023, unless the H–2B worker is a national of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, or Costa Rica and is counted towards the 20,000 cap. This attestation will serve as prima facie initial evidence to DHS that each worker, unless a national of one of these countries who is counted against the 20,000 country-specific cap, meets the returning worker requirement. DHS and DOS retain the right to review and verify that each beneficiary is in fact a returning worker any time before and after approval of the petition or visa. DHS has authority to review and verify this attestation during the course of an audit or investigation, as otherwise discussed in this rule.

With respect to satisfying the returning worker requirement, employers must maintain evidence that the employer requested and/or instructed that each of the workers petitioned by the employer in connection with this temporary rule were issued H–2B visas or otherwise granted H–2B status in FY 2021, 2022, or 2023, unless the H–2B worker is a national of one of the specific countries counted towards the 20,000 cap. Such evidence would include, but is not limited to, a date-stamped written communication from the employer to its agent(s) and/or recruiter(s) that instructs the agent(s) and/or recruiter(s) to only recruit and provide instruction regarding an application for an H–2B visa to those foreign workers who were

previously issued an H–2B visa or granted H–2B status in FY 2021, 2022, or 2023.

D. 20,000 Allocation for Nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica

As described above, the Secretary of Homeland Security has determined that up to 20,000 additional H–2B visas will be limited to workers who are nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica. These 20,000 visas will be exempt from the returning worker requirement. Because the returning worker allocations have no restrictions related to a worker's country of nationality, if the 20,000 visa limit has been reached and the 44,716 returning worker cap has not, petitioners may continue to request workers who are nationals of one of these countries, but the workers must be specifically requested as returning workers who were issued H–2B visas or were otherwise granted H–2B status in FY 2021, 2022, or 2023.

While DHS reiterates the benefits of allocating visas under the supplemental cap to returning workers, the Secretary of Homeland Security has determined that the 20,000 country-specific allocation which is exempted from the returning worker requirement is beneficial for following reasons. First, this country-specific allocation furthers the U.S. foreign policy objective of managing irregular migration with partner countries through expanding access to lawful pathways to nationals of these countries seeking economic opportunity in the United States. Several of these countries have extensively collaborated with the United States on migration issues such as through endorsing the L.A. Declaration, joining the United States to ramp up efforts to address the irregular migration flows through the Darien and hosting Safe Mobility Offices (SMOs) to facilitate access to lawful pathways to the United States and other countries, including expedited refugee processing and other humanitarian pathways. After a series of negotiations, on June 1, 2023, the United States and Guatemala issued a joint statement to commit to take a series of critical steps to humanely reduce irregular migration and expand lawful pathways under the L.A. Declaration.¹³⁷ As the first step of a comprehensive program to manage irregular migration, both countries have

been implementing a six-month pilot phase of SMOs since June 12, 2023.¹³⁸ On June 4, 2023, the United States and Colombia announced the impending establishment of SMOs that would identify, register, and categorize the reasons for irregular migration and channel those who qualify through lawful pathways from Colombia to the United States.¹³⁹ The Safe Mobility initiative launched in Colombia on June 28, 2023, with SMOs currently operational in three cities. Furthermore, on June 12, 2023, the United States and the Government of Costa Rica, in furtherance of bilateral partnership and addressing hemispheric challenge of irregular migration, launched an exploratory six-month implementation of SMOs.¹⁴⁰ On October 19, 2023, the United States and Ecuador announced their partnership in establishing SMOs in Ecuador.¹⁴¹ This allocation for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica will promote safe, orderly and lawful migration to the United States, as well as help provide U.S. employers with additional labor from these countries with whom the United States Government has engaged in outreach efforts to promote the H–2B program.¹⁴²

Second, in addition to the allocation for returning workers, the country-specific allocation will also address the needs of certain H–2B employers that

¹³⁸ *Id.*

¹³⁹ See United States Department of State, U.S.-Colombia Joint Commitment to Address the Hemispheric Challenge of Irregular Migration (June 4, 2023), <https://www.state.gov/u-s-colombia-joint-commitment-to-address-the-hemispheric-challenge-of-irregular-migration/>. See The White House, Readout of Principal Deputy National Security Advisor Jon Finer's Meeting with Colombian Foreign Minister Alvaro Leyva (June 11, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/11/readout-of-principal-deputy-national-security-advisor-jon-finers-meeting-with-colombian-foreign-minister-alvaro-leyva/>.

¹⁴⁰ See United States Department of State, U.S.-Costa Rica Joint Commitment to Address the Hemispheric Challenge of Irregular Migration (June 12, 2023), <https://www.state.gov/u-s-costa-rica-joint-commitment-to-address-the-hemispheric-challenge-of-irregular-migration/>.

¹⁴¹ See United States Department of State, Announcement of Safe Mobility Office in Ecuador (Oct. 19, 2023), <https://www.state.gov/announcement-of-safe-mobility-office-in-ecuador/>.

¹⁴² See, e.g., USAID, Administrator Samantha Power at the Summit of the Americas Fair Recruitment and H-2 Visa Side Event, <https://www.usaid.gov/news-information/speeches/jun-9-2022-administrator-samantha-power-summit-americas-fair-recruitment-and-h-2-visa> (Jun. 9, 2022) (“Our combined efforts [with the labor ministries in Honduras and Guatemala, and the Foreign Ministry in El Salvador] . . . resulted in a record number of H–2 visas issued in 2021, including a nearly forty percent increase over the pre-pandemic levels in H–2B visas issued across all three countries.”).

¹³⁷ See The White House, Joint Statement from the United States and Guatemala on Migration (June 1, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/01/joint-statement-from-the-united-states-and-guatemala-on-migration/>.

are suffering irreparable harm or will suffer impending irreparable harm.

Third, the 20,000 set-aside will deliver on the objectives of E.O. 14010, which, among other initiatives, instructs the Secretary of Homeland Security and the Secretary of State to implement measures to enhance access for nationals of the Northern Central American countries to visa programs, as appropriate and consistent with applicable law. E.O. 14010 also directs relevant government agencies to create a comprehensive regional framework to address the causes of migration, and to manage migration throughout North and Central America.¹⁴³

Fourth, DHS is allocating these visas to specific countries to further promote development and economic stability of these countries to reduce irregular migration throughout the Western Hemisphere.¹⁴⁴

As in prior years, DOS will work with the relevant countries to facilitate consular interviews, if required,¹⁴⁵ and channels for reporting incidents of fraud

and abuse within the H-2 programs. Further, each country's own consular networks will maintain contact with the workers while in the United States and ensure the workers know their rights and responsibilities under the U.S. immigration laws, which are all valuable protections to the immigration system, U.S. employers, U.S. workers, and workers entering the country on H-2 visas. DHS has determined that reserving 20,000 supplemental H-2B visas towards the country-specific allocation and inclusion of additional countries this fiscal year is reasonable given the progressively increasing use of H-2B visas in recent years among the Northern Central American and Haitian populations, as noted above. DHS believes these aspects will encourage U.S. employers that are suffering irreparable harm or will suffer impending irreparable harm to seek out workers from such countries, while, at the same time, increase interest among such nationals seeking a legal pathway for temporary employment in the United States. DHS also believes its outreach efforts with the governments of these countries, along with efforts in some of these countries by USAID to increase access to the H-2B program, support the decision to provide this allocation of 20,000 visas. USAID has worked to build government capacity in Northern Central America to facilitate access to temporary worker visas under the H-2 program. Collaborating closely with the governments of El Salvador, Guatemala, and Honduras, USAID has strengthened the capacity of relevant government ministries to transparently and efficiently match qualified workers to temporary labor opportunities in the United States. In Fiscal Years 2021, 2022, and 2023 USAID increased funding to expand capacity building activities in El Salvador, Guatemala, and Honduras in response to the increased demand generated by the supplemental allocations of H-2B visas for Northern Central American nationals included in the FY 2021, FY 2022, and FY 2023 TFRs. The acceleration of USAID's activities likely helped increase uptake of H-2B visas issuance under the FY 2021, FY 2022, and FY 2023 TFRs, as H-2B visa issuances to Salvadorans, Guatemalans and Hondurans increased significantly over prior years,¹⁴⁶ and

USAID's assistance helped reduce the average period of time to match qualified workers from these three countries to requests from U.S. employers—from 42 days to 14 days in El Salvador, 55 days to 20 days in Guatemala, and 24 days to 8 days in Honduras.¹⁴⁷ USAID's programs also strengthen worker protections by helping crowd out unethical recruiters and providing labor rights education and resources to seasonal workers.

DOS issued a combined total of approximately 26,630 H-2B visas to nationals of the Northern Central American countries and Haiti from FY 2015 through FY 2020, an average of approximately 4,400 per year.¹⁴⁸ In FY 2021, the first year in which supplemental H-2B visas were reserved for nationals of Northern Central American countries, DOS issued a combined total of 6,277 H-2B visas to nationals of those countries.¹⁴⁹ In FY 2022, DOS issued a combined total of 15,058 H-2B visas to nationals of Haiti and the Northern Central American countries.¹⁵⁰ In FY 2023, DOS issued a combined total of 23,816 H-2B visas to nationals of Haiti and the Northern Central American countries.¹⁵¹ This increase is likely due in part to the additional H-2B visas made available to nationals of these countries by the FY 2021, FY 2022, and FY 2023 H-2B supplemental visa temporary final rules. In addition, based in part on the vital U.S. interest of promoting sustainable development and the stability of Haiti, in November 2021, DHS added Haiti to the list of countries whose nationals are eligible to participate in the H-2A and

Issuances for FY 2023 H-2Bs By Requested Nationality Code.

¹⁴⁷ See USAID, *Additional H-2B Visa Allocations for Northern Central America and Haiti to Address Irregular Migration*, <https://www.usaid.gov/news-information/press-releases/oct-12-2022-additional-H-2B-visa-allocations-northern-central-america-and-haiti#:~:text=Collaborating%20closely%20with,eight%20in%20Honduras> (Oct. 12, 2022).

¹⁴⁸ The "combined total" includes all H-2B visas and are not limited to visas issued under supplemental caps. See DOS, *Nonimmigrant Visa Issuance Statistics, Nonimmigrant Visa Issuances by Visa Class and by Nationality*, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html>.

¹⁴⁹ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, C3 Consolidated, DOS Issuance Data, queried 10/2022, TRK #10698.

¹⁵⁰ See Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, C3 Consolidated, DOS Issuance Data, queried 10/2022, TRK #10698.

¹⁵¹ DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, Issuances for FY 2023 H-2Bs By Requested Nationality Code.

¹⁴³ See also *National Security Council, Collaborative Migration Management Strategy*, <https://www.whitehouse.gov/wp-content/uploads/2021/07/Collaborative-Migration-Management-Strategy.pdf> (July 2021) (stating that "The United States has strong national security, economic, and humanitarian interests in reducing irregular migration and promoting safe, orderly, and humane migration" within North and Central America).

¹⁴⁴ See, e.g., https://twitter.com/DHSGov/status/1580310211931144194?ref_src=twsrc%5Setfw (this supplemental allocation to workers from Haiti, Honduras, Guatemala, and El Salvador "advances the Biden Administration's pledge, under the L.A. Declaration to expand legal pathways as an alternative to irregular migration"); The White House, *Fact Sheet: The Los Angeles Declaration on Migration and Protection U.S. Government and Foreign Partner Deliverables*, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/fact-sheet-the-los-angeles-declaration-on-migration-and-protection-u-s-government-and-foreign-partner-deliverables/> (addressing several measures, including the H-2B allocation for nationals of Haiti, as part of "the President's commitment to support the people of Haiti").

¹⁴⁵ As noted previously, some consular sections may waive the in-person interview requirement for H-2B applicants whose prior visa expired within a specific timeframe and who otherwise meet the strict limitations set out under INA section 222(h), 8 U.S.C. 1202(h). The authority allowing for waiver of interview of certain H-2 (temporary agricultural and non-agricultural workers) applicants is extended through the end of 2023. Certain applicants renewing a visa in the same classification within 48 months of the prior visa's expiration are also eligible for interview waiver. DOS, *Important Announcement on Waivers of the Interview Requirement for Certain Nonimmigrant Visas*, <https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-waivers-of-the-interview-requirement-for-certain-nonimmigrant-visas.html> (last updated Dec. 23, 2022); DOS, *Extension of Interview Waivers for Certain Nonimmigrant Visa Applicants*, <https://www.state.gov/extension-of-interview-waivers-for-certain-nonimmigrant-visa-applicants/> (last updated Dec. 23, 2022).

¹⁴⁶ See DOS, *Nonimmigrant Visa Issuance Statistics, Nonimmigrant Visa Issuances by Visa Class and by Nationality*, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html> (last visited Sept. 26, 2023); U.S. Dep't of Homeland Security, U.S. Citizenship and Immigr. Servs., Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122,

H-2B programs.¹⁵² Therefore, as previously stated, DHS has determined that the additional increase in FY 2024 will not only provide U.S. businesses that have been unable to find qualified and available U.S. workers with potential workers, but also promote further expansion of lawful immigration and lawful employment authorization for nationals of the specified countries.

The exemption from the returning worker requirement recognizes the small, albeit increasing, number of individuals from the three Northern Central American countries and Haiti, and the small number of individuals from Colombia, Ecuador, and Costa Rica,¹⁵³ who were previously granted H-2B visas in recent years. Absent this exemption, there may be an insufficient number of qualifying workers from these countries to use the allocated visas. Exempting this population from the returning worker requirement will increase the ability of workers from these countries to pursue lawful temporary work in the U.S., encourage employers to seek out individuals from these countries, and maximize the chance of meeting the goal of reaching the full allocation.

USCIS will stop accepting petitions received under the country-specific allocation after September 16, 2024. This end date should provide H-2B employers ample time, should they choose, to petition for, and bring in, workers under the country-specific allocation. This, in turn, provides an opportunity for employers to contribute to our country's efforts to promote and improve safety, security and economic stability in these countries to help stem the flow of irregular migration to the United States. Nothing in this rule will limit the authority of DHS or DOS to deny, revoke, or take any other lawful action with respect to an H-2B petition or visa application at any time before or after approval of the H-2B petition or visa application.

¹⁵² See *Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs*, 86 FR 62559, 62562, <https://www.govinfo.gov/content/pkg/FR-2021-11-10/pdf/2021-24534.pdf> (Nov. 10, 2021).

¹⁵³ During fiscal years 2021 and 2022, the Department of State issued 74 and 247 H-2B visas respectively to Colombian nationals, 35 and 115 H-2B visas respectively to Ecuadorian nationals, and 204 and 283 H-2B visas respectively to Costa Rican nationals. See *Characteristics of H-2B Nonagricultural Temporary Workers Fiscal Year 2021 Report to Congress*, <https://www.uscis.gov/sites/default/files/document/reports/H-2B-FY21-Characteristics-Report.pdf> (Mar. 10, 2022); *Characteristics of H-2B Nonagricultural Temporary Workers Fiscal Year 2022 Report to Congress*, https://www.uscis.gov/sites/default/files/document/data/USCIS_H2B_FY22_Characteristics_Report.pdf (Feb. 14, 2023).

E. Business Need Standard—Irreparable Harm and FY 2024 Attestation

To file any H-2B petition under this rule, petitioners must meet all existing H-2B eligibility requirements, including having an approved, valid, and unexpired TLC. See 8 CFR 214.2(h)(6) and 20 CFR part 655, subpart A. The TLC process focuses on establishing whether a petitioner has a temporary need for workers and whether there are U.S. workers who are able, willing, qualified, and available to perform the temporary service or labor, and does not address the harm a petitioner is facing or will face in the absence of such workers; the attestation addresses this question. In addition, under this rule, the petitioner must submit an attestation to USCIS in which the petitioner affirms, under penalty of perjury, that it meets the business need standard—that they are suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H-2B workers requested on their petition.¹⁵⁴ In addition to asserting that it meets the business need standard, the employer must attest that, by the time of submission of the petition to USCIS, they have prepared and retained a detailed written statement describing how the evidence gathered in support of their petition demonstrates that irreparable harm is occurring or impending. The employer must also attest that, upon request, it will provide to DHS and/or DOL all documentary evidence that supports its claim of irreparable harm, along with the detailed written statement it prepared by the time of submitting the petition to USCIS, describing how such evidence demonstrates irreparable harm. The petitioner must submit the attestation directly to USCIS, together with Form I-129, the approved and valid TLC,¹⁵⁵ and any other necessary documentation. As in the rules implementing prior years' temporary cap increases, employers will be required to complete the new attestation form which can be found at:

¹⁵⁴ An employer may request fewer workers on the H-2B petition than the number of workers listed on the TLC. See Instructions for Petition for Nonimmigrant Worker, providing that “the total number of workers you request on the petition must not exceed the number of workers approved by the Department of Labor or Guam Department of Labor, if required, on the temporary labor certification.”

¹⁵⁵ Since July 26, 2019, USCIS has been accepting a printed copy of the electronic one-page ETA-9142B, Final Determination: H-2B Temporary Labor Certification Approval, as an original, approved TLC. See *Notice of DHS's Requirement of the Temporary Labor Certification Final Determination Under the H-2B Temporary Worker Program*, 85 FR 13178, 13179 (Mar. 6, 2020).

<https://www.foreignlaborcert.doleta.gov/form.cfm>.¹⁵⁶

The irreparable harm standard is the same as in the temporary final rule for the second half of FY 2022 and the temporary final rule for FY 2023. The irreparable harm standard requires employers to attest that they are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H-2B workers requested on the petition filed under this rule.

As noted above, Congress authorized the Secretary of Homeland Security, in consultation with the Secretary of Labor, to increase the total number of H-2B visas available “upon the determination that the needs of American businesses cannot be satisfied” with U.S. workers.¹⁵⁷ The irreparable harm standard in this rule aligns with this determination that Congress requires DHS to make before increasing the number of H-2B visas available to U.S. employers. In particular, requiring employers to attest that they are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the requested H-2B workers is directly relevant to the needs of the business—if an employer is suffering or will suffer irreparable harm, then their needs are not being satisfied. Because the authority to increase the statutory cap is tied to the needs of businesses, the Departments think it is reasonable for employers to attest that they are suffering irreparable harm or that they will suffer impending irreparable harm without the ability to employ all of the H-2B workers requested on their petition. If such employers are unable to attest to such harm and retain and produce (upon request) documentation of that harm, it calls into question whether the need set forth in this rule cannot in fact be satisfied without the ability to employ H-2B workers.

As in the FY 2023 rule, this rule also requires an employer to attest that it has prepared a detailed written statement describing (i) how the employer's business is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all H-2B workers requested on the I-129 petition, and (ii) how each type of evidence

¹⁵⁶ The attestation requirement does not apply to workers who have already been counted under the H-2B statutory caps for fiscal year 2024. Further, the attestation requirement does not apply to noncitizens who are exempt from the fiscal year 2024 H-2B statutory cap, including those who are extending their stay in H-2B status. Accordingly, petitioners that are filing on behalf of such workers are not subject to the attestation requirement.

¹⁵⁷ See section 303 of Public Law 117–328, as extended by Public Law 118–15.

relied upon by the employer demonstrates the applicable irreparable harm. The employer will not submit this detailed written statement to DHS with its petition for supplemental visas, but will attest on the attestation form to having prepared a detailed written statement. The detailed written statement must be provided to DHS and/or DOL upon request in the event of an audit or during the course of an investigation. This requirement was first introduced in the FY 2023 TFR to provide additional clarity informed by the Departments' experiences in assessing the irreparable harm standard in previous years.

As explained in the FY 2023 TFR, the attestation that irreparable harm is occurring or is impending cannot be based on a speculative analysis that permanent or severe financial loss "may occur" or "is likely to occur." Rather, as of the time of submission to DHS, employers must have concrete evidence establishing that severe and permanent financial loss is occurring, with the scope and severity of harm clearly articulable, or that severe and permanent financial loss will occur in the near future without access to the supplemental visas. Even if no irreparable harm ultimately occurs because the employer is approved for supplemental visas under this rule, the employer must be able to articulate how permanent and severe financial loss was impending at the time of filing. Additionally, in DOL's experience, employers sometimes do not retain the documentation they specifically attested they would retain, or will not or cannot explain how this documentation demonstrates the relevant irreparable harm to which they attested, which indicates that some of the employers seeking to benefit from hiring H-2B workers are not thoughtfully considering, or considering at all, whether their business needs qualify them for supplemental H-2B visas under these rules.

Additionally, the Departments continue to believe that the written statement is necessary in the case of an audit or investigation to explain, in detail, the employer's reasoning as to why irreparable harm was occurring or impending without the ability to employ H-2B workers, and how the evidence supports the employer's reasoning. In audits and investigations, some employers have provided hundreds of pages of evidence without any explanation as to how this evidence demonstrates irreparable harm, leaving DOL or DHS to determine how a voluminous compilation of complex and, sometimes, seemingly unrelated

documents demonstrates irreparable harm without any understanding of the employer's intent when providing the documents. A detailed, thoughtful explanation from the employer will clarify the purpose of these documents and allow the employer to clearly make their case that the business was experiencing irreparable harm or would experience impending irreparable harm at the time of petitioning for supplemental visas.

As such, the Departments believe that it is prudent to require employers to identify how they are suffering irreparable harm (that is, permanent or severe financial loss), or will suffer impending irreparable harm, and how the evidence they will maintain shows that harm was occurring or impending, at the time they petition for H-2B visas under this rule. The written statement should identify, in detail, the severe and permanent financial loss that is occurring or will occur in the near future without access to the supplemental visas and should describe how the information contained in the documentary evidence demonstrates this severe and permanent financial loss. A written statement explaining that no irreparable harm occurred because the employer was approved for supplemental H-2B visas is insufficient; if no irreparable harm actually occurred, the employer must be able to show that irreparable harm was impending at the time of the petition's filing. Supporting evidence of the employer's irreparable harm (either occurring or impending) maintained and discussed in the detailed written statement may include, but is not limited to, the following types of documentation:

(1) Evidence that the business is suffering or will suffer in the near future permanent and severe financial loss due to the inability to meet financial or existing contractual obligations because they were unable to employ H-2B workers, including evidence of contracts, reservations, orders, or other business arrangements that have been or would be cancelled, and evidence demonstrating an inability to pay debts/bills;

(2) Evidence that the business is suffering or will suffer in the near future permanent and severe financial loss, as compared to prior years, such as financial statements (including profit/loss statements) comparing the employer's period of need to prior years; bank statements, tax returns, or other documents showing evidence of current and past financial condition; and relevant tax records, employment records, or other similar documents showing hours worked and payroll

comparisons from prior years to the current year;

(3) Evidence showing the number of workers needed in the previous three seasons (FY 2021, 2022, and 2023) to meet the employer's need as compared to those currently employed or expected to be employed at the beginning of the start date of need. Such evidence must indicate the dates of their employment, and their hours worked (for example, payroll records) and evidence showing the number of H-2B workers it claims are needed, and the workers' actual dates of employment and hours worked; and/or

(4) Evidence that the petitioner is reliant on obtaining a certain number of workers to operate, based on the nature and size of the business, such as documentation showing the number of workers it has needed to maintain its operations in the past, or will in the near future need, including but not limited to: a detailed business plan, copies of purchase orders or other requests for good and services, or other reliable forecast of an impending need for workers.

These examples are not exhaustive, nor will they necessarily establish that the business meets the irreparable harm standard; petitioners may retain other types of evidence they believe will satisfy these standards. Such evidence must be maintained and provided, with the written statement, to DOL and/or DHS upon request.

While the employer will not submit the detailed written statement nor the supporting evidence to DHS at the time of filing a petition for H-2B visas under this rule, the Departments emphasize that the employer must prepare the detailed written statement and compile the evidence at the time of filing. The employer must complete the analysis as to whether the employer is experiencing irreparable harm or will experience impending irreparable harm at the time the employer petitions for supplemental visas using evidence available at this time. In the interest of efficiency, the Departments do not require the submission of this statement to DHS at the time of filing the petition. Instead, the employer must attest that it has prepared the detailed written statement.

The attestation form will serve as prima facie initial evidence to DHS that the petitioner's business is suffering irreparable harm or will suffer impending irreparable harm. USCIS may reject in accordance with 8 CFR 103.2(a)(7)(ii) or deny in accordance with 8 CFR 103.2(b)(8)(ii), as applicable, any petition requesting H-2B workers under this FY 2024 supplemental cap that is lacking the requisite attestation

form. Although this regulation does not require submission of evidence and/or a detailed written statement at the time of filing of the petition, other than an attestation, the employer must have such evidence and the accompanying detailed written statement on hand and ready to present to DHS and/or DOL at any time starting with the date of filing the I-129 petition, through the prescribed document retention period discussed below.

As with petitions filed under the FY 2021, FY 2022, and FY 2023 Supplemental TFRs, the Departments intend to select a significant number of petitions for audit examination to verify compliance with program requirements, including the irreparable harm standard and recruitment provisions implemented through this rule. The Departments may consider failure to provide evidence demonstrating irreparable harm, to prepare or provide the detailed written statement explaining irreparable harm, or to comply with the audit process to be a substantial violation resulting in an adverse agency action on the employer, including assessment of a civil money penalty, revocation of the petition and/or TLC, or program debarment. Similarly, failure to cooperate with any compliance review, evaluation, verification, or inspection conducted by DHS and/or DOL as required by 8 CFR 214.2(h)(6)(xiv)(B)(2)(v) and (vi) may constitute a violation of the terms and conditions of an approved petition and lead to petition revocation under 8 CFR 214.2(h)(11)(iii)(A)(3).

The attestation submitted to USCIS will also state that the employer:

(1) meets all other eligibility criteria for the available visas, including the returning worker requirement, unless exempt because the H-2B worker is a national of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, or Costa Rica who is counted against the 20,000 visas reserved for such workers;

(2) will comply with all assurances, obligations, and conditions of employment set forth in the *Application for Temporary Employment Certification* (Form ETA 9142B and appendices) certified by DOL for the job opportunity (which serves as the TLC);

(3) will conduct additional recruitment of U.S. workers in accordance with the requirements of this rule and discussed further below; and

(4) will document and retain evidence of such compliance.

Because petitioners will submit the attestation to USCIS as initial evidence with Form I-129, DHS considers the attestation to be evidence that is

incorporated into and a part of the petition consistent with 8 CFR 103.2(b)(1). Accordingly, USCIS may deny or revoke, as applicable, a petition based on or related to statements made in the attestation, including but not limited to the following grounds: (1) the employer failed to demonstrate employment of all of the requested workers is necessary under the appropriate business need standard; or (2) the employer failed to demonstrate that it requested and/or instructed that each worker petitioned for is a returning worker, or a national of one of the specified countries, as required by this rule. The petitioner may appeal any denial or revocation on such basis, however, under 8 CFR part 103, consistent with DHS regulations and existing USCIS procedures.

It is the view of the Secretaries of Homeland Security and Labor that requiring a post-TLC attestation to USCIS is the most practical approach to applying the eligibility requirements of this rule without causing undue delays in the filing or adjudication processes for those employers with start dates in the first half of the fiscal year, many of whom will have already begun or completed the TLC application process. The Departments have determined that, if such employers were required to submit the attestation form to DOL before filing a petition with DHS, the attendant delays would negatively impact the ability of American businesses to timely get the help that they need given TLC processing timeframes. For consistency and to avoid confusion, the Departments will also maintain the post-TLC attestation process for employers with start dates in the second half of the fiscal year that seek supplemental H-2B visas under this rule. This approach, in conjunction with additional integrity safeguards, has been used consistently in prior supplemental H-2B temporary final rules, and the Departments will continue to monitor its effectiveness and sufficiency.

As in prior years, all employers under this rule are required to retain documentation, which the employer must provide upon request by DHS and/or DOL, supporting the new attestations regarding (1) the irreparable harm standard; (2) the returning worker requirement, or, alternatively, documentation supporting that the H-2B worker(s) requested is a national of one of the specified countries who is counted against the 20,000 country-specific allocation (which may be satisfied by the separate Form I-129 that employers are required to file for such workers in accordance with this rule);

and (3) a recruitment report for any additional recruitment required under this rule for a period of 3 years. See 20 CFR 655.65. Although the employer must have such documentation on hand at the time it files the petition, the Departments do not believe it is necessary or efficient for all employers to submit such documentation to USCIS at the time of filing the petition. However, as noted above, the Departments will employ program integrity measures, including additional scrutiny by DHS of employers that have committed labor law violations in the H-2B program, and continue to conduct audits, investigations, and/or post-adjudication compliance reviews on a significant number of H-2B petitions. As part of that process, USCIS may issue a request for additional evidence, a notice of intent to revoke, or a revocation notice, based on the review of such documentation, see 8 CFR 103.2(b) and 8 CFR 214.2(h)(11), and DOL's OFLC and WHD will be able to review this documentation and enforce the attestations during the course of an audit examination or investigation.

In accordance with the attestation requirements, under which petitioners attest that they meet the irreparable harm standard, that they are seeking to employ only returning workers (unless exempt as described above), and that they meet the document retention requirements at 20 CFR 655.65, petitioners must retain documents and records fulfilling their responsibility to demonstrate compliance with this rule for 3 years from the date the TLC was approved, and must provide the documents and records upon the request of DHS and/or DOL. With regard to the irreparable harm standard, employers attesting that they are suffering irreparable harm must be able to provide concrete evidence establishing severe and permanent financial loss that is occurring; the scope and severity of the harm must be clearly articulable. Employers attesting that they will suffer impending irreparable harm must be able to demonstrate that severe and permanent financial loss will occur in the near future without access to the supplemental visas. It will not be enough to provide evidence suggesting that such harm may or is likely to occur; rather, the documentary evidence must show that impending harm is occurring or will occur and document the form of such harm. Examples of possible types of evidence to be maintained are listed earlier in this section.

When a petition is selected for audit examination, or investigation, DHS and/or DOL will review all evidence

available to it to confirm that the petitioner properly attested to DHS, at the time of filing the petition, that their business was suffering irreparable harm or would suffer impending irreparable harm, and that they petitioned for and employed only returning workers, unless the H-2B worker is a national of one of the specific countries counted towards the 20,000 country-specific allocation, among other attestations. If DHS subsequently finds that the evidence does not support the employer's attestations, DHS may deny or, if the petition has already been approved, revoke the petition at any time consistent with existing regulatory authorities. DHS may also, or alternatively, refer the petitioner to DOL for further investigation. In addition, DOL may independently take enforcement action, including by, among other things, debarring the petitioner from the H-2B program for not less than one year or more than five years from the date of the final agency decision, which also disqualifies the debarred party from filing any labor certification applications or labor condition applications with DOL for the same period set forth in the final debarment decision. *See, e.g.*, 20 CFR 655.73; 29 CFR 503.20, 503.24.¹⁵⁸

Evidence reflecting a preference for hiring H-2B workers over U.S. workers may warrant an investigation by additional agencies enforcing employment and labor laws, such as the Immigrant and Employee Rights Section (IER) of the Department of Justice's Civil Rights Division. *See* INA section 274B, 8 U.S.C. 1324b (prohibiting certain types of employment discrimination based on citizenship status or national origin). Moreover, DHS and DOL may refer potential discrimination to IER pursuant to applicable interagency agreements. *See* IER, Partnerships, <https://www.justice.gov/crt/partnerships> (last visited Sept. 26, 2023). In addition, if members of the public have information that a participating employer may be abusing this program, DHS invites them to notify USCIS by completing the online fraud tip form, <https://www.uscis.gov/report-fraud/>

uscis-tip-form (last visited Sept. 26, 2023).¹⁵⁹

DHS, in exercising its statutory authority under INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b), and section 303 of the FY 2023 Omnibus, as extended by Public Law 118-15, is responsible for adjudicating eligibility for H-2B classification. As in all cases, the burden rests with the petitioner to establish eligibility by a preponderance of the evidence. INA section 291, 8 U.S.C. 1361. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Accordingly, as noted above, where the petition lacks initial evidence, such as a properly completed attestation, USCIS may, as applicable, reject the petition in accordance with 8 CFR 103.2(a)(7)(ii) or deny the petition in accordance with 8 CFR 103.2(b)(8)(ii). Further, where the initial evidence submitted with the petition contains inconsistencies or is inconsistent with other evidence in the petition and the underlying TLC, USCIS may issue a Request for Evidence, Notice of Intent to Deny, or Denial in accordance with 8 CFR 103.2(b)(8). In addition, where it is determined that an H-2B petition filed pursuant to the FY 2023 Omnibus, as extended by Public Law 118-15, was granted erroneously, the H-2B petition approval may be revoked. *See* 8 CFR 214.2(h)(11).

Because of the particular circumstances of this regulation, and because the attestation and other requirements of this rule play a vital role in achieving the purposes of this rule, DHS and DOL intend that the attestation requirement, DOL procedures, and other aspects of this rule be non-severable from the remainder of the rule, including the increase in the numerical allocations.¹⁶⁰ Thus, if the attestation requirement or any other part of this rule is enjoined or held invalid, the Departments intend for the remainder of the rule, with the exception of the retention requirements being codified in 20 CFR 655.65, to cease operation in the relevant jurisdiction, without prejudice to workers already present in the United States under this regulation, as consistent with law.

¹⁵⁹ DHS may publicly disclose information regarding the H-2B program consistent with applicable law and regulations. For information about DHS disclosure of information contained in a system of records, see <https://www.dhs.gov/system-records-notices-sorns>. Additional general information about DHS privacy policy can be accessed at <https://www.dhs.gov/policy>.

¹⁶⁰ The Departments' intentions with respect to non-severability extend to all features of this rule other than the portability provision, which is described in the section below.

F. Portability

As an additional option for employers that cannot find U.S. workers, and as an additional flexibility for H-2B employees seeking to begin work with a new H-2B employer, this rule allows petitioners to immediately employ certain H-2B workers who are present in the United States in H-2B status without waiting for approval of the H-2B petition, generally for a period of up to 60 days. Such workers must be beneficiaries of a timely, non-frivolous H-2B petition requesting an extension of stay received on or after January 25, 2024, but no later than 1 year after that date.¹⁶¹ In addition, such workers must have been lawfully admitted to the United States and have not worked without authorization subsequent to such lawful admission. Additionally, petitioners may immediately employ individuals who are beneficiaries of a non-frivolous H-2B petition requesting an extension of the worker's stay that is pending as of January 25, 2024 without waiting for approval of the H-2B petition. To be eligible for portability, employers must have received an approved TLC demonstrating that they have completed a test of the U.S. labor market, and that DOL determined that there were no qualified U.S. workers available to fill these temporary positions. DHS is making this portability available for an additional one-year period in order to provide greater certainty for H-2B employers and workers.¹⁶²

The portability provision at new 8 CFR 214.2(h)(31) is substantively the same as the portability provision offered in the FY 2023 H-2B supplemental visa temporary final rule, which was codified at 8 CFR 214.2(h)(29), and will begin upon the expiration of that provision. *See* new 8 CFR 214.2(h)(31). Additionally, the provision is similar to temporary flexibilities that DHS has used previously to improve employer

¹⁶¹ Individuals who are the beneficiaries of petitions filed on the basis of 8 CFR 214.1(c)(4) are not eligible to port to a new employer under 8 CFR 214.2(h)(31).

¹⁶² On September 20, 2023, DHS issued a Modernizing H-2 Program Requirements, Oversight, and Worker Protections Notice of Proposed Rulemaking (NPRM), 88 FR 65040, 65066, with a 60-day public comment period that ends on November 20, 2023. In that NPRM, DHS proposed to extend portability to H-2A and H-2B workers on a permanent basis. The Department's proposal does not interfere with the portability provision of this rule, however, should DHS publish a final rule making H-2 portability permanent, any such provision will not expire on a specific date, unlike the portability provision made effective by this temporary final rule.

¹⁵⁸ Pursuant to the statutory provisions governing enforcement of the H-2B program, INA section 214(c)(14), 8 U.S.C. 1184(c)(14), a violation exists under the H-2B program where there has been a willful misrepresentation of a material fact in the petition or a substantial failure to meet any of the terms and conditions of the petition. A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions. *See, e.g.*, INA section 214(c)(14)(D), 8 U.S.C. 1184(c)(14)(D); *see also* 29 CFR 503.19.

access to noncitizen workers during the COVID-19 pandemic.¹⁶³

The employment authorization provided under this provision would end 15 days after USCIS denies the H-2B petition or such petition is withdrawn. This 15-day period of employment following an H-2B petition denial or withdrawal is consistent with prior H-2B supplemental cap temporary final rules, as well as the 15-day period of employment following petition denial under existing DHS regulations at 8 CFR 274a.12(b)(21) for certain E-Verify participants to employ H-2A workers. As in the prior temporary final rules, the 15-day period is intended to account for the passage of time between USCIS denial of the H-2B petition and the petitioner receiving notice of such denial.¹⁶⁴

DHS is strongly committed not only to protecting U.S. workers and helping U.S. businesses receive the documented workers authorized to perform temporary nonagricultural services or labor that they need, but also to protecting the rights and interests of H-2B workers (consistent with Executive Order 13563 and in particular its reference to “equity,” “fairness,” and “human dignity”). In the FY 2020 DHS Further Consolidated Appropriations Act (Pub. L. 116–94), Congress directed DHS to provide options to improve the

H-2A and H-2B visa programs, to include options that would protect worker rights.¹⁶⁵ DHS has determined that providing H-2B nonimmigrant workers with the flexibility of being able to begin work with a new H-2B petitioner immediately and avoid a potential job loss or loss of income while the new H-2B petition is pending, provides some certainty to H-2B workers who may have found themselves in situations that warrant a change in employers.¹⁶⁶ This flexibility also provides an alternative to H-2B petitioners who have not been able to find U.S. workers and who have not been able to obtain H-2B workers subject to the statutory or supplemental caps who have the skills to perform the job duties. In that sense as well, it is equitable and fair.

G. Compliance With Employment-Related Laws

In recent supplemental cap TFRs issued during the COVID-19 public health emergency, the Departments have specifically required petitioners to attest that they will comply with all Federal, State, and local employment-related laws and regulations, including, where applicable, with laws related to COVID-19 worker protections and any right to time off or paid time off for COVID-19 vaccination, or to reimbursement for travel to and from the nearest vaccination site. *See, e.g.*, 8 CFR 214.2(h)(29)(iii)(B). In addition, the Departments have required petitioners

to attest that they would notify any H-2B workers approved under the supplemental cap, in a language understood by the worker as necessary or reasonable, that all persons in the United States, including nonimmigrants, have equal access to COVID-19 vaccines and vaccine distribution sites. As the public health emergency is no longer in effect,¹⁶⁷ the Departments no longer believe it is necessary to include the requirements that are specific to COVID-19.

In addition, after removing the language related to COVID-19, the Departments believe that the remaining attestation from these prior rules would overlap with the general requirement found at 20 CFR 655.20(z) and 29 CFR 503.16(z) that all employers, as a condition of their labor certification, comply with employment-related laws including health and safety laws. To avoid confusion the Departments are also removing this attestation from the TFR. While there is no additional attestation with respect to H-2B petitioners that do not avail themselves of the supplemental H-2B visas made available under this rule, the Departments remind all H-2B employers that they must comply with all Federal, State, and local employment-related laws and regulations, including health and safety laws. To the extent that Federal, State, or local laws and regulations relating to COVID-19 remain in effect, the Departments note that an employer remains obligated to comply with them. Failure to comply with such laws and regulations would be contrary to the attestation 7 on ETA 9142B—Appendix B, and therefore may be a basis for DHS to revoke the petition under 8 CFR 214.2(h)(11)(iii)(A)(3) for violating terms and conditions of the approved petition.¹⁶⁸

H. DHS Petition Procedures

To petition for H-2B workers under the supplemental allocations in this rule, the petitioner must file a Form I-129 at the USCIS Texas Service Center¹⁶⁹ in accordance with applicable regulations and form instructions, along

¹⁶³ See *Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers* 86 FR 28198 (May 25, 2021). On May 14, 2020, DHS published a temporary final rule in the **Federal Register** to amend certain H-2B requirements to help H-2B petitioners seeking workers to perform temporary nonagricultural services or labor essential to the U.S. food supply chain. *Temporary Changes to Requirements Affecting H-2B Nonimmigrants Due to the COVID-19 National Emergency*, 85 FR 28843 (May 14, 2020). In addition, on April 20, 2020, DHS issued a temporary final rule which, among other flexibilities, allowed H-2A workers to change employers and begin work before USCIS approved the new H-2A petition for the new employer. *Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due to the COVID-19 National Emergency*, 85 FR 21739 (April 20, 2020). DHS has subsequently extended that portability provision for H-2A workers through two additional temporary final rules, on August 20, 2020, and December 18, 2020, which have been effective for H-2A petitions that were received on or after August 19, 2020 through December 17, 2020, and on or after December 18, 2020 through June 16, 2021, respectively. *Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due To the COVID-19 National Emergency: Partial Extension of Certain Flexibilities*, 85 FR 51304 (August 20, 2020) and *Temporary Changes to Requirements Affecting H-2A Nonimmigrants due to the COVID-19 National Emergency: Extension of Certain Flexibilities*, 85 FR 82291 (December 18, 2020).

¹⁶⁴ A similar portability provision exists in DHS regulations related to H-1B nonimmigrant workers, but does not include a 15-day period. *See* 8 CFR 214.2(h)(2)(i)(H)(2).

¹⁶⁵ The Joint Explanatory Statement accompanying the *Fiscal Year (FY) 2020 Department of Homeland Security (DHS) Further Consolidated Appropriations Act* (Pub. L. 116–94) states, “Not later than 120 days after the date of enactment of this Act, DHS, the Department of Labor, the Department of State, and the United States Digital Service are directed to report on options to improve the execution of the H-2A and H-2B visa programs, including: processing efficiencies; combatting human trafficking; protecting worker rights; and reducing employer burden, to include the disadvantages imposed on such employers due to the current semiannual distribution of H-2B visas on October 1 and April 1 of each fiscal year. USCIS is encouraged to leverage prior year materials relating to the issuance of additional H-2B visas, to include previous temporary final rules, to improve processing efficiencies.”

¹⁶⁶ The White House, *The National Action Plan to Combat Human Trafficking*, Priority Action 1.5.3, at p. 25 (Dec 2021); The White House, *The National Action Plan to Combat Human Trafficking*, Priority Action 1.6.3, at p. 20–21 (2020) (Stating that “[w]orkers sometimes find themselves in abusive work situations, but because their immigration status is dependent on continued employment with the employer in whose name the visa has been issued, workers may be left with few options to leave that situation.”). By providing the option of changing employers without risking job loss or a loss of income through the publication of this rule, DHS believes that H-2B workers may be more likely to leave abusive work situations, and thereby are afforded greater worker protections.

¹⁶⁷ See HHS, Fact Sheet: End of the COVID-19 Public Health Emergency (May 9, 2023), <https://www.hhs.gov/about/news/2023/05/09/fact-sheet-end-of-the-covid-19-public-health-emergency.html>.

¹⁶⁸ During the period of employment specified on the TLC, the employer must comply with all applicable Federal, State and local employment-related laws and regulations, including health and safety laws. 20 CFR 655.20(z). By submitting the TLC as evidence supporting the petition, it is incorporated into and considered part of the benefit request under 8 CFR 103.2(b)(1).

¹⁶⁹ This is a different filing location from the FY 2023 TFR.

with an unexpired TLC and the attestation Form ETA-9142-B-CAA-8. Petitions filed for supplemental allocations under this rule at any location other than the USCIS Texas Service Center will be rejected and the filing fees will be returned.¹⁷⁰ For all petitions filed under this rule and the H-2B program, generally, employers must establish, among other requirements, that insufficient qualified U.S. workers are available to fill the petitioning H-2B employer's job opportunity and that the foreign worker's employment in the job opportunity will not adversely affect the wages or working conditions of similarly-employed U.S. workers. INA section 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(6)(iii)(A) and (D); 20 CFR 655.1. To meet this standard of protection for U.S. workers and, in order to be eligible for additional visas under this rule, employers must have applied for and received a valid TLC in accordance with 8 CFR 214.2(h)(6)(iv)(A) and (D) and 20 CFR part 655, subpart A. Under DOL's H-2B regulations, TLCs are valid only for the period of employment certified by DOL and expire on the last day of authorized employment. 20 CFR 655.55(a).

In order to have a valid TLC, therefore, the employment start date on the employer's H-2B petition must not be different from the employment start date certified by DOL on the TLC. See 8 CFR 214.2(h)(6)(iv)(D). Under generally applicable DHS regulations, the only exception to this requirement applies when an employer files an amended H-2B petition, accompanied by a copy of the previously approved TLC and a copy of the initial visa petition approval notice, at a later date to substitute workers as set forth under 8 CFR 214.2(h)(6)(viii)(B). This rule also requires additional recruitment for certain petitioners, as discussed below.

All H-2B petitions must state the nationality of all the requested H-2B workers, whether named or unnamed, even if there are beneficiaries from more than one country. See 8 CFR 214.2(h)(2)(iii). If filing multiple Forms I-129 based on the same TLC (for instance, one requesting returning workers and another requesting workers under the country-specific allocation),

each H-2B petition must include a copy of the TLC and reference all previously-filed or concurrently-filed petitions associated with the same TLC. The total number of requested workers may not exceed the total number of workers indicated on the approved TLC.

Petitioners seeking H-2B classification for nationals under the 20,000 country-specific visa allocation that are exempt from the returning worker provision must file a separate Form I-129 for those nationals only. See new 8 CFR 214.2(h)(6)(xiv). In this regard, a petition must be filed with a single Form ETA-9142-B-CAA-8 that clearly indicates that the petitioner is only requesting nationals from El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, or Costa Rica who are exempt from the returning worker requirement. Specifically, if the petitioner checks the first box of Form ETA-9142-B-CAA-8, then the petition accompanying that form *must* be filed only on behalf of nationals of one or more of these and not other countries. In such a case, if the Form I-129 petition is requesting beneficiaries from countries other than one of these countries, then USCIS may reject it or issue a request for evidence, notice of intent to deny, or denial, or, in the case of a non-frivolous petition, a partial approval limiting the petition to the number of beneficiaries who are from Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica. Requiring the filing of separate petitions to request returning workers and to request workers who are nationals of the specified countries is necessary to ensure the operational capability to properly calculate and manage the respective additional cap allocations and to ensure that all corresponding visa issuances are limited to qualifying applicants, particularly when such petitions request unnamed beneficiaries or are relied upon for subsequent requests to substitute beneficiaries in accordance with 8 CFR 214.2(h)(6)(viii).

The attestations must be filed on Form ETA-9142-B-CAA-8, Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 303 of Division O of the Consolidated Appropriations Act, 2023, Public Law 117-328, as extended by sections 101(6) and 106 of Division A of the Continuing Appropriations Act, 2024 and Other Extensions Act, Public Law 118-15. See 20 CFR 655.64. Petitioners are required to retain a copy of such attestations and all supporting evidence for 3 years from the date the associated TLC was approved, consistent with 20 CFR 655.56 and 29 CFR 503.17. See 20 CFR 655.65. Petitions submitted to DHS

pursuant to Public Law 118-15, which extended the FY 2023 Omnibus, will be processed in the order in which they were received within the relevant supplemental allocation, and pursuant to processes parallel to those in place for when numerical limitations are reached under INA section 214(g)(1)(B) or (g)(10), 8 U.S.C. 1184(g)(1)(B) or (g)(10).

All filings under the supplemental allocations in this rule must be filed at the USCIS Texas Service Center. USCIS will reject petitions filed under the supplemental allocations in this rule at any location other than the USCIS Texas Service Center and will return the filing fees for any such petition.

Immediately upon publication of the rule, but no earlier than that date, USCIS will begin accepting returning worker H-2B petitions requesting dates of need starting on or before March 31, 2024, as well as H-2B petitions for workers under the country-specific allocation with dates of need in the first half of FY 2024. Beginning no earlier than 15 days after the second half statutory cap is reached, USCIS will begin accepting returning worker H-2B petitions requesting work to begin on or after April 1, 2024, through May 14, 2024, as well as H-2B petitions for workers under the country-specific allocation with dates of need on or after April 1, 2024 through September 30, 2024. Finally, beginning no earlier than 45 days after the second half statutory cap is reached, USCIS will begin accepting returning worker H-2B petitions requesting work to begin on or after May 15 through September 30, 2024.

USCIS will reject any returning worker petition that is received after September 16, 2024, or after the applicable numerical limitation has been reached. DHS believes that 15 days from the end of the fiscal year is the minimum time needed for petitions to be adjudicated, although USCIS cannot guarantee the time period will be sufficient in all cases. Therefore, even if the country-specific allocation and second half supplemental allocations provided in this rule have not yet been reached, USCIS will stop accepting petitions under those allocations that are received after September 16, 2024. See new 8 CFR 214.2(h)(6)(xiv)(C). Such petitions will be rejected and the filing fees will be returned. Petitioners may choose to request premium processing of their petitions under 8 CFR 106.4, which allows for expedited processing for an additional fee.

Based on the time-limited authority granted to DHS by Public Law 118-15, on the same terms as section 303 of the

¹⁷⁰ On Nov. 1, 2023, USCIS changed the service center filing location for all petitioners filing Forms I-129, Petition for a Nonimmigrant Worker, to request H-2B workers. Those petitions should now be filed at the Texas Service Center. Although USCIS provided a 60-day grace period for H-2B petitions that are filed at the California and Vermont Service Centers during which they could still be accepted (through Dec. 31, 2023), this grace period does not apply to petitions filed for supplemental allocations under this rule.

FY 2023 Omnibus, DHS is notifying the public that USCIS cannot approve petitions seeking H-2B workers under this rule on or after October 1, 2024. *See* new 8 CFR 214.2(h)(6)(xiv)(C). Petitions pending with USCIS that are not approved before October 1, 2024 will be denied and any fees will not be refunded. *See* new 8 CFR 214.2(h)(6)(xiv)(C).

I. DOL Procedures

As noted above, all employers are required to have an approved and valid TLC from DOL in order to file a Form I-129 petition with DHS. *See* 8 CFR 214.2(h)(6)(iv)(A) and (D). The standards and procedures governing the submission and processing of Applications for Temporary Employment Certification for employers seeking to hire H-2B workers are set forth in 20 CFR part 655, subpart A. An employer that seeks to hire H-2B workers must request a TLC in compliance with the application filing requirements set forth in 20 CFR 655.15 and meet all the requirements of 20 CFR part 655, subpart A, to obtain a valid TLC, including the criteria for certification set forth in 20 CFR 655.51. *See* 20 CFR 655.64(a) and 655.50(b). Employers with an approved TLC have conducted recruitment, as set forth in 20 CFR 655.40 through 655.48, to determine whether U.S. workers are qualified and available to perform the work for which employers sought H-2B workers.

The H-2B regulations require that, among other things, an employer seeking to hire H-2B workers in a non-emergency situation must file a completed Application for Temporary Employment Certification with the National Processing Center (NPC) designated by the OFLC Administrator no more than 90 calendar days and no fewer than 75 calendar days before the employer's date of need (*i.e.*, start date for the work). *See* 20 CFR 655.15.

Emergency Procedures

Under 20 CFR 655.17, an employer may request a waiver of the time period(s) for filing an Application for Temporary Employment Certification based on "good and substantial" cause, provided that the employer has sufficient time to thoroughly test the domestic labor market on an expedited basis and the OFLC certifying officer (CO) has sufficient time to make a final determination as required by the regulation. To rely on this provision, as the Departments explained in the 2015 H-2B Interim Final Rule, the employer must provide the OFLC CO with detailed information describing the

"good and substantial cause" necessitating the waiver. Such cause may include the substantial loss of U.S. workers due to Acts of God, or a similar unforeseeable human-made catastrophic event that is wholly outside the employer's control, unforeseeable changes in market conditions, or pandemic health issues. Thus, to ensure an adequate test of the domestic labor market and to protect the integrity of the H-2B program, the Departments clearly intended that use of emergency procedures must be narrowly construed and permitted in extraordinary and unforeseeable catastrophic circumstances that have a direct impact on the employer's need for the specific services or labor to be performed. Even under the existing H-2B statutory visa cap structure, DOL considers USCIS' announcement(s) that the statutory cap(s) on H-2B visas has been reached, which may occur with regularity every six months depending on H-2B visa need, as foreseeable, and therefore not within the meaning of "good and substantial cause" that would justify a request for emergency procedures. Accordingly, employers cannot rely solely on the supplemental H-2B visas made available through this rule as good and substantial cause to use emergency procedures under 20 CFR 655.17.

Additional Recruitment

In addition to the recruitment already conducted in connection with a valid TLC, to ensure the recruitment has not become stale, employers that wish to obtain visas for their workers under 8 CFR 214.2(h)(6)(xiv), and who file an I-129 petition 30 or more days after the certified start date of work on the TLC must conduct additional recruitment for U.S. workers. As noted in the 2015 H-2B Interim Final Rule, U.S. workers seeking employment in temporary nonagricultural jobs typically do not search for work months in advance and cannot make commitments about their availability for employment far in advance of the work start date. *See* 80 FR 24041, 24061, 24071. Given that the temporary labor certification process generally begins 75 to 90 days in advance of the employer's start date of work, employer recruitment efforts typically occur between 40 and 60 days before that date with an obligation to provide employment to any qualified U.S. worker who applies until 21 days before the date of need. Therefore, employers with TLCs containing a start date of work on October 1, 2023, for example, likely conducted their positive recruitment beginning around late-July and ending around mid-August 2023, and continued to consider U.S. worker

applicants and referrals only until September 10, 2023.

In order to provide U.S. workers a realistic opportunity to pursue jobs for which employers will be seeking foreign workers under this rule, the Departments have determined that if employers file an I-129 petition 30 or more days after their certified start dates of work, as shown on its approved Form ETA-9142B, *Final Determination: H-2B Temporary Labor Certification Approval*, they have not conducted recruitment recently enough for the DOL to reasonably conclude that there are currently an insufficient number of U.S. workers who are qualified, willing, and available to perform the work absent taking additional, positive recruitment steps. As noted in the FY 2022 second half H-2B supplemental cap TFR, the Departments determined that this 30-day requirement is consistent with provisions contained in previous TFRs and better aligns with the goal of affording workers an adequate opportunity to apply for jobs closer to when they tend to search for temporary employment, as explained in the 2015 H-2B Interim Final Rule, which found that U.S. applicants applying for temporary positions typically offered by H-2B employers are often not seeking job opportunities, or making informed decisions about such work, several months in advance. *See* 80 FR 24041, 24071; 87 FR 30334, 30353-54. The Departments continued to use this 30-day requirement in the FY 2023 H-2B supplemental cap TFR based on the rationale provided in the FY 2022 second half H-2B supplemental cap TFR. *See* 87 FR 76816, 76842-76843. The Departments have determined that this requirement is necessary to provide U.S. workers an opportunity to pursue jobs for which employers are seeking supplemental visas.

An employer that files an I-129 petition under 8 CFR 214.2(h)(6)(xiv) fewer than 30 days after the certified start date of work on the TLC must submit the TLC and a completed Form ETA-9142B-CAA-8 but is not required to conduct additional recruitment for U.S. workers beyond the recruitment already conducted as a condition of certification. Only those employers with still-valid TLCs with a certified start date of work that is 30 or more days before the date they file a petition will be required to conduct recruitment in addition to that conducted prior to being granted a TLC and attest that the recruitment will be conducted, as follows.

Placement of New Job Orders With State Workforce Agencies

Employers that are required to engage in additional recruitment must place a new job order for the job opportunity with the State Workforce Agency (SWA) serving the area of intended employment no later than the next business day after submitting an I-129 petition for H-2B workers to USCIS, and inform the SWA that the job order is being placed in connection with a previously submitted and certified Application for Temporary Employment Certification for H-2B workers by providing the SWA with the unique OFLC TLC case number. Under this rule, employers must also provide the OFLC NPC with the unique TLC case number concurrently with their placement of new job orders with the SWAs. This notification will allow OFLC to cross reference and repost information about the job opportunities that are provided on the employers' certified Applications for Temporary Labor Certification and posted by OFLC on *SeasonalJobs.dol.gov*, which is DOL's electronic job registry authorized under 20 CFR 655.34. Once posted by OFLC, information about the employer's certified job opportunity will remain posted for a period of at least 15 calendar days, which is consistent with the period of time SWAs post job orders for intrastate and interstate clearance to recruit U.S. workers, as discussed below. The Departments continue to believe this additional notification is a reasonable and cost-efficient method of disseminating available job opportunities to a wider audience and those U.S. workers who may be interested in applying. While not meant to recreate it, this action will serve the same functional purpose as the posting on *Seasonal Jobs*. To help employers who must conduct this notification requirement, DOL encourages employers to notify the OFLC NPC, at the same time notification is sent to the SWA, by sending an email to H-2Bsupplementalvisas@dol.gov, and including the words "H-2B TFR 2024 Recruitment" followed by the unique TLC case number in the subject line of the email.

The new job order placed with the SWA must contain the job assurances and contents set forth in 20 CFR 655.18 for recruitment of U.S. workers at the place of employment, and remain posted for at least 15 calendar days. The employer must also follow all applicable SWA instructions for posting job orders and receive applications in all forms allowed by the SWA, including online applications. The

Departments have concluded that keeping the job order posted for a period of at least 15 calendar days, during the period the employer is conducting the additional recruitment steps explained below and OFLC reposts the job opportunity information, will effectively ensure U.S. workers are apprised of the job opportunity and are referred for employment, if they are willing, qualified, and available to perform the work. The minimum 15 calendar day period also is consistent with the employer-conducted recruitment activity period applicable under 20 CFR 655.40(b).

Once the SWA places the new job order on its public labor exchange system, the SWA will perform its normal employment service activities by circulating the job order for intrastate clearance, and in interstate clearance by providing a copy of the job order to other SWAs with jurisdiction over listed worksites as well as those States the OFLC CO designated in the original Notice of Acceptance issued under 20 CFR 655.33. Where the occupation or industry is traditionally or customarily unionized, the SWA will also circulate a copy of the new job order to the central office of the State Federation of Labor in the State(s) in which work will be performed, and the office(s) of local union(s) representing workers in the same or substantially equivalent job classification in the area(s) in which work will be performed, consistent with its current obligation under 20 CFR 655.33(b)(5). To facilitate an effective dissemination of these job opportunities, DOL encourages union(s) or hiring halls representing workers in occupations typically used in the H-2B program to proactively contact and establish partnerships with SWAs in order to obtain timely information on available temporary job opportunities. This will aid the SWAs' prompt and effective outreach under the rule. DOL's OFLC maintains a comprehensive directory of contact information for each SWA at <https://www.dol.gov/agencies/eta/foreign-labor/contact>.

Contact With American Job Centers

The employer also must conduct additional recruitment steps during the period of time the SWA is actively circulating the job order for intrastate clearance. First, the employer must contact, by email or other electronic means, the nearest American Job Center(s) (AJC) serving the area of intended employment where work will commence to request staff assistance to advertise and recruit U.S. workers for the job opportunity. AJCs bring together a variety of programs providing a wide

range of employment and training services for U.S. workers, including job search services and assistance for prospective workers and recruitment services for employers through the Wagner-Peyser Program. Therefore, AJCs can offer assistance to employers with recruitment of U.S. workers, and contact with local AJCs will facilitate contemporaneous and effective recruitment activities that can broaden dissemination of the employer's job opportunity through connections with other partner programs within the One-Stop System to locate qualified U.S. workers to fill the employer's labor need. For example, the local AJC, working in concert with the SWA, can coordinate efforts to contact community-based organizations in the geographic area that serve potentially qualified workers or, when a job opportunity is in an occupation or industry that is traditionally or customarily unionized, the local AJC may be better positioned to identify and circulate the job order to appropriate local union(s) or hiring hall(s), consistent with 20 CFR 655.33(b)(5). In addition, as a partner program in the One-Stop System, AJCs are connected with the State's unemployment insurance program, thus an employer's connection with the AJC will help facilitate knowledge of the job opportunity to U.S. workers actively seeking employment. When contacting the AJC(s), the employer must provide staff with the job order number or, if the job order number is unavailable, a copy of the job order.

To increase navigability and to make the process as convenient as possible, DOL offers an online service for employers to locate the nearest local AJC at <https://www.careeronestop.org/> and by selecting the "Find Local Help" feature on the main homepage. This feature will navigate the employer to a search function called "Find an American Job Center" where the city, state or zip code covering the geographic area where work will commence can be entered. Once entered and the search function is executed, the online service will return a listing of the name(s) of the AJC(s) serving that geographic area as well as a contact option(s) and an indication as to whether the AJC is a "comprehensive" or "affiliate" center. Employers must contact the nearest "comprehensive" AJC serving the area of intended employment where work will commence or, where a "comprehensive" AJC is not available, the nearest "affiliate" AJC. A "comprehensive" AJC tends to be a

large office that offers the full range of employment and business services, and an “affiliate” AJC typically is a smaller office that offers a self-service career center, conducts hiring events, and provides workshops or other select employment services for workers. Because a “comprehensive” AJC may not be available in many geographic areas, particularly among rural communities, this rule permits employers to contact the nearest “affiliate” AJC serving the area of intended employment where a “comprehensive” AJC is not available. In order to facilitate efficient access to AJC services, this rule requires that employers utilize available electronic methods to contact the nearest AJC to meet the contact and disclosure requirements in this rule.

Contact With AFL–CIO for Jobs in Traditionally or Customarily Unionized Occupation or Industry

When a job is in a traditionally or customarily unionized occupation or industry, during the time the SWA is actively circulating the job order the employer must affirmatively contact the nearest American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) office covering the area of intended employment to provide written notice of the job opportunity and request assistance in recruiting qualified U.S. workers who may be interested in applying for the job opportunity. The employer must provide the AFL–CIO office (by mail, email, or other effective written means) a copy of the job order placed with the SWA. To determine which occupations are traditionally or customarily unionized, and to obtain information about the proper AFL–CIO office to contact,¹⁷¹ employers should

search the resources available on the OFLC website, under the “Customarily Unionized H–2B Occupations” tab on the lefthand side of the OFLC homepage: <https://www.dol.gov/agencies/eta/foreign-labor>.¹⁷² In addition, to help employers who must conduct this additional recruitment step, employers may also contact the national AFL–CIO and request assistance in circulating the job order to the nearest AFL–CIO office covering the area of intended employment to advertise and recruit U.S. workers for the job opportunity. The most effective means of contacting the national AFL–CIO is to email the job order and request for assistance to H-2B@aficio.org, but employers may also visit <https://aficio.org> to obtain information on other effective means of contacting the organization for assistance. Upon receipt, the national AFL–CIO will distribute a copy of the job order, on behalf of the employer, to the most appropriate AFL–CIO office(s) serving the area of intended employment for that job opportunity. The Department believes that this approach will be more straightforward and simpler for employers, and therefore encourages employers to meet the notification requirement by contacting the national AFL–CIO directly.

When applicable, the employer must include information in its recruitment report confirming that either the national or nearest AFL–CIO office was contacted and notified in writing of the job opportunity or opportunities. In the recruitment report, the employer must state whether the nearest AFL–CIO office referred qualified U.S. worker(s), including the number of referrals, or indicate that it was non-responsive to the employer’s requests. The employer must retain all documentation establishing that it has contacted either the national or nearest AFL–CIO office and submit all such information upon request from the Departments.

circulation of relevant job orders based on their knowledge of the local labor market would provide effective outreach to other federations of unions and non-affiliated unions.

¹⁷² These resources were developed based on recent information received from stakeholders indicating that collective bargaining agreements now exist in certain occupations, such as landscaping. In addition, the occupations or industries listed are ones in which the Department has typically observed substantial union presence in its program administration experience, such as occupations involved in public sector employment, construction and extraction activities, and service-related industries, where historical Bureau of Labor Statistics data has demonstrated a presence of union affiliated workers. See BLS, Economic News Release, Table 3. Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry (Jan. 20, 2022), <https://www.bls.gov/news.release/union2.t03.htm>.

Documentation or evidence that would help employers establish that the appropriate AFL–CIO office was contacted, may include, but is not limited to: documentation proving the job order was shipped and delivered to the AFL–CIO office (e.g., copy of the job order along with the certificate of shipment provided by the U.S. Postal Service or other courier mail or parcel delivery services and/or any other form of delivery confirmation); evidence confirming that the job order, along with a request for assistance to recruit workers, was in fact emailed to the appropriate AFL–CIO office (e.g., copies of emails); phone records accompanied by proof of a follow-up email sending the job order to the appropriate AFL–CIO office; or copies of any correspondence exchanged (e.g., letter, email) between the employer and the AFL–CIO office regarding worker referrals.

We believe the requirement that employers contact the AFL–CIO in occupations or industries that are traditionally or customarily unionized will complement the requirement that SWAs circulate the job order to the State Federation of Labor and local unions in such situations, thereby increasing the likelihood that a U.S. worker will be recruited for the job opportunity. This is because in traditionally or customarily unionized industries and occupations, unions serve as an essential conduit for communications between U.S. workers and hiring employers and have traditionally been recognized as a reliable source of referrals of U.S. workers. Unionized applicants may additionally share information about the job opportunity with nonunionized applicants, resulting in more referrals of qualified applicants to the job opportunity. Within this context, the two requirements complement each other as the State Federations of Labor and local unions that SWAs would circulate relevant job orders to, based on their knowledge of the local labor market, are comprised of various union organizations and may not always include the AFL–CIO. Since H–2B job opportunities in traditionally or customarily unionized occupations tend to fall within those industries most likely to be organized or represented by AFL–CIO member unions, this requirement increases outreach to qualified U.S. workers. Moreover, this requirement offers a chance for hiring employers to directly contact a potential pool of U.S. workers who are qualified and interested in the job opportunity, which can strengthen the probability that employers will locate U.S. workers

¹⁷¹ The Departments have determined that the requirement for employers to contact the nearest AFL–CIO office properly balances the goal of increasing U.S. worker outreach in those H–2B job opportunities that are in traditionally or customarily unionized occupations, while still providing employers with necessary guidance on recruitment requirements. The AFL–CIO is a voluntary federation of more than 60 national and international labor unions covering a substantial number of union employees. AFL–CIO, About Us, <https://aficio.org/about-us> (last visited October 11, 2023). The H–2B job opportunities in traditionally or customarily unionized occupations most frequently fall within those industries most likely to be organized or represented by AFL–CIO member unions. Additionally, the AFL–CIO’s status as the largest federation of unions in the United States provides for comprehensive national coverage and increases the chances that a U.S. worker will be hired. See AFL–CIO Press Release, <https://aficio.org/press/releases/afl-cio-teams-wilmington-trust-and-bny-mellon-expand-retirement-planning-options> (last visited October 11, 2023) (noting the AFL–CIO is “the nation’s largest federation of labor unions”). As discussed below, the SWAs

suited for the job opportunity. For example, potential U.S. workers may be more inclined to contact an employer directly upon learning of the job opportunity rather than utilize the SWA as an intermediary since the application process could be quicker and demonstrates a willingness by employers to consider union workers. Direct contact between employers and unions may also initiate a dialogue between employers and unions that could lead to a future working relationship that fulfills the workforce needs of employers. Therefore, in providing timely and meaningful notice of job opportunities in traditionally or customarily unionized industries to the AFL-CIO, employers build on efforts by SWAs to circulate job orders to state and local unions, which may differ from the AFL-CIO, and thus broaden the scope of their U.S. worker outreach.

Contact With Former U.S. Workers

During the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of 20 CFR 655.64 for intrastate clearance, the employer must make reasonable efforts to contact (by mail or other written effective means) its former U.S. workers that it employed in the occupation at the place of employment (except those who were dismissed for cause or who abandoned the worksite) during the period beginning January 1, 2022 until the date the I-129 petition required under 8 CFR 214.2(h)(6)(xiv) is submitted. Among the employees the employer must contact are those who have been furloughed¹⁷³ or laid off during this period. The employer must disclose to its former employees the terms of the job order placed with the SWA, and solicit their return to the job. The employer must provide the contact and disclosures required by this paragraph in a language understood by the worker, as necessary or reasonable, and in writing to ensure the recruitment effort is effective and meaningful in reaching each former U.S. worker. The Departments are requiring written communication because they believe that written contact and disclosure of the terms of the job order is more effective than oral disclosure, and provides greater assurance that workers understand the terms and working conditions of the job opportunity and can more effectively pursue redress if they do not receive the disclosed terms and working conditions. Written

communication and disclosure will also make it easier for employers to establish compliance with this requirement, if necessary.

Contact With the Bargaining Representative or Posting of the Job Order

As the employer was required to do when initially applying for its labor certification, the employer must provide a copy of the job order to the bargaining representative for its employees in the occupation and area of intended employment, consistent with 20 CFR 655.45(a), or if there is no bargaining representative, post the job order in the places and manner described in 20 CFR 655.45(b). Similar to the requirement to contact former U.S. workers, discussed above, the employer must provide the contact and disclosures required by this paragraph in a language understood by the worker, as necessary or reasonable, and in writing to ensure the recruitment effort is effective and meaningful in reaching each former U.S. worker.

Contact With Current U.S. Workers

As was required in the FY 2023 H-2B supplemental visa TFR, employers must again contact U.S. workers currently employed at the place of employment to inform them of the job opportunity and request their assistance in recruiting qualified U.S. workers who may be seeking employment. The Departments continue to believe this recruitment step is a reasonable and cost-effective method of broadening dissemination of available job opportunities and increasing the likelihood that qualified U.S. workers will apply. We believe the requirement that employers contact their current U.S. workers employed at the place(s) of employment and solicit their assistance in recruiting other qualified U.S. workers will complement the requirement that employers post the job order in the places and manner described in 20 CFR 655.45(b), enhance word-of-mouth recruiting, which is a common method of soliciting referrals of qualified U.S. workers, and increase the likelihood of locating U.S. workers suited for the job opportunity more quickly and efficiently. U.S. workers currently employed by the employer, who are more likely to be familiar with the nature of the employer's business operations and services or labor to be performed, will generally refer other U.S. workers who are qualified and may be more inclined to contact an employer directly upon learning of the job opportunity from a family, friend, or colleague with experience working for the employer.

Accordingly, during the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of 20 CFR 655.64 for intrastate clearance, the employer must make reasonable efforts to contact (by mail or other effective written means) all U.S. workers it currently employs at the place(s) of employment under the certified TLC. The employer must disclose to each of its current U.S. workers the terms of the job order placed with the SWA, and request assistance in recruiting qualified U.S. workers who may be interested in applying for the job opportunity. The contacts, disclosures, and requests for assistance required by this paragraph must be provided in a language understood by the worker, as necessary or reasonable, and in writing to ensure the recruitment effort is effective and meaningful in reaching each current U.S. worker.

The employer must retain all documentation establishing that it has contacted each U.S. worker it currently employs at the place(s) of employment under the certified TLC and submit all such information upon request from the Departments. Documentation or evidence that would help employers establish compliance with this regulatory requirement may include, but is not limited to the following: documentation proving the job order, along with a request for assistance to recruit workers, was shipped and delivered to each current U.S. worker's address (e.g., copy of the job order and request for assistance along with the certificate of shipment provided by the U.S. Postal Service or other courier mail or parcel delivery services and/or any other form of delivery confirmation); evidence confirming that the job order, along with a request for assistance to recruit workers, was emailed to the current U.S. worker (e.g., copies of emails); or copies of any correspondence exchanged (e.g., letter, email) between the employer and the current U.S. worker regarding referrals of other qualified U.S. workers.

The requirements to contact current and former U.S. workers and provide notice to the bargaining representative or post the job order must be conducted in a language understood by the workers, as necessary or reasonable. This requirement would apply, for example, in situations where an employer has one or more employees who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English. This requirement would allow those workers to make informed decisions regarding the job

¹⁷³ Furloughed employees are employees the employer laid off (as the term is defined in 20 CFR 655.5 and 29 CFR 503.4), but the layoff is intended to last for a temporary period of time.

opportunity, and is a reasonable interpretation of the recruitment requirements in 20 CFR part 655, subpart A, in light of the need to ensure that the test of the U.S. labor market is as comprehensive as possible. Consistent with existing language requirements in the H-2B program under 20 CFR 655.20(l), DOL intends to broadly interpret the necessary or reasonable qualification, and apply an exemption only in those situations where having the job order translated into a particular language would both place an undue burden on an employer and not significantly disadvantage the employee.

Posting of the Job Opportunity on the Employer's Website If the Employer Has a Website

Finally, as was required in the FY 2023 H-2B supplemental visa TFR, where the employer maintains a company website for its business operations, the employer must post an electronic advertisement of the job opportunity in a conspicuous location on this website.

Although the vast majority of small businesses in the United States maintain a website, the Departments acknowledge that not all employers maintain a company website.¹⁷⁴ As discussed in the prior TFR, although there is no parallel requirement for employers without a website, the Departments believe that continuing to require employers with websites to post the job announcement on their website is reasonable because this population of employers uses their websites to inform the public about their existence and/or the services they may provide. Thus, these employers' advertisement of the job opportunity, via their websites, is consistent with these employers' use of the internet/electronic means to communicate with the public. Accordingly, this recruitment requirement will continue to apply only to employers that maintain a website for business operations. For employers who must conduct this additional recruitment step, the electronic advertisement of the job opportunity on the company website must be posted in a conspicuous location. This means

access to the electronic advertisement on the company website must be clearly visible on the website's homepage or easily accessible from the website's homepage using any job search tool(s) or direct links from the homepage to a subsequent web page where other available jobs or careers are normally posted by the employer.

The Departments have concluded that keeping the electronic advertisements on company websites posted for a period of at least 15 calendar days, along with the other additional recruitment steps discussed above, will effectively ensure that U.S. workers are apprised of the job opportunity and are referred for employment, if they are willing, qualified, and available to perform the work. The minimum 15 calendar day period is also consistent with the employer-conducted recruitment activity period applicable under 20 CFR 655.40(b).

The employer must retain all documentation establishing that it has posted the electronic advertisement of the job opportunity in compliance with regulatory requirements and submit all such information upon request from the Departments. Documentation or evidence for employers to establish compliance with these regulatory requirements can include screenshots of the company website on which the advertisement appears for a period of no less than 15 days and screen shots of the web pages establishing the path that U.S. workers must follow to access the advertisement on the website.

Hiring U.S. Workers

The employer must hire any qualified U.S. worker who applies or is referred for the job opportunity until either (1) the date on which the last H-2B worker departs for the place of employment, or (2) 30 days after the last date on which the SWA job order is posted, whichever is later. Additionally, consistent with 20 CFR 655.40(a), applicants may be rejected only for lawful job-related reasons. Given that the employer, SWA, and AJC(s) will be actively engaged in conducting recruitment and broader dissemination of the job opportunity during the period of time the job order is active, this requirement provides an adequate period of time for U.S. workers to contact the employer or SWA for referral to the employer and completion of the additional recruitment steps described above. As explained above, the Departments have determined that if employers file a petition 30 or more days after their dates of need, they have not conducted recruitment recently enough for the Departments to reasonably conclude that there are

currently an insufficient number of U.S. workers qualified, willing, and available to perform the work absent additional recruitment.

Because of the abbreviated timeline for the additional recruitment required for employers whose initial recruitment has gone stale, the Departments have determined that this hiring period is necessary to approximate the hiring period under normal recruitment procedures and ensure that domestic workers have access to these job opportunities, consistent with the Departments' mandate. Additionally, given the relatively brief period during which additional recruitment will occur, additional time may be necessary for U.S. workers to have a meaningful opportunity to learn about the job opportunities and submit applications.

The Departments remind all H-2B employers that the job opportunity must be, through the recruitment period set forth in this rule, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, disability, or citizenship, as specified under 20 CFR 655.20(r). Further, employers that wish to require interviews must conduct those interviews by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost. Employers cannot provide potential H-2B workers with more favorable treatment with respect to the requirement for, and conduct of, interviews. *See* 20 CFR 655.40(d).

Any U.S. worker who applies or is referred for the job opportunity and is not considered by the employer for the job opportunity, experiences difficulty accessing or understanding the material terms and conditions of the job opportunity, or believes they have been improperly rejected by the employer may file a complaint directly with the SWA serving the area of intended employment. Each SWA maintains a complaint system for public labor exchange services, established under 20 CFR part 658, subpart E, and any complaint filed with the SWA by, or on behalf of, a U.S. worker about a specific H-2B job order will be processed under this existing complaint system. Depending on the circumstances, the SWA may seek informal resolution by working with the complainant and the employer to resolve, for example, miscommunications with the employer to be considered for the job opportunity or other concerns or misunderstandings related to the terms and conditions of the job opportunity; or issue a formal, written determination where informal

¹⁷⁴ The U.S. Chamber of Commerce reports that 71% of small businesses have a website and, of those with websites, 79% of survey respondents claimed that their websites are mobile-friendly. According to the survey results, 92% of the 29% of small businesses without a website reported planning to have one up and running by the end of 2018. *See* U.S. Chamber of Commerce, Small Business Statistics, available at <https://www.chamberofcommerce.org/small-business-statistics/#marketing-statistics> (accessed October 11, 2023).

resolution cannot be reached. In other circumstances, such as allegations involving discriminatory hiring practices or violations of other employment-related laws, the SWA will formally enter the complaint and refer the matter to an appropriate enforcement agency for prompt action. As mentioned above, DOL's OFLC maintains a comprehensive directory of contact information for each SWA that can be used to obtain more information on how to file a complaint.

Although the hiring period may require some employers to hire U.S. workers after the start of the contract period, this is not unprecedented. For example, in the H-2A program, employers have been required to hire U.S. workers through 50 percent of the contract period since at least 2010, which "enhance[s] protections for U.S. workers, to the maximum extent possible, while balancing the potential costs to employers," and is consistent with the Departments' responsibility to ensure that these job opportunities are available to U.S. workers. 74 FR 45906, 45917. The Department acknowledges that hiring workers after the start of the contract period imposes an additional cost on employers, but that cost can be lessened, in part, by the ability to discharge the H-2B worker upon hiring a U.S. worker (note, however, that an employer must pay for any discharged H-2B worker's return transportation, 20 CFR 655.20(j)(1)(ii) and 29 CFR 503.16(j)(1)(ii)). Additionally, this rule permits employers to immediately hire H-2B workers who are already present in the United States without waiting for approval of an H-2B petition, which will reduce the potential for harm to H-2B workers as a result of displacement by U.S. workers. See new 8 CFR 214.2(h)(31). Most importantly, a longer hiring period will ensure that available U.S. workers have a viable opportunity to apply for H-2B job opportunities. Accordingly, the Departments have determined that in affording the benefits of this temporary cap increase to businesses that are suffering irreparable harm or will suffer impending irreparable harm, it is necessary to ensure U.S. workers have sufficient time to apply for these jobs.

As in the temporary rules implementing the supplemental cap increases in prior years, employers must retain documentation demonstrating compliance with the recruitment requirements described above. Under this TFR, in accordance with 20 CFR 655.65, employers must retain documentation that demonstrates placement of a new job order with the SWA, contact with AJCs, contact with

the bargaining representative or AFL-CIO when required, contact with former U.S. workers, compliance with 20 CFR 655.45(a) or (b), contact with current U.S. workers at the place of employment, and posting of the job opportunity on the employer's website, if the employer has a website. Employers must prepare and retain a recruitment report that describes these efforts and meets the requirements set forth in 20 CFR 655.48, including the requirement to update the recruitment report throughout the recruitment and hiring period set forth in paragraph (a)(4)(viii) of 20 CFR 655.64. Employers must maintain copies of the recruitment report, attestation, and supporting documentation, as described above, for a period of 3 years from the date that the TLC was approved, consistent with the document retention requirements under 20 CFR 655.65, 20 CFR 655.56, and 29 CFR 503.17. These requirements are similar to those that apply to certain seafood employers that stagger the entry of H-2B workers under 20 CFR 655.15(f).

The Departments are committed to ensuring that all recruitment conducted in conjunction with this rule complies with the additional recruitment requirements discussed above and encourages individuals with information about that recruitment to contact DOL through the OFLC H-2B Ombudsman Program email box (*H2B.Ombudsman@dol.gov*). The H-2B Ombudsman Program facilitates the fair and equitable resolution of concerns that arise within the H-2B filing community, by conducting independent and impartial inquiries into issues related to the administration of the H-2B program. The H-2B Ombudsman Program also receives concerns and information relevant to case processing from employers, unions, and worker advocate organizations and ensures such information is appropriately referred within OFLC or to SWAs, as appropriate.

DOL actively monitors the H-2B Ombudsman Program email box, which is the best method for the public to provide information to the Department that is relevant to the processing of H-2B applications. Such information may include information about an in-process TLC application, information regarding the employer's compliance with H-2B recruitment of U.S. workers, or information bearing on an employer's irreparable harm justification. When the H-2B Ombudsman Program receives information relevant to its review of an H-2B TLC application, the information will be forwarded to the H-2B processing center. The H-2B processing

center will review the information it receives and will consider it, as appropriate.

The H-2B Ombudsman Program, however, is separate and distinct from the employment service complaint system administered by the Employment and Training Administration under regulations at 20 CFR part 658, subpart E. Any information relevant to an employment service complaint will be forwarded to the appropriate SWA. The public may also submit employment service complaints directly to the appropriate SWA; the contact information for each SWA is available at the following web page: <https://www.dol.gov/agencies/eta/foreign-labor/contact>.

Complaints regarding an employer's failure to comply with the H-2B program requirements may also be submitted to DOL's WHD. WHD has the authority to investigate the employer's attestations, as the attestations are a required part of the H-2B petition process under this rule and the attestations rely on the employer's existing, approved TLC. Where a WHD investigation determines that there has been a willful misrepresentation of a material fact or a substantial failure to meet the required terms and conditions of the attestations, WHD may institute administrative proceedings to impose sanctions and remedies, including (but not limited to) assessment of civil money penalties; recovery of wages due to workers; make-whole relief for any U.S. worker who has been improperly rejected for employment, laid off, or displaced; make-whole relief for any person who has been discriminated against; and/or debarment for 1 to 5 years. See 29 CFR 503.19, 503.20. This regulatory authority is consistent with WHD's existing enforcement authority and is not limited by the expiration date of this rule. Therefore, in accordance with the documentation retention requirements at 20 CFR 655.65, the petitioner must retain documents and records evidencing compliance with this rule, and must provide the documents and records upon request by DHS or DOL.

When conducting an investigation, WHD will generally review the employer's compliance with this rule, the H-2B program obligations in general, and any other Federal labor laws that WHD enforces (such as the Fair Labor Standards Act, which establishes minimum wage, overtime, recordkeeping and child labor obligations for most employers in the United States) and to which the employer is subject. WHD's investigations generally involve meeting

with the employer, touring the worksite, conducting confidential interviews with employees, reviewing records (including those required by 20 CFR 655.65 evidencing compliance with this rule), and, when appropriate, imposing sanctions and remedies (including back wages). For example, in the past five years (Fiscal Years 2019–2023), WHD collected more than \$16.7 million in H–2B back wages owed to 10,778 workers, and assessed more than \$12.4 million in H–2B civil money penalties.

Within the context of this rule, WHD's investigative tools are particularly adept for the review of alleged violations that may result in back wages and/or that require intensive fact-finding at the worksite. Additionally, WHD is well suited to investigate alleged violations that occur after the job order has closed and H–2B workers are already in the United States. For example, WHD's tools are well suited to investigate allegations that U.S. applicants were improperly rejected for the job opportunity (if supplemental recruitment was required as outlined in 20 CFR 655.64(a)(4)) after the job order has closed, as WHD may conduct employee interviews, question the employer as to why the applicant was not hired, review recruitment records, and, if a violation is substantiated, compute back wages for the improperly rejected U.S. applicant.

Additionally, WHD is well suited to investigate allegations of retaliation, as these cases involve complex fact finding and, if allegations are substantiated, may result in make-whole relief or back wages owed to the worker. An employer is prohibited from intimidating, threatening, restraining, coercing, blacklisting, discharging, or in any manner discriminating against any person who has, among other actions: filed a complaint related to H–2B rights and protections; consulted with a workers' rights center, community organization, labor union, legal assistance program, or attorney on H–2B rights or protections; or exercised or asserted H–2B rights and protections on behalf of themselves or others. 20 CFR 655.20(n) and 29 CFR 503.16(n). Examples of protected activity include making a complaint to a manager, employer, or WHD; cooperating with a WHD investigation; requesting payment of wages; refusing to return back wages to the employer; consulting with WHD or workers' rights organization; and testifying in a trial. If other laws are applicable (such as the Fair Labor Standards Act), the anti-retaliation provisions of those laws may also be applicable.

In addition to the H–2B Ombudsman Program and the employment service complaint system under 20 CFR part 658, subpart E, which are described above, workers or U.S. applicants for job opportunities who believe their rights under the H–2B program have been violated may file complaints with WHD by telephone at 1–866–487–9243 or may access the telephone number via TTY by calling 1–877–889–5627 or visit <https://www.dol.gov/agencies/whd> to locate the nearest WHD office for assistance. Complainants should be prepared to provide their name and contact information; name, address, and contact information for the employer; and details about the alleged violation. WHD maintains all complaints as confidential unless the complainant provides WHD with permission to use their name when speaking to the employer.

DHS has the authority to verify any information submitted to establish H–2B eligibility at any time before or after the petition has been adjudicated by USCIS. See, e.g., INA sections 103 and 214 (8 U.S.C. 1103, 1184); see also 8 CFR part 103 and section 214.2(h). DHS' verification methods may include, but are not limited to, review of public records and information, contact via written correspondence or telephone, unannounced physical site inspections, and interviews. USCIS will use information obtained through verification to determine H–2B eligibility and assess compliance with the requirements of the H–2B program. Subject to the exceptions described in 8 CFR 103.2(b)(16), USCIS will provide petitioners with an opportunity to address adverse information that may result from a USCIS compliance review, verification, or site visit that occurs after a formal decision is made on a petition or after the agency has initiated an adverse action that may result in revocation or termination of an approval.

DOL's OFLC already has the authority under 20 CFR 655.70 to conduct audit examinations on adjudicated Applications for Temporary Employment Certification, including all appropriate appendices, and verify any information supporting the employer's attestations. OFLC uses audits of adjudicated Applications for Temporary Employment Certification, as authorized by 20 CFR 655.70, to ensure employer compliance with attestations made in its Application for Temporary Employment Certification and to ensure the employer has met all statutory and regulatory criteria and satisfied all program requirements. The OFLC CO has sole discretion to choose which Applications for Temporary Employment

Certification will be audited. See 20 CFR 655.70(a). Post-adjudication audits can be used to establish a record of employer compliance or non-compliance with program requirements and the information gathered during the audit assists DOL in determining whether it needs to further investigate or debar an employer or its agent or attorney from future labor certifications.

Under this rule, an employer may submit a petition to USCIS, including a valid TLC and Form ETA–9142B–CAA–8, in which the employer attests to compliance with requirements for access to the supplemental H–2B visas allocated through 8 CFR 214.2(h)(6)(xiv), including that its business is suffering irreparable harm or will suffer impending irreparable harm, and that it will conduct additional recruitment, if necessary to refresh the TLC's labor market test. DHS and DOL consider Form ETA–9142B–CAA–8 to be an appendix to the Application for Temporary Employment Certification and the attestations contained on the Form ETA–9142B–CAA–8 and documentation supporting the attestations to be evidence that is incorporated into and a part of the approved TLC. Therefore, DOL's audit authority includes the authority to audit the veracity of any attestations made on Form ETA–9142B–CAA–8 and documentation supporting the attestations. In order to make certain that the supplemental visa allocation is not subject to fraud or abuse, DHS will continue to share information regarding Forms ETA–9142B–CAA–8 with DOL, consistent with existing authorities. This information sharing between DHS and DOL, along with relevant information that may be obtained through the separate SWA and WHD complaint systems, are expected to support DOL's identification of TLCs used to access the supplemental visa allocation for closer examination of TLCs through the audit process.

In accordance with the documentation retention requirements in this rule, the petitioner must retain documents and records proving compliance with this rule, and must provide the documents and records upon request by DHS or DOL. Under this rule, DOL will audit a significant number of TLCs used to access the supplemental visa allocation to ensure employer compliance with attestations, including those regarding the irreparable harm standard and additional employer conducted recruitment, required under this rule. In the event of an audit, the OFLC CO will send a letter to the employer and, if appropriate, a copy of the letter to the

employer's attorney or agent, listing the documentation the employer must submit and the date by which the documentation must be sent to the CO. During audits under this rule, the CO will request documentation necessary to demonstrate the employer conducted all recruitment steps required under this rule and truthfully attested to the irreparable harm the employer was suffering or would suffer in the near future without the ability to employ all of the H-2B workers requested under the cap increase, including documentation the employer is required to retain under this rule. If necessary to complete the audit, the CO may request supplemental information and/or documentation from the employer during the course of the audit process. 20 CFR 655.70(c).

Failure to comply in the audit process may result in the revocation of the employer's certification or in debarment, under 20 CFR 655.72 and 655.73, respectively, or require the employer to undergo assisted recruitment in future filings of an Application for Temporary Employment Certification, under 20 CFR 655.71. Where an audit examination or review of information from DHS or other appropriate agencies determines that there has been fraud or willful misrepresentation of a material fact or a substantial failure to meet the required terms and conditions of the attestations or failure to comply with the audit examination process, OFLC may institute appropriate administrative proceedings to impose sanctions on the employer. Those sanctions may result in revocation of an approved TLC, the requirement that the employer undergo assisted recruitment in future filings of an Application for Temporary Employment Certification for a period of up to 2 years, and/or debarment from the H-2B program and any other foreign labor certification program administered by DOL for 1 to 5 years. See 20 CFR 655.71, 655.72, 655.73. Additionally, OFLC has the authority to provide any finding made or documents received during the course of conducting an audit examination to DHS, WHD, IER, or other enforcement agencies. OFLC's existing audit authority is independently authorized, and is not limited by the expiration date of this rule. Therefore, in accordance with the documentation retention requirements at 20 CFR 655.65, the petitioner must retain documents and records proving compliance with this rule, and must provide the documents and records upon request by DHS or DOL.

Petitioners must also comply with any other applicable laws, such as avoiding

unlawful discrimination against U.S. workers based on their citizenship status or national origin. Specifically, the failure to recruit and hire qualified and available U.S. workers on account of such individuals' national origin or citizenship status may violate INA section 274B, 8 U.S.C. 1324b.

IV. Statutory and Regulatory Requirements

A. Administrative Procedure Act

This rule is issued without prior notice and opportunity to comment and with an immediate effective date pursuant to the Administrative Procedure Act (APA). 5 U.S.C. 553(b) and (d).

1. Good Cause To Forgo Notice and Comment Rulemaking

The APA, 5 U.S.C. 553(b)(B), authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency, for good cause, finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Among other things, the good cause exception for forgoing notice and comment rulemaking "excuses notice and comment in emergency situations, or where delay could result in serious harm." *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004). Courts have found "good cause" under the APA in similar situations when an agency is moving expeditiously to avoid significant economic harm to a program, program users, or an industry. See, e.g., *Nat'l Fed'n of Fed. Emps. v. Devine*, 671 F.2d 607, 611 (D.C. Cir. 1982) (holding that an agency may use the good cause exception to address "a serious threat to the financial stability of [a government] benefit program"); *Am. Fed'n of Gov't Emps. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (finding good cause when an agency bypassed notice and comment to avoid "economic harm and disruption" to a given industry, which would likely result in higher consumer prices).

Although the good-cause exception is "narrowly construed and only reluctantly countenanced," *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992), the Departments have appropriately invoked the exception in this case due to the time exigencies resulting from the unique procedural history of the Department's authority for this action and the ongoing economic need for this rulemaking, as described further below. Overall, the Departments are bypassing notice and comment to prevent "serious economic harm to the H-2B community,"

including U.S. employers, associated U.S. workers, and related professional associations, that could result from the failure to provide supplemental visas as authorized by Congress. See *Bayou Lawn & Landscape Servs. v. Johnson*, 173 F. Supp. 3d 1271, 1285 & n.12 (N.D. Fla. 2016). The Departments note that this action is temporary in nature, see *id.*,¹⁷⁵ and limits eligibility for H-2B supplemental visas to only those businesses most in need, and also protects H-2B and U.S. workers.

With respect to the supplemental allocations provisions in 8 CFR 214.2 and 20 CFR part 655, subpart A, as explained above, the Departments are acting pursuant to the extension of supplemental cap authority in Section 303 of the Consolidated Appropriations Act, 2023 by sections 101(6) and 106 of the Continuing Appropriations Act, 2024 and Other Extensions Act (authorized on September 30, 2023) to FY 2024.¹⁷⁶ The deadline for exercising the FY 2024 supplemental cap authority under the Continuing Appropriations Act, 2023 is November 17, 2023, the date on which the Continuing Appropriations Act, 2024 expires.¹⁷⁷ This timing concern is critical since the Departments are bypassing advance notice and comment in order to urgently address increased labor demand.¹⁷⁸ Acting expeditiously is intended to prevent economic harm resulting from American businesses suffering irreparable harm due to a lack of a sufficient labor force. This harm would ensue if the Departments do not exercise the authority provided by the extension of supplemental cap authority. USCIS

¹⁷⁵ Because the Departments have issued this rule as a temporary final rule, the supplemental cap portion of this rule—with the sole exception of the document retention requirements—will be of no effect after September 30, 2024. The ability to initiate employment with a new employer pursuant to the portability provisions of this rule expires at the end of on January 24, 2025.

¹⁷⁶ See Section 303, Consolidated Appropriations Act, 2023, Division O, Public Law 117–328 (Dec. 29, 2022), extended by sections 101(6) and 106 of the Continuing Appropriations Act, 2024 and Other Extensions Act, Division A ("Continuing Appropriations Act, 2024"), Public Law 118–15 (Sep. 30, 2023).

¹⁷⁷ Pursuant to section 101(6) and 106 of the Continuing Appropriations Act, 2024, Division A, Public Law 118–15, the deadline for exercising the FY 2024 supplemental cap authority under this act is Nov. 17, 2023, the date on which the Continuing Appropriations Act expires.

¹⁷⁸ See Irina Ivanova, *America's labor shortage is actually an immigrant shortage*, CBS News, <https://www.cbsnews.com/news/immigration-jobs-workers-labor-shortage/> (Apr. 8, 2022). ("U.S. employers say it's a hard time to find and keep talent. Workers are decamping at near-record rates, while millions of open jobs go unfilled. One reason for this labor crunch that has largely flown beneath the radar: Immigration to the U.S. is plummeting, a shift with potentially enormous long-term implications for the job market.")

received more than enough petitions to meet the H-2B visa statutory cap for the first half of FY 2024 on October 11, 2023.¹⁷⁹ Based on past years' experience, DHS anticipates that it will also receive sufficient petitions to meet the semiannual cap for the second half of the FY 2024; last year on February 27, 2023, USCIS received sufficient petitions to meet the H-2B visa statutory cap for the second half of FY 2023.¹⁸⁰ Given the continued high demand of American businesses for H-2B workers (as discussed in this preamble), rapidly evolving economic conditions and historically high labor demand, and the limited time remaining until the expiration of the continuing resolution authorizing supplemental cap authority to help prevent further irreparable harm currently experienced by some U.S. employers or avoid impending economic harm for others, a decision to undertake notice and comment rulemaking, which would delay final action on this matter by months, would greatly complicate and potentially preclude the Departments from successfully exercising the authority created by section 303, Public Law 117-328 as extended to FY 2024 by secs. 101(6) and 106, Public Law 118-15. If the Departments are precluded from exercising this authority, substantial economic harm will result for the reasons stated above.

The temporary portability and change of employer provisions in 8 CFR 214.2 and 274a.12 are also supported by labor market demands. Courts have found "good cause" under the APA when an agency is moving expeditiously to avoid significant economic harm to a program, program users, or an industry. Courts have held that an agency may use the good cause exception to address "a serious threat to the financial stability of [a government] benefit program," *Nat'l Fed'n of Fed. Emps. v. Devine*, 671 F.2d 607, 611 (D.C. Cir. 1982), or to avoid "economic harm and disruption" to a given industry, which would likely result in higher consumer prices, *Am. Fed'n of Gov't Emps. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

Finally, taking public comments on this year's temporary final rule before implementation may have limited

utility given that the Departments took post-promulgation public comments during a 60-day comment period on last year's (FY 2023) nearly identical TFR. Those comments are discussed in detail above in the preamble of this temporary final rule. In addition, DHS is separately pursuing broader programmatic improvements in the H-2B and H-2A programs through a separate notice and comment rulemaking which includes a proposal to make portability permanent for all H-2 workers.¹⁸¹

2. Good Cause To Proceed With an Immediate Effective Date

The APA also authorizes agencies to make a rule effective immediately, upon a showing of good cause, instead of imposing a 30-day delay. 5 U.S.C. 553(d)(3). The good cause exception to the 30-day effective date requirement is easier to meet than the good cause exception for foregoing notice and comment rulemaking. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992); *Am. Fed'n of Gov't Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 289-90 (7th Cir. 1979). An agency can show good cause for eliminating the 30-day delayed effective date when it demonstrates urgent conditions the rule seeks to correct or unavoidable time limitations. *U.S. Steel Corp.*, 605 F.2d at 290; *United States v. Gavrilovic*, 511 F.2d 1099, 1104 (8th Cir. 1977). For the same reasons set forth above expressing the need for immediate action, we also conclude that the Departments have good cause to dispense with the 30-day effective date requirement.

B. Executive Order 12866: Regulatory Planning and Review; Executive Order 14094: Modernizing Regulatory Review; and Executive Order 13563: Improving Regulation and Regulatory Review

Under E.O. 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 FR 51735. Section 3(f) of E.O. 12866, as amended by E.O. 14094, defines a "significant regulatory action" as an action that is

likely to result in a rule that: (1) has an annual effect on the economy of \$200 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. 88 FR 21879.

The Office of Management and Budget (OMB) has designated this temporary final rule a significant regulatory action under section 3(f)(1) of Executive Order 12866, as amended by Executive Order 14094, because its annual effects on the economy exceed \$200 million in any year of the analysis. Accordingly, OMB has reviewed this rule.

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

1. Summary

With this temporary final rule (TFR), DHS is authorizing the release of up to an additional 64,716 total H-2B visas to be allocated throughout FY 2024. In accordance with the FY 2024 continuing resolution extending the authority provided in section 303 of the FY 2023 Omnibus, DHS is allocating the supplemental visas in the following manner:

¹⁷⁹ See USCIS, *USCIS Reaches H-2B Cap for First Half of FY 2024*, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2024> (Oct 13, 2023).

¹⁸⁰ See USCIS, *USCIS Reaches H-2B Cap for Second Half of FY 2023 and Announces Filing Dates for the Second Half of FY 2023 Supplemental*

Visas, <https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-second-half-of-fy-2023-and-announces-filing-dates-for-the-second-half-of> (Mar. 2, 2023).

¹⁸¹ On September 20, 2023, DHS issued a Modernizing H-2 Program Requirements, Oversight, and Worker Protections Notice of

Proposed Rulemaking (NPRM), 88 FR 65040, 65066, with a 60-day public comment period that ends on November 20, 2023. In that NPRM, DHS proposed to extend portability to H-2A and H-2B workers on a permanent basis.

Table 1. Allocation of Supplemental Visas	
Supplement	Number of visas
FY24 First Half Returning Worker Allocation	20,716
FY24 Second Half Returning Worker Allocation	19,000
FY24 Second Half Returning Worker Allocation #2 - (Late season Filers)	5,000
FY24 Country-specific Allocation (available whole FY)	20,000
FY24 Total Supplemental Visas	64,716

As with previous H-2B visa supplements, these visas will be available to businesses that: (1) show that there are an insufficient number of U.S. workers to meet their needs throughout FY 2024; (2) attest that their businesses are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H-2B workers requested on their petition; and (3) petition for returning workers who were issued an H-2B visa or were otherwise granted H-2B status in FY 2021, 2022, or 2023, unless the H-2B worker is a national of one of the countries included in the country-specific allocation. Additionally, up to 20,000 visas may be granted to workers from countries included in the country-specific allocation who are exempt from the returning worker requirement. This TFR aims to prevent irreparable harm to

certain U.S. businesses by allowing them to hire additional H-2B workers within FY 2024.

The estimated total costs to petitioners range from \$7,530,484 to \$10,043,625. The estimated total cost to the Federal Government is \$350,028. Therefore, DHS estimates that the total cost of this rule ranges from \$7,880,512 to \$10,393,653. Total transfers from filing fees made by petitioners to the Government are \$9,214,500. The benefits of this rule are diverse, though some of them are difficult to quantify. Some of these benefits include:

- Employers benefit from this rule significantly through increased access to H-2B workers;
- Customers and others benefit directly or indirectly from increased access;
- Some American workers may benefit to the extent that they do not

lose jobs through the reduced or closed business activity that might occur if fewer H-2B workers were available;

- Some American workers may benefit from the additional recruitment activities that the rule requires certain petitioners to complete, to the extent that these activities could result in some U.S. workers being hired.
- The existence of a lawful pathway for up to 20,000 temporary workers from countries included in the country-specific allocation is likely to provide multiple benefits in terms of U.S. policy with respect to those countries; and
- The Federal Government benefits from increased evidence regarding attestations. Table 2 provides a summary of the provisions in this rule and some of their impacts.

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Table 2. Summary of the TFR's Provisions and Economic Impact

Current Provision	Changes Resulting from the Provisions of the TFR	Expected Costs of the Provisions of the TFR	Expected Benefits of the Provisions of the TFR
- The current statutory cap limits H-2B visa allocations to 66,000 workers a year.	- The amended provisions will allow for an additional 64,716 H-2B temporary workers. Up to 20,000 of the 64,716 additional visas will be reserved for workers who are nationals of the countries included in the country-specific allocation and will be exempt from the returning worker requirement.	- The total estimated opportunity cost of time to file Form I-129 (Petition for a Nonimmigrant Worker) by human resource specialists is approximately \$508,705. The total estimated opportunity cost of time to file Form I-129 and Form G-28 will range from approximately \$1,214,165 if filed by in-house lawyers to approximately \$2,093,429 if filed by outsourced lawyers. The total estimated opportunity cost of time associated with filing additional petitions ranges from \$1,722,870 to \$2,602,134 depending on the filer. - The total estimated opportunity cost of time associated with filing Form I-907 (Request for Premium Processing Service) if it is filed with Form I-129 is	- Form I-129 petitioners would be able to hire temporary workers needed to prevent their businesses from suffering irreparable harm. - Businesses that are dependent on the success of other businesses that are dependent on H-2B workers would be protected from the repercussions of local business failures. - Some American workers may benefit to the extent that they do not lose jobs through the reduced or closed business activity that might occur if additional H-2B workers were not available. - Additional recruitment activities may result in some U.S. workers being hired.

		\$62,173 if filed by human resource specialists. The total estimated costs associated with filing Form I-907 would range from approximately \$124,560 if filed by an in-house lawyer to approximately \$214,754 if filed by an outsourced lawyer. The total estimated opportunity cost of time associated with requesting premium processing ranges from approximately \$186,733 to approximately \$276,927. - The total estimated costs of this provision to petitioners range from \$1,909,603 to \$2,879,061, depending on the filer.	
n/a	-Petitioners will be required to fill out Form ETA-9142B in order to utilize the 5,000 late season H-2B visas allocated under the rule.	- The estimated cost for late season petitioners to file Form ETA-9142B ranges from \$59,068 to \$87,595 depending on the filer.	-An approved Form ETA-9142B is required before filing a Form I-129 to request H-2B workers.
n/a	- Petitioners will be required to fill out the newly created Form ETA-9142-B-CAA-8, Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 303 of Division O of the Consolidated Appropriations Act, 2023, Public Law 117-328, as extended by sections 101(6) and 106 of Division A of the	- The total estimated cost to petitioners to complete and file Form ETA-9142-B-CAA-8 is approximately \$1,912,291.	- Form ETA-9142-B-CAA-8 will serve as initial evidence to DHS that the petitioner meets the irreparable harm standard and returning worker requirements.

	Continuing Appropriations Act, 2024 and Other Extensions Act, Public Law 118-15.		
n/a	- Certain Petitioners would be required to conduct an additional round of recruitment.	- The total estimated cost to petitioners to conduct an additional round of recruitment is approximately \$284,245.	- The additional round of recruitment will ensure that a U.S. worker who is willing and able to fill the position is not replaced by a nonimmigrant worker. Furthermore, additional recruitment activities may result in some U.S. workers being hired.
Temporary Portability	- An H-2B nonimmigrant who is physically present in the United States may port to another employer.	- The total estimated opportunity cost of time to file Form I-129 by human resource specialists is approximately \$34,046. The total estimated opportunity cost of time to file Form I-129 and Form G-28 will range from approximately \$81,456 if filed by in-house lawyers to approximately \$140,444 if filed by outsourced lawyers. - The total estimated costs associated with filing Form I-907 if it is filed with Form I-129 is \$4,167 if filed by human resource specialists. The total estimated costs associated with filing Form I-907 would range from approximately \$8,344 if filed by an in-house lawyer to approximately \$14,385 if filed by an outsourced lawyer. - The total estimated costs associated with	- H-2B workers present in the United States will be able to port to another employer and potentially extend their stay and, therefore, earn additional wages. - An H-2B worker with an employer that is not complying with H-2B program requirements would have additional flexibility in porting to another employer's certified position. - This provision would ensure employers will be able to hire the H-2B workers they need.

		the portability provision ranges from \$128,013 to \$193,042, depending on the filer. - DHS may incur some additional adjudication costs as more petitioners file Form I-129. However, these additional costs to USCIS are expected to be covered by the fees paid for filing the form, which have been accounted for in costs to petitioners.	
n/a	- DHS and DOL intend to conduct several audits during the period of temporary need to verify compliance with H-2B program requirements, including the irreparable harm standard as well as other key worker protection provisions implemented through this rule.	- Employers will have to comply with audits for an estimated total opportunity cost of time of \$213,948. - It is expected both DHS and DOL will be able to shift resources to be able to conduct these audits without incurring additional costs. However, the Departments will incur opportunity costs of time. The audits are expected to take a total of approximately 4,200 hours and cost approximately \$350,028.	- DOL and DHS audits will yield evidence of the efficacy of attestations in enforcing compliance with H-2B supplemental cap requirements. - Conducting a significant number of audits will discourage uncorroborated attestations.
Additional Scrutiny	- Some petitioners will provide additional evidence.	- Some employers will need to print and ship additional evidence to USCIS. Opportunity costs of time associated with compiling such evidence are unavailable due to the unique fact pattern in each instance and a lack of data regarding the time to comply. The	- Additional scrutiny of employers with past H-2B program violations are aimed at ensuring compliance with program requirements, reducing harms to both U.S. workers and H-2B workers.

		estimated cost to submit additional evidentiary requirements is \$22,028.	
Familiarization Cost	- Petitioners or their representatives will familiarize themselves with the rule.	- Petitioners or their representatives will need to read and understand the rule at an estimated total opportunity cost of time that ranges from \$3,001,288 to \$4,451,415.	- Petitioners will have the necessary information to take advantage of and comply with the provisions of this rule.
Total Costs		Total cost of the rule to petitioners ranges from \$7,530,484 to \$10,043,625 depending on the filer. Total costs of the rule to government are \$350,028. Total costs of the rule range from \$7,880,512 to \$10,393,653.	
Source: USCIS and DOL analysis.			

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2. Background and Purpose of the Temporary Rule

The H-2B visa classification program was designed to serve U.S. businesses that are unable to find enough U.S. workers to perform nonagricultural work of a temporary nature. For a nonimmigrant worker to be admitted into the United States under this visa classification, the hiring employer is required to: (1) receive a temporary labor certification (TLC) from the Department of Labor (DOL); and (2) file Form I-129 with DHS. The temporary nature of the services or labor described on the approved TLC is subject to DHS review during adjudication of Form I-129.¹⁸² The INA sets the annual number of H-2B visas for workers performing temporary nonagricultural work at 66,000 to be distributed semiannually beginning in October (33,000) and in

April (33,000).¹⁸³ Any unused H-2B visas from the first half of the fiscal year are available for employers seeking to hire H-2B workers during the second half of the fiscal year. However, any unused H-2B visas from one fiscal year do not carry over into the next and would therefore not be made available.¹⁸⁴ Once the statutory H-2B visa cap limit has been reached, petitioners must wait until the next half of the fiscal year, or the beginning of the next fiscal year, for additional visas to become available.

On September 30, 2023, the President signed the Continuing Appropriations Act, 2024 and Other Extensions Act. Sections 101(6) and 106 reauthorize Sec. 303 of Div. O of the Consolidated Appropriations Act FY 2023, permitting the Secretary of Homeland Security, under certain circumstances, to increase

the number of H-2B visas available to U.S. employers, notwithstanding the established statutory numerical limitation. After consulting with the Secretary of Labor, the Secretary of the Homeland Security has determined it is appropriate to exercise his discretion and raise the H-2B cap by up to a total of 64,716 visas for FY 2024. The total supplemental allocation will be divided into four separate allocations: one for the first half of FY 2024, two for the second half of FY 2024 (a first one for employment from April 1 through May 14, 2024, and a second one for those with start dates on or after May 15, 2024), and a full fiscal year allocation for workers from the countries included in the country-specific allocation. As with previous supplemental allocations, USCIS will make these supplemental visas available only to businesses that qualify and meet the requirements for the supplemental visas. These businesses must attest that they are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all the H-2B workers requested on their petition.

¹⁸² Revised effective 1/18/2009; *Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers; Correction*, 73 FR 78104 (Jan. 19, 2009); *Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers; Correction*, 74 FR 2837 (Jan 18, 2009).

¹⁸³ See INA 214(g)(1)(B), 8 U.S.C. 1184(g)(1)(B) and INA 214(g)(4), 8 U.S.C. 1184(g)(4).

¹⁸⁴ A temporary labor certification (TLC) approved by the Department of Labor must accompany an H-2B petition. The employment start date stated on the petition must match the start date listed on the TLC. See 8 CFR 214.2(h)(6)(iv)(A) and (D).

In contrast to previously issued H-2B TFRs which codified the availability of supplemental H-2B visas only after the relevant statutory fiscal half-year caps had been reached, the Secretaries have determined that this TFR will cover the entirety of FY 2024. While the

Departments cannot predict with certainty what labor market conditions will be during the second half of FY 2024, they believe that the structure of this TFR is reasonable because: (1) the availability of the second half FY supplemental visas is contingent on the

exhaustion of the second half FY statutory cap, (2) strong historical demand for H-2B workers, and (3) mainstream estimates of labor market conditions for FY 2024 indicate a continuation of labor market tightness from a historical perspective.¹⁸⁵

Table 3. DOL Certified Worker Demand¹⁸⁶

Fiscal Year	Number of Certifications	Number of DOL Certified Workers Requested	DOL Certified Workers with requested start dates 4/1 or later
2019	7,044	141,787	91,209
2020	6,001	123,291	78,544
2021	6,365	136,711	89,543
2022	8,899	177,429	113,108
2023	10,385	193,961	113,505
5-yr Average ¹⁸⁷	7,739	154,636	97,182

With respect to historical demand for H-2B workers, Table 3 makes two important points supporting the Departments' decision to structure this rule in a manner that covers the entire fiscal year. First, Table 3 shows that H-2B demand, as represented by the number of workers requested on certified TLCs, has outpaced the statutorily capped allotment of H-2B visas. This demonstrates that, in aggregate, there is sufficient demand for the entire supplementary allocation that the Departments are making available. To that end, the 5-year average of workers requested on certified TLCs, 154,636, would still completely exhaust the total supplementary allocation made available by the TFR. Second, Table 3 demonstrates that within a given fiscal year, demand for H-2B workers is particularly strong in the second half of the fiscal year. On average over the last 5 fiscal years, H-2B employers have requested 97,182 employees with start dates on April 1 or later, which would completely exhaust the 24,000¹⁸⁸ total supplemental H-2B visas explicitly set aside for workers with employment start dates in the second half of FY 2024. Given these conditions, the Departments believe that the decision to authorize a second half supplement is reasonable.

In terms of the actual distribution of the visas being made available by the Rule, the Departments have determined that up to 44,716 of the 64,716 supplemental visas will be limited to returning H-2B returning workers for nationals of any country. These individuals must be workers who were issued H-2B visas or were otherwise granted H-2B status in fiscal years 2021, 2022, or 2023. The 44,716 visas for returning workers will be divided into three separate allocations that will be available to petitioners over the fiscal year. The first allocation is comprised of 20,716 visas for returning workers with requested start dates between October 1, 2023, and March 31, 2024. These visas will be available to petitioners immediately upon the publication of the rule. The second allocation is comprised of 19,000 visas for returning workers with requested start dates between April 1, 2024, and May 14, 2024. These visas will be available to petitioners 15 calendar days after the second half statutory cap of 33,000 visas is reached. The third allocation is comprised of 5,000 visas for returning workers with requested start dates between May 15, 2024, and September 30, 2024. These visas will be available to petitioners 45

calendar days after the second half statutory cap of 33,000 visas is reached.

The inclusion of an allocation of visas specifically for those petitioners with employment needs starting on or after May 15 is in response to trends in TLC data. As stated in the FY 2023 H-2B TFR, the relative demand in FY 2016 for workers with start dates later in the fiscal year was higher relative to recent years. More specifically, data for FY 2016 show that approximately 45.51 percent of certified TLCs requested workers with start dates in April while 17.93 percent of certified TLCs requested workers with start dates after April.¹⁸⁹ Table 4 and Table 5 demonstrate that the 5-year average for these values skew toward April start dates. The increase in the relative prevalence of April 1 start dates since 2016 raises the question whether petitioners with employment needs later in the fiscal year may not have the opportunity to utilize the H-2B program because the supply of supplemental visas is already exhausted by the time a petitioner with a later start date can file a TLC and receive eligibility to request workers on Form I-129. Under DOL regulations, employers must apply for a TLC 75 to 90 days before the start

¹⁸⁵ September 2023 Federal Open Market Committee (FOMC) projections for unemployment rate in 2024 ranged from 3.7 to 4.5% with central tendency more tightly clustered between 3.9 and 4.4%. See <https://www.federalreserve.gov/monetarypolicy/fomcprojtabl20230920.htm> (last accessed Sept. 29, 2023).

¹⁸⁶ USCIS analysis of OFLC Performance data. All data are for applications listed as having a case status of "Certification", "Partial Certification",

"Determination—Certification", or "Determination—Partial Certification". Furthermore, data have been adjusted to a fiscal year using the employment begin date provided on the TLC application. As such, counts differ from counts based on the Disclosure Files of OFLC H-2B Performance data. This adjustment was made so that the OFLC data more closely align to USCIS I-129 data. Data for FY 2023 include data through the end of quarter 3.

¹⁸⁷ Averages are rounded to the nearest whole number.

¹⁸⁸ 19,000 visas for returning workers and 5,000 visas for filers with employment start dates May 15, 2024 or later.

¹⁸⁹ See <https://www.federalregister.gov/documents/2022/12/15/2022-27236/exercise-of-time-limited-authority-to-increase-the-numerical-limitation-for-fy-2023-for-the-h-2b> (accessed September 26, 2023).

date of work.¹⁹⁰ Employers must have a DOL-approved TLC before filing their Form I-129 request for H-2B workers with USCIS. Because the availability of H-2B visas is limited by statute and regulation, USCIS generally announces to the public when it has received a sufficient number of I-129 petitions, and by extension H-2B beneficiaries, to

exhaust the respective H-2B visa allocation.¹⁹¹ USCIS rejects H-2B I-129 petitions that are received after USCIS has determined that a given allocation has been fully utilized. Functionally, this means that a subset of petitioners that would utilize H-2B workers given the chance may not be able to do so because the available visas have already

been allocated before they can petition USCIS for the necessary workers. Using OFLC TLC data, Table 4 illustrates that relative to 2016, when employers of returning workers had greater flexibility in determining TLC-requested start dates, requested H-2B employment start dates have become increasingly concentrated in April.¹⁹²

Table 4. DOL Certified Worker Demand for April Start Dates

Fiscal Year	Certified DOL Workers Requested	DOL Certified Workers with requested start dates in April	Percentage of DOL Certified Workers with requested start dates in April
2016	93,324	42,469	45.51%
2018	129,374	80,239	62.02%
2019	141,787	85,421	60.25%
2020	123,291	76,168	61.78%
2021	136,711	86,589	63.34%
2022	177,429	108,361	61.07%

Table 5. DOL Certified Worker Demand post-April Start Dates

Fiscal Year	Certified DOL Workers Requested	DOL Certified Workers with requested start dates after April	Percentage of DOL Certified Workers with requested start dates after April
2016	93,324	16,736	17.93%
2018	129,374	5,470	4.23%
2019	141,787	5,788	4.08%
2020	123,291	2,376	1.93%
2021	136,711	2,954	2.16%
2022	177,429	4,747	2.68%

¹⁹⁰ See 20 CFR 655.15(b).

¹⁹¹ See USCIS, *Cap Reached for Additional Returning Worker H-2B Visas for Second Half of FY 2022*, <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-second-half-of-fy-2022> (May 31, 2022).

¹⁹² Tables 4 and 5 contain USCIS analysis of OFLC Performance data. All data are for applications listed as having a case status of "Certification", "Partial Certification", "Determination—Certification", or "Determination—Partial Certification." Furthermore, data have been adjusted to a fiscal

year using the employment begin date provided on the TLC application. As such, counts differ from counts based on the Disclosure Files of OFLC H-2B Performance data. This adjustment was made so that the OFLC data more closely align to USCIS I-129 data.

This has given rise to the concern that this proliferation of April start dates may be crowding out employers with labor needs later in the season (shown in Table 5). These data suggest there may be structural barriers that preclude employers with later start dates from being able to employ needed workers through the H-2B program. To illustrate, in FY 2016, a temporary statutory provision exempted certain H-2B visas from the cap that had been counted against the cap in any of the three prior fiscal years. Data from FY 2016 show a much higher incidence of employers that request relatively later start dates, suggesting that employers with late-season needs would use the H-2B program but for the unavailability of visas.

As part of the FY 2023 TFR, USCIS made 10,000 visas available to petitioners with start dates later in the season (after May 15). The goal for this separate allocation was to address this potentially inequitable situation and to take steps towards collecting information through that rule to determine whether such a structural barrier exists. As of September 2023, approximately 72 percent of the late-season filer allocation was used.¹⁹³ Preliminary analysis of Form I-129 filings under the late-season filer allocation suggests some variation in the demand by industry appeared for this allocation. Specifically, petitioners in the Seafood Product Preparation and Packaging industry (NAICS 3117), appeared to respond to the availability of the late-season filer allocation. This industry historically requested temporary H-2B workers during the first half of the fiscal year for both statutory caps and any available supplemental allocations, such that well over 50 percent of the total industry beneficiaries were for the first half of a given fiscal year.¹⁹⁴ For FY 2023, however, approximately 47 percent of industry beneficiaries were requested

under first half caps while almost 22 percent were requested under the late-season filer allocation.¹⁹⁵ This data point, while limited, provides some evidence that certain industries may be able to more efficiently fulfill their temporary labor needs by petitioning for beneficiaries under this cap.

While DOL TLC data indicates that there was sufficient employer demand to exhaust the late-season filer allocation, the Form I-129 filing data mentioned above indicates that fewer employers took the subsequent (and necessary) step of filing for supplemental workers under this cap.¹⁹⁶ Therefore, the Departments' experience with the late-season filer allocation under the prior TFR confirms that the demand for workers with later start dates exists, though it may not be fully reflected in petition filings. To that end, USCIS has elected to scale down this allocation, as mentioned in the preamble.

The Secretaries have also determined that up to 20,000 of the 64,716 additional visas will be reserved for workers who are nationals of the countries included in the country-specific allocation and that these 20,000 workers will be exempt from the returning worker requirement. These visas will be available for the entirety of the fiscal year and do not have limitations regarding the requested start date of the H-2B beneficiaries' employment within the fiscal year. If the 20,000-visa limit has been reached, a petitioner may request H-2B visas for workers who are nationals of the countries included in the country-specific allocation but these workers must be returning workers.

The Departments note that they are committed to analyzing the results and impacts of this and future H-2B supplemental visa TFRs in a holistic manner, and have attempted to fully quantify the potential impacts of the FY 2024 TFR, where time and data allow.

3. Population

This rule will affect those employers that file Form I-129 on behalf of nonimmigrant workers they seek to hire under the H-2B visa program. More specifically, this rule will affect those employers that can establish that their business is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all the H-2B workers requested on their petition and without the exercise of authority that is the subject of this rule. Due to historical trends and strong demand for the H-2B program (see Table 3), the Departments believe that it is reasonable to assume that the population of eligible petitioners for these additional 64,716 visas will generally be the same population as those employers that would already complete the steps to receive an approved TLC irrespective of this rule. One exception is the population of late season employers, described below.

This rule will also have additional impacts on the population of H-2B employers and workers presently in the United States by permitting some H-2B workers to port to another certified H-2B employer. These H-2B workers will continue to earn wages and gaining employers will continue to obtain necessary workers.

a. Population That Will File a Form I-129, Petition for a Nonimmigrant Worker

As discussed above, the population that will file a Form I-129 is necessarily limited to those business that have already established that their business is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all the H-2B workers requested on their petition and without the exercise of authority that is the subject of this rule. Because the number of supplementary visas available is finite, USCIS has generally informed the public when the number of submitted Form I-129 petitions and, by extension, the number of respective beneficiaries is enough to exhaust the supply of supplemental visas.¹⁹⁷

¹⁹⁷ See, e.g., <https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-second-half-of-fy-2022>.

¹⁹³ USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 09/2023, TRK 12921. Calculation: 7,198 beneficiaries granted visas under the late-season filer allocation/10,000 visas allocated = 71.98% utilization.

¹⁹⁴ For Fiscal Years 2018 through 2022, Petitioners in NAICS 3117 were approved for 49,332 non cap-exempt beneficiaries. Of that total, 31,204 were approved for the 1st half of a fiscal year, yielding a rate of 63% (rounded).

¹⁹⁵ USCIS Analysis as of 7/29/2023, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 07/2023, TRK 12149.

¹⁹⁶ See DOL H-2B public disclosure data for FY 2023 covering applications processed on and after October 1, 2022, through June 30, 2023, at Performance Data | U.S. Department of Labor (<https://www.dol.gov/agencies/eta/foreign-labor/performance>).

Table 6. I-129 Petitions per Supplemental H-2B Visa Allocation

Supplement	Supplement Amount	Total I-129 Petitions Received	Total I-129 Beneficiaries	Beneficiaries per I-129 petition
2018 Supplement	15,000	983	15,868	16.14
2019 Supplement	30,000	2,700	33,239	12.31
2021 Supplement ¹⁹⁸	22,000	2,180	31,274	14.35
2022 Supplement ¹⁹⁹	55,000	4,045	61,868	15.29
2023 Supplement	64,716	4,900	79,095	16.14
Average				14.85

Table 6 shows the total supplemental H-2B visa allocations issued by the Departments in each fiscal year since 2017,²⁰⁰ including the total number of petitions and the total number of beneficiaries submitted under a supplement in each fiscal year. Using the historical average of 14.85 beneficiaries per petition for supplemental visas derived in Table 6, USCIS anticipates that 4,358 Forms I-129 will be submitted as a result of this temporary final rule.²⁰¹

Using the estimates in Table 6, the Departments further estimate that the allocation of 5,000 visas for late season filers made by this TFR, addressing the disadvantage these employers face in accessing scarce H-2B visas, will result in 337²⁰² additional Form ETA-9142B requests to DOL, assuming each late season visa requestor submits a TLC and Form I-129 for the historic average of 14.85 beneficiaries. The number of additional Form ETA-9142B requests

could be lower if some petitioners that would have filed for April 1 start dates in the absence of this TFR change their behavior to request late season workers as a result of this allocation.

Alternatively, this number could be higher if late season filers are at a larger disadvantage in accessing H-2B workers than recent data suggests. The Departments commit to monitoring the utilization of these late season FY24 visas to determine if this carve-out promotes access, as anticipated, to employers with needs for workers later in the second half of the fiscal year but that have faced obstacles to accessing H-2B workers in the past.

USCIS recognizes that some employers will have to submit two I-129 Forms if they choose to request H-2B workers under both the returning worker and country-specific caps. At this time, USCIS cannot predict how many employers will choose to take advantage of more than one allocation,

and therefore recognizes that the number of petitions may be underestimated.

b. Population That Files Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative

If a lawyer or accredited representative submits Form I-129 on behalf of the petitioner, Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, must accompany the Form I-129 submission.²⁰³ Using data from FY 2018 to FY 2022, we estimate that a lawyer or accredited representative will file 47.21 percent of Form I-129 petitions. Table 7 shows the percentage of Form I-129 H-2B petitions that were accompanied by a Form G-28. Therefore, we estimate that in-house or outsourced lawyers will file 2,057 Forms I-129 and Forms G-28, and that human resources (HR) specialists will file 2,301 Forms I-129.²⁰⁴

¹⁹⁸ In Fiscal Year 2021, the Departments authorized a single supplemental allocation which was divided between returning workers and workers from specific countries. See <https://www.federalregister.gov/documents/2021/05/25/2021-11048/exercise-of-time-limited-authority-to-increase-the-fiscal-year-2021-numerical-limitation-for-the> (accessed October 6, 2023).

¹⁹⁹ In Fiscal Year 2022, the Departments authorized two separate supplemental allocations of H-2B Visas, with each being further divided between returning workers and workers from specific countries. See <https://www.federalregister.gov/documents/2022/01/28/>

2022-01866/exercise-of-time-limited-authority-to-increase-the-fiscal-year-2022-numerical-limitation-for-the; <https://www.federalregister.gov/documents/2022/05/18/2022-10631/exercise-of-time-limited-authority-to-increase-the-numerical-limitation-for-second-half-of-fy-2022>.

²⁰⁰ FY 2020 was not included due to the suspension of additional H-2B visas to be released in 2020. DHS also noted that the Department of State had suspended routine visa services.

²⁰¹ Calculation for expected petitions. If each I-129 requests 14.85 workers, we'd expect to see 4,358 petitioners exhausting the 64,716 supplement

allocated this year: $64,716 / 14.85 = 4,358$ (rounded).

²⁰² Calculation for expected late season TLCs: $5,000 \text{ visas} / 14.85 \text{ beneficiaries per petition} = 337$ TLCs (rounded down).

²⁰³ USCIS, *Filing Your Form G-28*, <https://www.uscis.gov/forms/filing-your-form-g-28>.

²⁰⁴ Calculation: $4,358 \text{ estimated additional petitions} * 47.21 \text{ percent of petitions filed by a lawyer} = 2,057$ (rounded) petitions filed by a lawyer.

Calculation: $4,358 \text{ estimated additional petitions} - 2,057 \text{ petitions filed by a lawyer} = 2,301$ petitions filed by an HR specialist.

Table 7. Form I-129 H-2B Petition Receipts That Were Accompanied by a Form G-28, FY 2019-2023.

Fiscal Year	Number of Form I-129 H-2B petitions accompanied by a Form G-28	Total Number of Form I-129 H-2B petitions received	Percent of Form I-129 H-2B petitions accompanied by a Form G-28
2019	3,335	7,461	44.70%
2020	2,434	5,422	44.89%
2021	4,228	9,160	46.16%
2022	5,983	12,392	48.28%
2023	6,498	13,181	49.30%
2019 - 2023 Total	22,478	47,616	47.21%
Source: USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 09/2023, TRK 12921			

c. Population That Files Form I-907, Request for Premium Processing Service

Employers may use Form I-907, Request for Premium Processing Service, to request faster processing of their Form I-129 petitions for H-2B visas. Table 8 shows the percentage of

Form I-129 H-2B petitions that were filed with a Form I-907. Using data from FY 2018 to FY 2022, USCIS estimates that approximately 91.43 percent of Form I-129 H-2B petitioners will file a Form I-907 requesting premium processing. Based on this historical data, USCIS estimates that

3,985 Forms I-907 will be filed with the Forms I-129 as a result of this rule.²⁰⁵ Of these 3,985 premium processing requests, we estimate that in-house or outsourced lawyers will file 1,881 Forms I-907 and HR specialists or an equivalent occupation will file 2,104.²⁰⁶

Table 8. Form I-129 H-2B Petition Receipts that Were Accompanied by a Form I-907, FY 2019-2023.

Fiscal Year	Number of Form I-129 H-2B Petitions Accompanied by Form I-907	Total Number of Form I-129 H-2B Petitions Received	Percent of Form I-129 H-2B Petitions Accompanied by Form I-907
2019	7,227	7,461	96.86%
2020	4,341	5,422	80.06%
2021	8,650	9,160	94.43%
2022	11,773	12,392	95.00%
2023	11,543	13,181	87.57%
2019 - 2023 Total	43,534	47,616	91.43%
Source: USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 09/2023, TRK 12921			

²⁰⁵ Calculation: 4,358 estimated additional petitions * 91.43 percent premium processing filing rate = 3,985 (rounded) additional Form I-907.

²⁰⁶ Calculation: 3,985 additional Form I-907 * 47.21 percent of petitioners represented by a lawyer = 1,881 (rounded) additional Form I-907 filed by a lawyer.

Calculation: 3,985 additional Form I-907 – 1,881 additional Form I-907 filed by a lawyer = 2,104 additional Form I-907 filed by an HR specialist.

d. Population That Files Form ETA-9142-B-CAA-8, Attestation for Employers Seeking To Employ H-2B Nonimmigrant Workers Under Section 303 of Division O of the Consolidated Appropriations Act, 2023, Public Law 117-328, as Extended by Sections 101(6) and 106 of Division A of the Continuing Appropriations Act, 2024 and Other Extensions Act, Public Law 118-15

Petitioners seeking to take advantage of this FY 2024 H-2B supplemental visa cap will need to file a Form ETA-9142-B-CAA-8 attesting that their business is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all the H-2B workers requested on the petition, comply with third-party notification, and maintain required records, among other requirements. DOL estimates that each of the 4,358 petitions will need to be accompanied by Form ETA-9142-B-CAA-8 and petitioners filing these petitions and attestations will incur burdens complying with the evidentiary requirements.

e. Population of Late Season Employers That File Form ETA-9142B, Application for Temporary Employment Certification

As Table 3 demonstrated, historical data strongly indicate that there will be sufficient demand such that only those petitioners that utilize the late season allocation of supplemental visas will need to file an additional Form ETA-9142B. Assuming that the historical average of 14.85 beneficiaries per I-129 petition holds, 337²⁰⁷ petitioners will need to file Form ETA-9142B as a direct result of the provision reserving 5,000 visas for beneficiaries of these employers. Given estimates from Table 7 of the percentage of Form I-129 H-2B

petitions accompanied by a Form G-28, we estimate that in-house or outsourced lawyers will file 159 of these Forms ETA-9142B, and that human resources (HR) specialists will file 178 Forms ETA-9142B.²⁰⁸

f. Population That Must Undergo Additional Recruitment Activities

An employer that files Form ETA-9142B-CAA-8 and the I-129 petition 30 or more days after the certified start date of work must conduct additional recruitment of U.S. workers. This consists of placing a new job order with the State Workforce Agency (SWA), contacting the relevant American Job Center (AJC), contacting former U.S. workers, contacting the bargaining representative or posting the job order in the places and manner described in 20 CFR 655.45(b) if there is no bargaining representative, contacting current U.S. workers, posting the job to the company's website if it maintains one and, if applicable, contacting the AFL-CIO.

The Departments assume that, due to the timing of the publication of the rule, only petitioners that file for H-2B workers under the first half supplemental allocation of 20,716 workers will incur burdens associated with this additional recruitment. By utilizing the average number of beneficiaries per Form I-129 petition established in Table 6, the Departments estimate that the population of petitioners that would need to fulfill the additional recruitment requirements would be 1,395.²⁰⁹

²⁰⁸ Calculation: 337 estimated additional requests * 47.21 percent of petitions filed by a lawyer (see Table 5) = 159 (rounded) ETA-9142-B requests filed by a lawyer.

Calculation: 337 estimated additional requests - 159 requests filed by a lawyer = 178 requests filed by an HR specialist.

²⁰⁹ Calculation: 20,716 workers in the 1st half returning working supplemental allocation/14.85 workers per petitioner = 1,395 (rounded) petitioners required to undertake additional recruitment.

g. Population Affected by the Portability Provision

The population affected by this provision are nonimmigrants in H-2B status who are present in the United States and the employers with valid TLCs seeking to hire H-2B workers. We use the population of 66,000 H-2B workers authorized by statute and the 64,716 additional H-2B workers authorized by this rule as a proxy for the H-2B population that could be currently present in the United States.²¹⁰ USCIS uses the number of Forms I-129 filed for extension of stay due to change of employer relative to the Forms I-129 filed for new employment from FY 2016 to FY 2020, the five years prior to the implementation of the first portability provision in a H-2B supplemental cap TFR, to estimate the baseline rate. We compare the average rate from FY 2016-FY 2020 to the average rate from FY 2021-FY 2023. Table 9 presents the number of Forms I-129 filed for extensions of stay due to change of employer and Forms I-129 filed for new employment for Fiscal year 2016 FY through FY 2020. The average rate of extension of stay due to change of employer compared to new employment is approximately 12.6 percent.

²¹⁰ H-2B workers may have varying lengths in time approved on their H-2B visas. This number may overestimate H-2B workers who have already completed employment and departed and may underestimate H-2B workers not reflected in the current cap and long-term H-2B workers. In FY 2021, USCIS approved 735 requests for change of status to H-2B, and Customs and Border Protection (CBP) processed 1,341 crossings of visa-exempt H-2B workers. See *Characteristics of H-2B Nonagricultural Temporary Workers FY2021 Report to Congress*, <https://www.uscis.gov/sites/default/files/document/reports/H-2B-FY21-Characteristics-Report.pdf> (accessed April 4, 2022). USCIS assumes some of these workers, along with current workers with a valid H-2B visa under the cap, could be eligible to port under this new provision. USCIS does not know the exact number of H-2B workers who would be eligible to port at this time but uses the cap and supplemental cap allocations as a possible proxy for this population.

²⁰⁷ Calculation for expected late season TLCs: 5,000 late season visas/14.85 beneficiaries per petition = 337 TLCs (rounded up).

Table 9. Numbers of Form I-129 H-2B Petitions Filed for Extension of Stay due to Change of Employer and Form I-129 H-2B Petitions Filed for New Employment, FY 2016 – FY 2020

Fiscal Year	Form I-129 H-2B petitions filed for extension of stay due to change of employer	Form I-129 H-2B petitions filed for new employment	Rate of extension to stay due to change of employer filings relative to new employment filings
2016	427	5,750	7.4%
2017	556	5,298	10.5%
2018	744	5,136	14.5%
2019	812	6,251	13.0%
2020	804	3,997	20.1%
FY 2016 -2020 Total	3,343	26,433	12.6%
USCIS, USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 09/2023, TRK 12921			

In FY 2021, the first year an H-2B supplemental cap included a portability provision, there were 1,113 Forms I-129 filed for extension of stay due to change of employer compared to 7,206 Forms I-129 filed for new employment.²¹¹ In FY 2022, there were 1,795 Forms I-129 filed for extension of stay due to change of employer compared to 9,231 Forms I-129 filed for new employment.²¹² In FY 2023, there were 2,113 Forms I-129 filed for extension of stay due to change of employer compared to 9,579 Forms I-129 filed for new employment.²¹³ Over the period when a portability provision was in place for H-2B workers, the rate of Form I-129 for extension of stay due to change of employer relative to new employment is 19.3 percent.²¹⁴ This is above the 12.6 percent rate expected

²¹¹ USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 09/2023, TRK 12921

²¹² See Id.

²¹³ See Id.

²¹⁴ Calculation, Step 1: 1,113 Form I-129 petitions for extension of stay due to change of employer FY 2021 + 1,795 Form I-129 petitions for extension of stay due to change of employer in FY 2022 + 2,113 Form I-129 petitions for extension of stay due to change of employer FY 2023 = 5,021 Form I-129 petitions filed extension of stay due to change of employer in portability provision years.

Calculation, Step 2: 7,206 Form I-129 petitions filed for new employment in FY 2021 + 9,231 Form I-129 petitions filed for new employment in FY 2022 + 9,579 Form I-129 petitions filed for new employment in FY 2023 = 26,016 Form I-129 petitions filed for new employment in portability provision years.

Calculation, Step 3: 5,021 extension of stay due to change of employment petitions/26,016 new employment petitions = 19.3 percent rate of extension of stay due to change of employment to new employment (rounded).

without a portability provision. 19.3 percent is our estimate of the rate expected in periods with a portability provision in the supplemental visa allocation. Using the 4,358 as our estimate for the number of Forms I-129 filed for H-2B new employment in FY 2024, we estimate that 549 Forms I-129 for extension of stay due to change of employer would be filed in absence of this provision.²¹⁵ With this portability provision, we estimate that 841 Forms I-129 for extension of stay due to change of employer would be filed.²¹⁶ This difference results in 292 additional Forms I-129 as a result of this provision.²¹⁷ As previously estimated, we expect that about 47.21 percent of Form I-129 petitions will be filed by an in-house or outsourced lawyer. Therefore, we expect that a lawyer will file 138 of these petitions and an HR specialist or equivalent occupation will file the remaining 154.²¹⁸ Previously in

²¹⁵ Calculation: 4,358 Form I-129 H-2B petitions filed for new employment * 12.6 percent = 549 estimated number of Form I-129 H-2B petitions filed for extension of stay due to change of employer, no portability provision.

²¹⁶ Calculation: 4,358 Form I-129 H-2B petitions filed for new employment * 19.3 percent = 841 estimated number of Form I-129 H-2B petitions filed for extension of stay due to change of employer, with a portability provision.

²¹⁷ Calculation: 841 estimated number of Form I-129 H-2B petitions filed for extension of stay due to change of employer, with a portability provision – 549 estimated number of Form I-129 H-2B petitions filed for extension of stay due to change of employer, no portability provision = 292 Form I-129 H-2B petition increase as a result of portability provision.

²¹⁸ Calculation, Lawyers: 292 additional Form I-129 due to portability provision * 47.21 percent of

this analysis, we estimated that about 91.43 percent of Form I-129 H-2B petitions are filed with Form I-907 for premium processing. As a result of this portability provision, we expect that an additional 267 Forms I-907 will be filed.²¹⁹ We expect a lawyer to file 126 of those Forms I-907 and an HR specialist to file the remaining 141.²²⁰

h. Population Affected by the Audits

Under this time-limited FY 2024 H-2B supplemental cap rule, DHS intends to conduct 250 audits of employers hiring H-2B workers, and DOL intends to conduct 100 audits of employers hiring H-2B workers. The determination of which employers will be audited will be done at the discretion of the Departments, though the agencies will coordinate so that no employer is audited by both DOL and DHS. Therefore, the Federal Government expects to conduct a total of 350 audits

Form I-129 for H-2B positions filed by an attorney or accredited representative = 138 (rounded) estimated Form I-129 filed by a lawyer.

Calculation, HR specialist: 292 additional Form I-129 due to portability provision – 138 estimated Form I-129 filed by a lawyer = 154 estimated Form I-129 filed by an HR specialist.

²¹⁹ Calculation: 292 Form I-129 H-2B petitions * 91.43 percent premium processing filing rate = 267 (rounded) Forms I-907.

²²⁰ Calculation, Lawyers: 267 Forms I-907 * 47.21 percent filed by an attorney or accredited representative = 126 (rounded) Forms I-907 filed by a lawyer.

Calculation, HR specialists: 267 Forms I-907 – 126 Forms I-907 filed by a lawyer = 141 Forms I-907 filed by an HR specialist.

on employers that petition for H-2B workers under this TFR.²²¹

i. Population Affected by Additional Scrutiny

DHS expects that petitioners that have been cited by WHD for H-2B program violations will undergo additional scrutiny from USCIS. To estimate the number of firms expected to undergo increased scrutiny, we utilize DOL's

Wage and Hour Compliance Action Data.²²² The data available here is for concluded cases. Table 10 presents the number of employers that were cited for H-2B violations that have a worker protection violation end date in FYs 2018–2022. The worker protection violation end date is established based on the “findings end date,” which represents the date that the last worker protection violation occurred in the

concluded case. During FY 2018–2022, on average 77 (rounded) employers that were cited for H-2B violations had a worker protection violation end date each year. USCIS intends to request evidence from employers cited for H-2B violations with a worker protection violation end date in the last two years. Therefore, for purposes of this analysis, we expect 154 petitioners will undergo additional scrutiny from USCIS.²²³

Table 10. Employers with H-2B violations with worker protection violation end date in FY 2018-2022

Fiscal Year	Employers cited for H-2B violations with worker protection violation end date in Fiscal Year
2018	96
2019	119
2020	84
2021	48
2022	37
Five-year Average (rounded)	77
Source: USCIS analysis of DOL Wage and Hour Compliance Action Data	

j. Population Expected To Familiarize Themselves With This Rule

DHS expects employers that have filed for TLCs to familiarize themselves with this rule. Table 3 shows that the average number of certifications over the last five FYs is 7,739. We use the TLC population, rather than the estimated 4,358 expected to file a Form I-129 petition, because employers that have applied for TLCs would need to familiarize themselves with the rule in order to determine whether or not to subsequently file a Form I-129 petition.

We expect a HR specialist, in-house lawyer, or outsourced lawyer will perform familiarization with the rule at the same rate as petitioners that file a Form G-28. As discussed above, an estimated 47.21 percent of petitioners are submitted by lawyers. Therefore, we

estimate that 3,654 lawyers and 4,085 HR specialists will incur familiarization costs.²²⁴

4. Cost-Benefit Analysis

The provisions of this rule require the submission of a Form I-129 H-2B petition. The costs for this form include the opportunity cost of time to complete and submit the form.²²⁵ The estimated time to complete and file Form I-129 for H-2B classification is 4.34 hours.²²⁶ A U.S. employer, a U.S. agent, or a foreign employer filing through the U.S. agent must file the petition. DHS estimates that an in-house or outsourced lawyer will file 47.21 percent of Form I-129 H-2B petitions, and an HR specialist or equivalent occupation will file the remainder (52.79 percent). DHS presents estimated costs for HR specialists filing

Form I-129 petitions and an estimated range of costs for in-house lawyers or outsourced lawyers filing Form I-129 petitions.

To estimate the total opportunity cost of time to HR specialists who complete and file Form I-129, DHS uses the mean hourly wage rate of HR specialists of \$35.13 as the base wage rate.²²⁷ If petitioners hire an in-house or outsourced lawyer to file Form I-129 on their behalf, DHS uses the mean hourly wage rate \$78.74 as the base wage rate.²²⁸ Using the most recent BLS data, DHS calculated a benefits-to-wage multiplier of 1.45 to estimate the full wages to include benefits such as paid leave, insurance, and retirement.²²⁹ DHS multiplied the average hourly U.S. wage rate for HR specialists and for in-house lawyers by the benefits-to-wage

²²¹ These 350 audits are separate and distinct from WHD's investigations pursuant to its existing enforcement authority.

²²² Available at https://enforcedata.dol.gov/views/data_catalogs.php (accessed September 22, 2023).

²²³ It is possible not every employer that has been cited for an H-2B violation in the last two years will petition for H-2B employees under this supplemental cap authority. DHS considers an upper limit of 154 to be a reasonable estimate of the number of petitioners that will undergo additional scrutiny.

²²⁴ Calculation for lawyers: 7,739 estimated applicants * 47.21 percent represents by a lawyer = 3,654 (rounded) represented by a lawyer.

Calculation for HR specialists: 7,739 approved, pending, and projected applicants – 3,654

represented by a lawyer = 4,085 represented by an HR specialist.

²²⁵ Filing fees are not considered costs to society. These fees have been accounted for as a transfer from petitioners to USCIS.

²²⁶ The public reporting burden for this form is 2.34 hours for Form I-129 and an additional 2.00 hours for H Classification Supplement, totaling 4.34 hours. See Form I-129 instructions at <https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf> (accessed September 28, 2023).

²²⁷ U.S. Department of Labor, Bureau of Labor Statistics, “May 2022 National Occupational Employment and Wage Statistics” Human Resources Specialist (13–1071), Mean Hourly Wage, available at <https://www.bls.gov/oes/2022/may/oes131071.htm> (accessed September 13, 2023).

²²⁸ U.S. Department of Labor, Bureau of Labor Statistics, “May 2022 National Occupational Employment and Wage Estimates” Lawyers (23–1011), Mean Hourly Wage, available at <https://www.bls.gov/oes/2022/may/oes231011.htm> (accessed September 13, 2023).

²²⁹ Calculation: \$42.48 mean Total Employee Compensation per hour for civilian workers/\$29.32 mean Wages and Salaries per hour for civilian workers = 1.45 benefits-to-wage multiplier. See Economic News Release, Bureau of Labor Statistics, U.S. Department of Labor, Employer Costs for Employee Compensation—December 2022 Table 1. Employer Costs for Employee Compensation by ownership, Civilian workers, available at https://www.bls.gov/news.release/archives/eccec_03172023.pdf (accessed September 13, 2023).

multiplier of 1.45 to estimate total compensation to employees. The total compensation for an HR specialist is \$50.94 per hour, and the total compensation for an in-house lawyer is \$114.17 per hour.²³⁰ In addition, DHS recognizes that an entity may not have an in-house lawyer and may seek outside counsel to complete and file Form I-129 on behalf of the petitioner. Therefore, DHS presents a second wage rate for lawyers labeled as outsourced lawyers. DHS recognizes that the wages for outsourced lawyers may be much higher than in-house lawyers and therefore uses a higher compensation-to-wage multiplier of 2.5 for outsourced lawyers.²³¹ DHS estimates the total compensation for an outsourced lawyer is \$196.85 per hour.²³² If a lawyer submits Form I-129 on behalf of the petitioner, Form G-28 must accompany the Form I-129 petition.²³³ DHS estimates the time burden to complete and submit Form G-28 for a lawyer is 50 minutes (0.83 hour, rounded).²³⁴ For this analysis, DHS adds the time to complete Form G-28 to the opportunity cost of time to lawyers for filing Form I-129 on behalf of a petitioner. This results in a time burden of 5.17 hours

²³⁰ Calculation, HR specialist: \$35.13 mean hourly wage * 1.45 benefits-to-wage multiplier = \$50.94 hourly total compensation (hourly opportunity cost of time).

Calculation, In-house Lawyer: \$78.74 mean hourly wage * 1.45 benefits-to-wage multiplier = \$114.17 hourly total compensation (hourly opportunity cost of time).

²³¹ The DHS ICE "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter" acknowledges that "the cost of hiring services provided by an outside vendor or contractor is two to three times more expensive than the wages paid by the employer for that service produced by an in-house employee," based on information received in public comment to that rule. We believe the explanation and methodology used in the Final Small Entity Impact Analysis (SEIA) remains sound for using 2.5 as a multiplier for outsourced labor wages in this rule: *Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis*, 73 FR 63843 (Oct. 28, 2008), available at <https://www.regulations.gov/document/ICEB-2006-0004-0921> (accessed Sep. 29, 2023). See also *Exercise of Time-Limited Authority To Increase the Fiscal Year 2022 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 87 FR 4722 (Jan. 28, 2022), available at <https://www.regulations.gov/document/DHS-2022-0010-0001> (accessed September 29, 2023).

²³² Calculation, Outsourced Lawyer: \$78.74 mean hourly wage * 2.5 benefits-to-wage multiplier = \$196.85 hourly total compensation (hourly opportunity cost of time).

²³³ USCIS, Filing Your Form G-28, <https://www.uscis.gov/forms/filing-your-form-g-28> (accessed October 11, 2023).

²³⁴ USCIS, G-28, Instructions for Notice of Entry of Appearance as Attorney or Accredited Representative, <https://www.uscis.gov/sites/default/files/document/forms/g-28instr.pdf>.

Calculation: 50 minutes/60 minutes per hour = 0.83 hour (rounded).

for in-house lawyers and outsourced lawyers to complete Form G-28 and Form I-129.²³⁵ Therefore, the total opportunity cost of time per petition for an HR specialist to complete and file Form I-129 is approximately \$221.08, for an in-house lawyer to complete and file Forms I-129 and G-28 is about \$590.26, and for an outsourced lawyer to complete and file is approximately \$1,017.71.²³⁶

a. Transfers

i. Transfers From Petitioners to the Government

The provisions of this rule require the submission of a Form I-129 H-2B petition. The transfers for this form include the filing costs to submit the form. The current filing fee for Form I-129 is \$460 and employers filing H-2B petitions must submit an additional fee of \$150.²³⁷ These filing fees are not a cost to society or an expenditure of new resources but a transfer from the petitioner to USCIS in exchange for agency services. DHS anticipates that petitioners will file 4,358 Forms I-129 due to the rule's supplemental visa allocation and an additional 292 Forms I-129 due to the rule's portability provision. The total value of transfers from petitioners to the Government for Form I-129 filings due to the rule is \$2,836,500.²³⁸

Additionally, employers may use Form I-907 to request premium processing of Form I-129 petitions for H-2B visas. The filing fee for Form I-907 for H-2B petitions is \$1,500. Based upon historical trends, USCIS expects that 91.43 percent of petitioners will file a Form I-907 in addition to their Form I-129. Applying that rate to the expected number of Forms I-129 would result in 4,252 Forms I-907 filed due to the rule.²³⁹ Transfers from petitioners to the Government related to the filing of Forms I-907 as a result of the rule are

²³⁵ Calculation: 0.83 hour to file Form G-28 + 4.34 hours to file Form I-129 = 5.17 hours to file both forms.

²³⁶ Calculation, HR specialist files Form I-129: \$50.94 hourly opportunity cost of time * 4.34 hours = \$221.08 opportunity cost of time per petition.

Calculation, In-house Lawyer files Form I-129 and Form G-28: \$114.17 hourly opportunity cost of time * 5.17 hours = \$590.26 opportunity cost of time per petition.

Calculation, Outsourced Lawyer files Form I-129 and Form G-28: \$196.85 hourly opportunity cost of time * 5.17 hours = \$1,017.71 opportunity cost of time per petition.

²³⁷ See Form I-129 instructions at <https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf> (accessed September 28, 2023). See also 8 U.S.C. 1184(c)(13).

²³⁸ Calculation: (4,358 petitions + 292 petitions) * \$610 per petition = \$2,836,500.

²³⁹ Calculation (4,358 petitions + 292 petitions) * 91.43 Form I-907 rate = 4,252 Forms I-907.

\$6,378,000.²⁴⁰ Total transfers from petitioners to the Government are \$9,214,500.²⁴¹

b. Cost to Petitioners

As mentioned in *Section 3*, the estimated population impacted by this rule is 4,358 eligible petitioners that are projected to apply for the additional 64,716 H-2B visas, with 20,000 of those additional visas reserved for employers that will petition for workers who are nationals of the countries included in the country-specific allocation, who are exempt from the returning worker requirement.

i. Costs to Petitioners To File Form I-129 and Form G-28

As discussed above, DHS estimates that HR specialists will file an additional 2,301 petitions using Form I-129 and lawyers will file an additional 2,057 petitions using Form I-129 and Form G-28. DHS estimates the total cost to file Form I-129 petitions if filed by HR specialists is \$508,705 (rounded).²⁴² DHS estimates the total cost to file Form I-129 petitions and Form G-28 if filed by lawyers will range from \$1,214,165 (rounded) if only in-house lawyers file these forms, to \$2,093,429 (rounded) if only outsourced lawyers file them.²⁴³ Therefore, the estimated total cost to file Form I-129 and Form G-28 range from \$1,722,870 and \$2,602,134.²⁴⁴

ii. Costs to File Form I-907

Employers may use Form I-907 to request premium processing of Form I-129 petitions for H-2B visas. The filing fee for Form I-907 for H-2B petitions is \$1,500, and the time burden for completing the form is 35 minutes (0.58 hour).²⁴⁵ ²⁴⁶ Using the wage rates

²⁴⁰ Calculation: \$1,500 per petition * 4,252 Forms I-907 = \$6,378,000

²⁴¹ Calculation: \$2,836,500 + \$6,378,000 = \$9,214,500.

²⁴² Calculation, HR specialist: \$221.08 cost per petition * 2,301 Form I-129 = \$508,705 (rounded) total cost.

²⁴³ Calculation, In-house Lawyer: \$590.26 cost per petition * 2,057 Form I-129 and Form G-28 = \$1,214,165 (rounded) total cost.

Calculation, Outsourced Lawyer: \$1,017.71 cost per petition * 2,057 Form I-129 and Form G-28 = \$2,093,429 (rounded) total cost.

²⁴⁴ Calculation: \$508,705 total cost of Form I-129 filed by HR specialists + \$1,214,165 total cost of Form I-129 and Form G-28 filed by in-house lawyers = \$1,722,870 estimated total costs to file Form I-129 and G-28.

Calculation: \$508,705 total cost of Form I-129 filed by HR specialists + \$2,093,429 total cost of Form I-129 and G-28 filed by outsourced lawyers = \$2,602,134 estimated total costs to file Form I-129 and G-28.

²⁴⁵ The filing fee is a transfer from the petitioner requesting premium processing and proxy for the total costs to USCIS.

²⁴⁶ See Form I-907 instructions at <https://www.uscis.gov/i-907> (accessed September 22, 2023).

established previously, the opportunity cost of time to file Form I-907 is approximately \$29.55 for an HR specialist, \$66.22 for an in-house lawyer, and \$114.17 for an outsourced lawyer.²⁴⁷

As discussed above, DHS estimates that HR specialists will file an additional 2,104 Form I-907 and lawyers will file an additional 1,881 Form I-907. DHS estimates the total cost of Form I-907 filed by HR specialists is about \$62,173 (rounded).²⁴⁸ DHS estimates the total cost to file Form I-907 filed by lawyers range from about \$124,560 (rounded) for only in-house lawyers, to \$214,754 (rounded) for only outsourced lawyers.²⁴⁹ The estimated total cost to file Form I-907 range from \$186,733 and \$276,927.²⁵⁰

iii. Cost to Late Season Employers Filing Form ETA-9142B

In addition to the costs for employers projected to request TLCs irrespective of this rule, the population of 337 late season employers that would not otherwise request H-2B workers will file Form ETA-9142B as a precondition to utilizing the late season allocation of H-2B visas made available by the rule. There is no filing fee for Form ETA-9142B, and the time burden for completing the form, including Appendix A, Appendix B, Appendix C, Appendix D, and record keeping, is 2 hours and 10 minutes (2.17 hours).²⁵¹ DHS estimates the total cost of Form

ETA-9142B filed by HR specialists is about \$19,676 (rounded).²⁵² DHS estimates the total cost to file Form ETA-9142B by lawyers range from about \$39,392 (rounded) for only in-house lawyers, to \$67,919 (rounded) for only outsourced lawyers.²⁵³ The estimated total cost to file Form ETA-9142B range from \$59,068 and \$87,595.²⁵⁴

iv. Cost to File Form ETA-9142-B-CAA-8

Form ETA-9142-B-CAA-8 is an attestation form that includes recruiting requirements, the irreparable harm standard, and document retention obligations. DOL estimates the time burden for completing and signing the form is 0.25 hours, 0.25 hours for retaining records, and 0.50 hours to comply with the returning workers' attestation, for a total time burden of 1 hour. Using the \$50.94 hourly total compensation for an HR specialist, the opportunity cost of time for an HR specialist to complete the attestation form, notify third parties, and retain records relating to the returning worker requirements is approximately \$50.94.²⁵⁵ Employers are also required to send OFLC and AFL-CIO the ETA case number when filing a petition with DHS. DOL estimates the time burden for this task is 10 minutes (0.17 hours) for an HR specialist. The opportunity cost of time for an HR specialist to send OFLC and AFL the ETA case number is approximately \$8.66.²⁵⁶ The total opportunity cost of time for filing Form ETA-9142-B-CAA-8 and emailing the ETA case number to both OFLC and the AFL-CIO is \$59.60.²⁵⁷

Additionally, the form requires that petitioners assess, prepare a detailed written statement, and document supporting evidence for meeting the irreparable harm standard, and retain those documents and records, which we assume will require the resources of a financial analyst (or another equivalent occupation). Using the same methodology previously described for wages, the mean hourly wage for a financial analyst is \$52.30,²⁵⁸ and the estimated hourly total compensation for a financial analyst is \$75.84.²⁵⁹ DOL estimates the time burden for these tasks is at least 4 hours, and 1 hour for gathering and retaining documents and records, for a total time burden of 5 hours. Therefore, the total opportunity cost of time for a financial analyst to assess, document, and retain supporting evidence is approximately \$379.20.²⁶⁰

As discussed previously, DHS believes that the 4,358 Form I-129 petitions required to exhaust the number of supplemental visas made available in this rule represents the number of potential employers that will request to employ H-2B workers under this rule. This number of petitions is a reasonable proxy for the number of employers that may need to review and sign the attestation. Using this estimate for the total number of certifications, we estimate the opportunity cost of time for completing the attestation and sending the ETA case number to OFLC and AFL-CIO for HR specialists is approximately \$259,737 (rounded) and for financial analysts is about \$1,652,554 (rounded).²⁶¹

The estimated total cost to file Form ETA-9142-B-CAA-8 and comply with the attestation is approximately 1,912,291.²⁶²

²⁵⁸ See U.S. Department of Labor, Bureau of Labor Statistics, "May 2022 National Occupational Employment and Wage Statistics" Financial and Investment Analysts (13-2051), <https://www.bls.gov/oes/2022/may/oes132051.htm> (accessed September 13, 2023).

²⁵⁹ Calculation: \$52.30 mean hourly wage for a financial analyst * 1.45 benefits-to-wage multiplier = \$75.84 (rounded).

²⁶⁰ Calculation: \$75.84 estimated total compensation for a financial analyst * 5 hours to meet the requirements of the irreparable harm standard = \$379.20.

²⁶¹ Calculations, HR specialists: \$59.60 opportunity cost of time to comply with attestation requirements and to send the ETA case number to OFLC and AFL-CIO * 4,358 estimated additional petitions = \$259,737 (rounded) total cost to comply with attestation requirements.

Calculation, Financial Analysts: \$379.20 opportunity cost of time to comply with attestation requirements * 4,358 estimated additional petitions = \$1,652,554 (rounded) to comply with attestation requirements.

²⁶² Calculation: \$259,737 total cost for HR specialist to comply with attestation requirement

Continued

Calculation: 35 minutes/60 minutes per hour = 0.58 (rounded) hour.

²⁴⁷ Calculation, HR specialist Form I-907: \$50.94 hourly opportunity cost of time * 0.58 hour = \$29.55 opportunity cost of time per request.

Calculation, In-house Lawyer Form I-907: \$114.17 hourly opportunity cost of time * 0.58 hour = \$66.22 opportunity cost of time per request.

Calculation, Outsourced Lawyer Form I-907: \$196.85 hourly opportunity cost of time * 0.58 hour = \$114.17 opportunity cost of time per request.

²⁴⁸ Calculation, HR specialist: \$29.55 opportunity cost of time per request * 2,104 Form I-907 = \$62,173 (rounded) total cost of Form I-907 filed by HR specialists.

²⁴⁹ Calculation, In-house Lawyer Form I-907: \$66.22 hourly opportunity cost of time * 1,881 applications = \$124,560.

Calculation, Outsourced Lawyer Form I-907: \$114.17 hourly opportunity cost of time * 1,881 applications = \$214,754.

²⁵⁰ Calculation: \$62,173 total cost of Form I-907 filed by HR specialists + \$124,560 total cost of Form I-907 filed by in-house lawyers = \$186,733 estimated total costs to file Form I-907.

Calculation: \$62,173 total cost of Form I-129 filed by HR specialists + \$214,754 total cost of Form I-907 filed by outsourced lawyers = \$276,927 estimated total costs to file Form I-907.

²⁵¹ The 130 minute burden estimate is as follows: 9142-B—55 minutes, Appendix A—15 minutes, Appendix B—15 minutes, Appendix C—20 minutes, Appendix D—10 minutes, Record Keeping—15 minutes. See Form ETA-9142-B at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/ETA_Form_9142B.pdf (last accessed Sep. 22, 2023).

²⁵² Calculation, HR specialist: \$50.94 per hour * 2.17 hours * 178 Form ETA-9142-B = \$19,676 (rounded) total cost of Form ETA-9142-B filed by HR specialists.

²⁵³ Calculation, In-house Lawyer Form ETA-9142-B: \$114.17 per hour * 2.17 hours * 159 applications = \$39,392 (rounded). Calculation, Outsourced Lawyer Form ETA-9142-B: \$196.85 per hour * 2.17 hours * 159 applications = \$67,919 (rounded).

²⁵⁴ Calculation: \$19,676 total cost of Form ETA-9142-B filed by HR specialist + \$39,392 total cost of Form ETA-9142-B filed by In-house Lawyer = \$59,068 estimated total costs to file Form ETA-9142-B.

Calculation: \$19,676 total cost of Form ETA-9142-B filed by HR specialist + \$67,919 total cost of Form ETA-9142-B filed by Outsourced Lawyer = \$87,595 estimated total costs to file Form ETA-9142-B.

²⁵⁵ Calculation: \$50.94 hourly opportunity cost of time * 1-hour time burden for the new attestation form and notifying third parties and retaining records related to the returning worker requirements = \$50.94.

²⁵⁶ Calculation: \$50.94 hourly opportunity cost of time * 0.17 hours to send OFLC and AFL-CIO the ETA case number = \$8.66 (rounded).

²⁵⁷ Calculation: \$50.94 + \$8.66 = \$59.60.

v. Cost To Conduct Recruitment

An employer that files Form ETA–9142B–CAA–8 and the I–129 petition 30 or more days after the certified start date of work must conduct additional recruitment of U.S. workers. This consists of: (1) placing a new job order with the State Workforce Agency (SWA), (2) contacting the relevant American Job Center (AJC), (3) contacting the AFL–CIO if applicable, (4) contacting former U.S. workers, (5) recruiting U.S. workers as provided in § 655.45(a) and (b), (6) contacting current employees for referrals, and (7) placing the available job opportunity on the employer's website if the employer maintains a website for its business and.

Specifically, the employer must place a new job order for the job opportunity with the SWA serving the area of intended employment. During the period the SWA is actively circulating the job order, employers must also contact, by email or other available electronic means, the nearest local AJC to request staff assistance advertising and recruiting qualified U.S. workers for the job opportunity, and to provide to the AJC the unique identification number associated with the job order placed with the SWA.

If the occupation is traditionally or customarily unionized, employers must provide written notification of the job opportunity to the nearest American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) office covering the area of intended employment, by providing a copy of the job order, and request assistance in recruiting qualified U.S. workers for the job opportunity.

Employers are required to make reasonable efforts to contact, by mail or other effective means, their former U.S. workers, including those workers who were furloughed and laid off, beginning January 1, 2022. Employers must disclose the terms of the job order to these workers as required by the rule.

The employer must provide a copy of the job order to the bargaining representative for its employees in the occupation and area of intended employment, consistent with 20 CFR 655.45(a), or if there is no bargaining representative, post the job order in the places and manner described in 20 CFR 655.45(b).

Employers are also required to contact current employees regarding available job opportunities for referrals.

and to send the ETA case number to OFLC and AFL–CIO + \$1,652,554 total cost for financial analysts to comply with attestation requirements = \$1,912,291 total cost to comply with attestation requirements.

Finally, employers are required to post the available job opportunity on the employer's website if the employer maintains a website for its business.

DOL estimates the average expected time burden for activities related to conducting recruitment is 4 hours.²⁶³ Assuming this work will be done by an HR specialist or an equivalent occupation, the estimated cost to each petitioner is approximately \$203.76.²⁶⁴ Using 1,395 as the estimated number of petitioners required to undergo additional recruitment activities, the estimated total cost of this provision is approximately \$284,245 (rounded).²⁶⁵

It is possible that if U.S. employees apply for these positions, H–2B employers may incur some costs associated with reviewing applications, interviewing, vetting, and hiring applicants who are referred to H–2B employers by the recruiting activities required by this rule. However, DOL is unable to quantify the impact.

vi. Cost of the Portability Provision

Petitioners seeking to hire H–2B nonimmigrants who are currently present in the United States with a valid H–2B visa would need to file a Form I–129, which includes paying the associated fee as discussed above. Also previously discussed, we estimate that approximately 292 additional Form I–129 H–2B petitions will be filed as a result of this provision.

As discussed previously, if a petitioner is represented by a lawyer, the lawyer must file Form G–28. In addition, if a petitioner desires premium processing, the petitioner must file Form I–907 and pay the associated fee. We expect an HR specialist, in-house lawyer, or an outsourced lawyer will perform these actions. Moreover, as previously estimated, we expect that an

in-house or outsourced lawyer will file about 47.21 percent of these Form I–129 petitions. Therefore, we expect that a lawyer will file 138 of these petitions and an HR specialist or equivalent occupation will file the remaining 154. As previously discussed, the opportunity cost of time to file a Form I–129 H–2B petition is \$221.08 for an HR specialist; and the opportunity cost of time to file a Form I–129 H–2B petition with accompanying Form G–28 is \$590.26 for an in-house lawyer and \$1,017.71 for an outsourced lawyer. Therefore, we estimate the cost of the additional Forms I–129 from the portability provision for HR specialists is \$34,046.²⁶⁶ The estimated cost of the additional Forms I–129 accompanied by Forms G–28 from the portability provision for lawyers is \$81,456 if filed by in-house lawyers and \$140,444 if filed by outsourced lawyers.²⁶⁷

Previously in this analysis, we estimated that about 91.43 percent of Form I–129 H–2B petitions are filed with Form I–907 for premium processing. As a result of this provision, we expect that an additional 267 Forms I–907 will be filed.²⁶⁸ We expect a lawyer will file 126 of those Forms I–907 and an HR specialist or equivalent occupation will file the remaining 141.²⁶⁹ As previously discussed, the estimated opportunity cost of time to file a Form I–907 is \$29.55 for an HR specialist; and the estimated opportunity cost of time to file a Form I–907 is approximately \$66.22 for an in-house lawyer and \$114.17 for an outsourced lawyer. The estimated total cost of the additional Forms I–907 if HR specialists file is \$4,167.²⁷⁰ The estimated total cost of the additional Forms I–907 is \$8,344 if filed by in-house lawyers and \$14,385 if filed by outsourced lawyers.²⁷¹

²⁶³ This is the average expected time burden across all employers; not all employers will need to notify the AFL–CIO, because not all occupation are traditionally or customarily unionized. DOL estimates the time burden for placing a new job order for the job opportunity with SWA is 1 hour, 0.5 hours for contacting the nearest AJC, 1 hour for contacting former U.S. workers, 0.5 hours for contacting current employees for referrals, 0.5 hours for placing the available job opportunity on the employer's website, and 0.5 hours to provide a copy of job order to the bargaining representative and written notification of job opportunity to nearest AFL–CIO if the occupation is traditionally or customarily unionized, for a total time burden of 4 hours.

²⁶⁴ Calculation: \$50.94 hourly opportunity cost of time for an HR specialist * 4 hours to conduct additional recruitment = \$203.76 per petitioner cost to conduct additional recruitment.

²⁶⁵ Calculation: 1,395 estimated number of petitioners subject to additional recruitment requirements * \$203.76 per petitioner cost to conduct additional recruitment = \$284,245 (rounded) total cost to conduct additional recruitment.

²⁶⁶ Calculation, HR specialist: \$221.08 estimated cost to file a Form I–129 H–2B petition * 154 petitions = \$34,046 (rounded).

²⁶⁷ Calculation, In-house Lawyer: \$590.26 estimated cost to file a Form I–129 H–2B petition and accompanying Form G–28 * 138 petitions = \$81,456 (rounded).

Calculation, Outsourced Lawyer: \$1,017.71 estimated cost to file a Form I–129 H–2B petition and accompanying Form G–28 * 138 petitions = \$140,444 (rounded).

²⁶⁸ Calculation: 292 estimated additional Form I–129 H–2B petitions * 91.43 percent accompanied by Form I–907 = 267 (rounded) additional Form I–907.

²⁶⁹ Calculation, Lawyers: 267 additional Form I–907 * 47.21 percent = 126 (rounded) Form I–907 filed by a lawyer. Calculation, HR specialists: 267 Form I–907 – 126 Form I–907 filed by a lawyer = 141 Form I–907 filed by an HR specialist.

²⁷⁰ Calculation, HR specialist: \$29.55 to file a Form I–907 * 141 forms = \$4,167 (rounded).

²⁷¹ Calculation, In-house lawyer: \$66.22 to file a Form I–907 * 126 forms = \$8,344 (rounded).

Calculation for an outsourced lawyer: \$114.17 to file a Form I–907 * 126 forms = \$14,385 (rounded).

The estimated total cost of this provision ranges from \$128,013 to \$193,042 depending on what share of the forms are filed by in-house or outsourced lawyers.²⁷²

vii. Cost of Audits to Petitioners

As discussed above, DHS intends to conduct 250 audits of employers hiring H-2B workers, and DOL intends to conduct 100 audits of employers hiring H-2B workers, for a total of 350 employers. Employers will need to provide requested information to comply with the audit. We estimate that the expected time burden to comply with audits conducted by DHS and DOL's Office of Foreign Labor Certification is 12 hours.²⁷³ We expect that an HR specialist or equivalent occupation will provide these documents. Given an hourly opportunity cost of time of \$50.94, the estimated cost of complying with audits is \$611.28 per audited employer.²⁷⁴ Therefore, the total estimated cost to employers to comply with audits is \$213,948.²⁷⁵

viii. Cost of Additional Scrutiny

The Departments expect that petitioners undergoing additional scrutiny will need to submit additional evidence to USCIS. The costs associated with additional scrutiny include the opportunity cost of time to assess, document, and compile evidence and the costs (both explicit costs and opportunity costs of time) of submitting the compiled evidence.

The opportunity costs of time associated with compiling such evidence are unavailable due to the unique fact pattern in each instance and a lack of data at this time regarding the time to comply. To estimate the explicit costs of additional scrutiny, we assume 154 petitioners will need to print 500 pages of documents and mail this to USCIS. We expect these documents to

be able to fit in a Priority Mail Medium Flat Rate box, which costs \$17.10.²⁷⁶ We estimate the costs of printing at \$0.15 per page and the cost of printing 500 at \$75.00.²⁷⁷ The estimated cost for an employer to print and ship evidence to USCIS is \$92.10.²⁷⁸ With an estimated 154 petitioners expected to print and ship evidence, the total estimated costs for printing and shipping evidence is \$14,183.²⁷⁹

We also expect petitioners to incur a time burden associated with printing and shipping evidence to USCIS. We estimate it will take an HR specialist or equivalent employee 1 hour to print and ship evidence. Using the \$50.94 hourly opportunity cost of time for HR specialist, we estimate the opportunity cost of time for each petitioner is \$50.94.²⁸⁰ With an estimated 154 petitioners expected to print and ship evidence, the total estimated opportunity cost of time to print and ship evidence is \$7,845.²⁸¹

We do not expect this provision to impose new costs on USCIS. The costs to request and review evidence from petitioners is included in the fees paid to the agency.

The total estimated cost of additional scrutiny is \$22,028.²⁸²

ix. Familiarization Costs

We expect that petitioners or their representatives will need to read and understand this rule if they seek to take advantage of the supplemental cap. As a result, we expect this rule will impose one-time familiarization costs associated with reading and understanding this rule. As shown previously, we estimate that approximately 7,739 petitioners may take advantage of the provisions of this rule, and that a lawyer will represent 3,654 of these petitioners and

an HR specialist or equivalent occupation will represent 4,085.

To estimate the costs of rule familiarization, we estimate the time it will take to read and understand the rule by assuming a reading speed of 238 words per minute.²⁸³ This rule has approximately 69,000 words.²⁸⁴ Using a reading speed of 238 words per minute, DHS estimates it will take approximately 4.8 hours to read and understand this rule.²⁸⁵

The estimated hourly total compensation for a HR specialist, in-house lawyer, and outsourced lawyer are \$50.94, \$114.17, and \$196.85, respectively. The estimated opportunity cost of time for each of these filers to read and understand the rule are \$244.51, \$548.02, and \$944.88, respectively.²⁸⁶ The estimated total opportunity cost of time for 4,085 HR specialists to familiarize themselves with this rule is approximately \$998,823.²⁸⁷ The estimated total opportunity cost of time for 3,654 lawyers to familiarize themselves with this rule is approximately \$2,002,465 if they are all in-house lawyers and \$3,452,592 if they are all outsourced lawyers.²⁸⁸ Accordingly, the estimated total opportunity costs of time for petitioners' representatives to familiarize themselves with this rule

²⁸³ Brysbaert, Marc (2019, April 12). 'How many words do we read per minute? A review and meta-analysis of reading rate.' <https://doi.org/10.31234/osf.io/xynwg> (accessed September 22, 2023). We use the average speed for silent reading of English nonfiction by adults.

²⁸⁴ Please note that this number represents that Departments' best estimate of the final word count, given that the actual word may change during the promulgation of the Rule.

²⁸⁵ Calculation, Step 1: roughly 69,000 words/238 words per minute = 290 (rounded) minutes.

Calculation, Step 2: 290 minutes/60 minutes per hour = 4.8 (rounded) hours.

²⁸⁶ Calculation, HR Specialists: \$50.94 estimated hourly total compensation for an HR specialist * 4.8 hours to read and become familiar with the rule = \$244.51 opportunity cost of time for an HR specialist to read and understand the rule.

Calculation, In-house lawyer: 114.17 estimated hourly total compensation for an in-house lawyer * 4.8 hours to read and become familiar with the rule = 548.02 (rounded) opportunity cost of time for an in-house lawyer to read and understand the rule.

Calculation, Outsourced lawyer: \$196.85 estimated hourly total compensation for an outsourced lawyer * 4.8 hours to read and become familiar with the rule = \$944.88 (rounded) opportunity cost of time for an outsourced lawyer to read and understand the rule.

²⁸⁷ Calculation, HR specialists: \$244.51 opportunity cost of time * 4,085 = \$998,823 (rounded).

²⁸⁸ Calculation for in-house lawyers: \$548.02 opportunity cost of * 3,654 = \$2,002,465 (rounded).

Calculation for outsourced lawyers: 944.88 opportunity cost of time * 3,654 = \$3,452,592 (rounded).

²⁷² Calculation for HR specialists and in-house lawyers: \$34,046 for HR specialists to file Form I-129 H-2B petitions + \$81,456 for in-house lawyers to file Form I-129 and the accompanying Form G-28 + \$4,167 for HR specialists to file Form I-907 + \$8,344 for in-house lawyers to file Form I-907 = \$128,013.

Calculation for HR specialists and outsourced lawyers: \$34,046 for HR specialists to file Form I-129 H-2B petitions + \$140,444 for outsourced lawyers to file Form I-129 and the accompanying Form G-28 + \$4,167 for HR specialists to file Form I-907 + \$14,385 for outsourced lawyers to file Form I-907 = \$193,042.

²⁷³ The number in hours for audits was provided by the USCIS, Service Center Operations.

²⁷⁴ Calculation: \$50.94 hourly opportunity cost of time for an HR specialist * 12 hours to comply with an audit = \$611.28 per audited employer.

²⁷⁵ Calculation: 350 audited employers * \$611.28 opportunity cost of time to comply with an audit = \$213,948.

²⁷⁶ USPS, Priority Mail, <https://www.usps.com/ship/priority-mail.htm> (accessed September 23, 2023).

²⁷⁷ See <https://www.montgomerycountymd.gov/Library/services/computerhelp.html> (accessed September 20, 2023). Cost to make black and white copies. Calculation: 500 pages * \$0.15 per page = \$75.00 in printing costs.

²⁷⁸ Calculation: \$75.00 in printing costs + \$17.10 in shipping costs = \$92.10 to print and ship evidence.

²⁷⁹ Calculation: 154 petitioners * \$92.10 to print and ship evidence = \$14,183 total printing and shipping costs.

²⁸⁰ Calculation: \$50.94 hourly opportunity cost of time for HR specialist * 1 hour to print and ship evidence = \$50.94 opportunity cost of time per petitioner.

²⁸¹ Calculation: 154 petitioners * \$50.94 opportunity cost of time per petitioner = \$7,845 total estimated opportunity cost of time to print and ship evidence.

²⁸² Calculation: \$14,183 total printing and shipping costs + \$7,845 total opportunity cost of time = \$22,028 total estimated cost of additional scrutiny.

ranges from \$3,001,288 to \$4,451,415.²⁸⁹

x. Estimated Total Costs to Petitioners

In sum, the monetized costs of this rule come from time spent filing and complying with Form I-129, Form G-28, Form I-907, and Form ETA-9142-B-CAA-8, as well as contacting and refreshing recruitment efforts, posting notifications, time spent filing to obtain a porting worker, and complying with audits. The estimated total cost to file Form I-129 and an accompanying Form G-28 ranges from \$1,722,870 to \$2,602,134, depending on the filer. The estimated total cost of filing Form I-907 ranges from \$186,733 to \$276,927, depending on the filer. The estimated cost for late season employers to file Form ETA-9142B ranges from \$59,068 to \$87,595 depending on the filer. The estimated total cost of filing and complying with Form ETA-9142-B-CAA-8 is \$1,912,291. The estimated total cost of conducting additional recruitment is \$284,245. The estimated cost of the portability provision ranges from \$128,013 to \$193,042, depending on the filer. The estimated total cost for employers to comply with audits is \$213,948. The estimated total costs for petitioners or their representatives to familiarize themselves with this rule ranges from \$3,001,288 to \$4,451,415, depending on the filer. The estimated total cost of additional scrutiny is \$22,028. The total estimated cost to petitioners ranges from \$7,530,484 to \$10,043,625, depending on the filer.²⁹⁰

c. Cost to the Federal Government

USCIS will incur costs related to the adjudication of petitions as a result of this TFR. DHS expects USCIS to recover these costs by the fees associated with the forms, which have been accounted for as a transfer from petitioners to USCIS and serve as a proxy for the costs to the agency. The total filing fees associated with Form I-129 H-2B petitions are \$2,836,500,²⁹¹ and the total filing fees associated with premium processing are \$6,378,000.²⁹²

²⁸⁹ Calculation: $\$998,823 + \$2,002,465 = \$3,001,288$.

Calculation: $\$998,823 + \$3,452,592 = \$4,451,415$.

²⁹⁰ Calculation of lower range: $\$1,722,870 + \$186,733 + \$59,068 + \$1,912,291 + \$284,245 + \$128,013 + \$213,948 + \$3,001,288 + \$22,028 = \$7,530,484$.

Calculation of upper range: $\$2,602,134 + \$276,927 + \$87,595 + \$1,912,291 + \$284,245 + \$193,042 + \$213,948 + \$4,451,415 + \$22,028 = \$10,043,625$.

²⁹¹ Calculation: $(4,358 + 292 \text{ Form I-129 petitions}) * \$610 \text{ per petition} = \$2,836,500$.

²⁹² Calculation: $(3,985 + 267 \text{ Forms I-907}) * \$1,500 \text{ per form} = \$6,378,000$.

Total transfers from petitioners to the Government are \$9,214,500.²⁹³

The INA provides USCIS with the authority to collect fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including administrative costs, and services provided without charge to certain applicants and petitioners.²⁹⁴ DHS notes USCIS establishes its fees by assigning costs to an adjudication based on its relative adjudication burden and use of USCIS resources. USCIS establishes fees at an amount that is necessary to recover these assigned costs, such as clerical, officers, and managerial salaries and benefits, plus an amount to recover unassigned overhead (for example, facility rent, IT equipment and systems among other expenses) and immigration benefits provided without a fee charged. Consequently, since USCIS immigration fees are primarily based on resource expenditures related to the benefit in question, USCIS uses the fee associated with an information collection as a reasonable measure of the collection's costs to USCIS. DHS anticipates some additional costs in adjudicating the additional petitions submitted because of the increase in cap limitation for H-2B visas.

Both DOL and DHS intend to conduct a significant number of audits during the period of temporary need to verify compliance with H-2B program requirements, including the irreparable harm standard as well as other key worker protection provisions implemented through this rule.²⁹⁵ While fees fund most USCIS activities and appropriations fund DOL, we expect both agencies will be able to shift resources to conduct these audits without incurring additional costs. As previously mentioned, the agencies will conduct a total of 350 audits, and we expect each audit to take 12 hours. This results in a total time burden of 4,200 hours.²⁹⁶ USCIS anticipates that a Federal employee at a GS-13 Step 5 salary will typically conduct these audits for each agency. The base hourly pay for a GS-13 Step 5 in the Washington, DC locality area is \$60.83.²⁹⁷ To estimate the total hourly

²⁹³ Calculation: $\$2,836,500 + \$6,378,000 = \$9,214,500$.

²⁹⁴ See INA section 286(m), 8 U.S.C. 1356(m).

²⁹⁵ These audits are distinct from the WHD's authority to perform investigations regarding employers' compliance with the requirements of the H-2B program.

²⁹⁶ Calculation: $12 \text{ hours to conduct an audit} * 350 \text{ audits} = 4,200 \text{ total hours to conduct audits}$.

²⁹⁷ See U.S. Office of Personnel Management, Pay and Leave, Salaries and Wages, For the Locality Pay area of Washington-Baltimore-Arlington, DC-MD-VA-WV-PA, 2023, Hourly Basic Rate, [https://](https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/DCB_h.pdf)

compensation for these positions, we multiply the hourly wage (\$60.83) by the Federal benefits to wage multiplier of 1.37.²⁹⁸ This results in an hourly opportunity cost of time of \$83.34 for GS-13 Step 5 Federal employees in the Washington, DC locality pay area.²⁹⁹ The total opportunity costs of time for Federal workers to conduct audits is estimated to be \$350,028.³⁰⁰

This final rule implements changes to the DOL's mechanisms to receive complaints from advocates, unions, and other stakeholders about jobs posted on *seasonaljobs.gov*. DOL expects that the changes to the DOL's mechanisms to receive complaints may result in some additional costs to DOL. However, DOL is unable to quantify such costs due to lack of data.

d. Benefits to Petitioners

The Departments assume that employers will incur the costs of this rule and other costs associated with hiring H-2B workers if the expected benefits of those workers exceed the expected costs. We assume that employers expect some level of net benefit from being able to hire additional H-2B workers. However, the Departments do not collect or require data from H-2B employers on the profits from hiring these additional workers to estimate this increase in net benefits.

The inability to access H-2B workers for some entities is currently causing irreparable harm or will cause their businesses to suffer irreparable harm in the near future. Temporarily increasing the number of available H-2B visas for this fiscal year may result in a benefit, because it will allow some businesses to hire the additional labor resources necessary to avoid such harm. Preventing such harm may also result in cost savings by ultimately preserve the jobs of other employees (including U.S. workers) at that establishment.

www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/DCB_h.pdf (last accessed September 14, 2023).

²⁹⁸ Calculation, Step 1: $\$2,342,954 \text{ Full-time Permanent Salaries} + \$860,318 \text{ Civilian Personnel Benefits} = \$3,203,272 \text{ Compensation}$.

Calculation, Step 2: $\$3,203,272 \text{ Compensation} / \$2,342,954 \text{ Full-time Permanent Salaries} = 1.37 \text{ (rounded) Federal employee benefits to wage ratio}$. See https://www.uscis.gov/sites/default/files/document/reports/USCIS_FY_2021_Budget_Overview.pdf (accessed September 13, 2023).

²⁹⁹ Calculation: $\$60.83 \text{ hourly wage for a GS 13-5 in the Washington, DC locality area} * 1.37 \text{ Federal employee benefits to wage ratio} = \$83.34 \text{ hourly opportunity cost of time for a GS 13-5 federal employee in the Washington, DC locality area}$.

³⁰⁰ Calculation: $4,200 \text{ hours to conduct audits} * \$83.34 \text{ hourly opportunity cost of time} = \$350,028 \text{ total opportunity costs of time for Federal employees to conduct audits}$.

Additionally, returning workers are likely to be very familiar with the H-2B process and requirements, and may be positioned to begin work more expeditiously with these employers. Moreover, employers may already be familiar with returning workers as they have trained, vetted, and worked with some of these returning workers in past years. As such, limiting the supplemental visas to returning workers will assist employers that are suffering irreparable harm or will suffer impending irreparable harm.

e. Benefits to Workers

The Departments assume that workers will only incur the costs of this rule and other costs associated with obtaining a H-2B position if the expected benefits of that position exceed the expected costs. We assume that H-2B workers expect some level of net benefit from being able to work for H-2B employers. However, the Departments do not have sufficient data to estimate this increase in net benefits and lack the necessary resources to investigate this in a timely manner. This rule is not expected to impact wages because DOL prevailing wage regulations apply to all H-2B workers covered by this rule. Additionally, the RIA shows that employers incur costs in conducting additional recruitment of U.S. workers and attesting to irreparable harm from current labor shortfall. These costs suggest employers are not taking advantage of a large supply of foreign labor at the expense of domestic workers.

The existence of this rule will benefit the workers who receive H-2B visas. See Arnold Brodbeck et al., *Seasonal Migrant Labor in the Forest Industry of the United States: The Impact of H-2B Employment on Guatemalan Livelihoods*, 31 *Society & Natural Resources* 1012 (2018), and in particular this finding: “Participation in the H-2B guest worker program has become a vital part of the livelihood strategies of rural Guatemalan families and has had a positive impact on the quality of life in the communities where they live. Migrant workers who were landless, lived in isolated rural areas, had few economic opportunities, and who had limited access to education or adequate health care, now are investing in small trucks, building roads, schools, and homes, and providing employment for others in their home communities. . . . The impact has been transformative and positive.”

Some provisions of this rule will benefit such workers in particular ways. The portability provision of this rule will allow nonimmigrants with valid H-

2B visas who are present in the United States to transfer to a new employer more quickly and potentially extend their stay in the United States and, therefore, earn additional wages.

DHS recognizes that some of the effects of these provisions may occur beyond the borders of the United States. The current analysis does not seek to quantify or monetize costs or benefits that occur outside of the United States.

U.S. workers will also benefit from this rule in multiple ways. For example, the additional round of recruitment and U.S. worker referrals required by the provisions of this rule will ensure that a nonimmigrant worker does not displace a U.S. worker who is willing and able to fill the position and may result in some U.S. workers being hired. As noted, the avoidance of current or impending irreparable harm made possible through the granting of supplemental visas in this rule could ensure that U.S. workers—who otherwise may be vulnerable if H-2B workers were not given visas—do not lose their jobs.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), imposes certain requirements on Federal agency rules that are subject to the notice and comment requirements of the APA. See 5 U.S.C. 603(a), 604(a). This temporary final rule is exempt from notice and comment requirements for the reasons stated above. Therefore, the requirements of the RFA applicable to final rules, 5 U.S.C. 604, do not apply to this temporary final rule. Accordingly, the Departments are not required to either certify that the temporary final rule would not have a significant economic impact on a substantial number of small entities nor conduct a regulatory flexibility analysis.

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed rule, or final rule for which the agency published a proposed rule that includes any Federal mandate that may result in \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector.³⁰¹

³⁰¹ See 2 U.S.C. 1532(a).

This rule is exempt from the written statement requirement because DHS did not publish a notice of proposed rulemaking for this rule.

In addition, this rule does not exceed the \$100 million in 1995 expenditure in any 1 year when adjusted for inflation (\$192 million in 2022 dollars based on the Consumer Price Index for All Urban Consumers (CPI-U)),³⁰² and this rulemaking does not contain such a Federal mandate as the term is defined under UMRA.³⁰³ The requirements of Title II of the Act, therefore, do not apply, and the Departments have not prepared a statement under the Act.

E. Executive Order 13132 (Federalism)

This 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. Therefore, in accordance with section 6 of Executive Order 13132, 64 FR 43255 (Aug. 4, 1999), this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, 61 FR 4729 (Feb. 5, 1996).

G. National Environmental Policy Act

DHS and its components analyze their proposed actions to determine whether the National Environmental Policy Act (NEPA) applies to them and, if so, what degree of analysis is required. DHS Directive (Dir) 023–01 Rev. 01 and Instruction Manual 023–01–001–01 Rev. 01 (Instruction Manual) establish the procedures that DHS and its components use to comply with NEPA

³⁰² See U.S. Department of Labor, BLS, “Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. city average, all items, by month,” available at <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202308.pdf> (last visited September 27, 2023). Calculation of inflation: (1) Calculate the average monthly CPI-U for the reference year (1995) and the current year (2022); (2) Subtract reference year CPI-U from current year CPI-U; (3) Divide the difference of the reference year CPI-U and current year CPI-U by the reference year CPI-U; (4) Multiply by 100 = [(Average monthly CPI-U for 2022 – Average monthly CPI-U for 1995)/(Average monthly CPI-U for 1995)] * 100 = [(292.655 – 152.4)/152.4] * 100 = (140.255/152.4) * 100 = 0.9203 (rounded) * 100 = 92.03 percent = 92 percent (rounded). Calculation of inflation-adjusted value: \$100 million in 1995 dollars * 1.92 = \$192 million in 2022 dollars.

³⁰³ The term “Federal mandate” means a Federal intergovernmental mandate or a Federal private sector mandate. See 2 U.S.C. 1502(1), 658(6).

and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

NEPA and the CEQ regulations allow Federal agencies to establish categories of actions (“categorical exclusions”) that normally do not significantly affect the quality of the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 42 U.S.C. 4336e(1), 42 U.S.C. 4336(a)(2); 40 CFR 1501.4, 40 CFR 1508.1(d). The Instruction Manual, Appendix A, Table 1 lists Categorical Exclusions that DHS has found to have no such effect. Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Instruction Manual, section V.B.2(a–c).

This rule temporarily amends the regulations implementing the H–2B nonimmigrant visa program to increase the numerical limitation on H–2B nonimmigrant visas for FY 2024, based on the Secretary of Homeland Security’s determination, in consultation with the Secretary of Labor, consistent with the FY 2023 Omnibus and Public Law 118–15. It also allows H–2B beneficiaries who are in the United States to change employers upon the filing of a new H–2B petition and begin to work for the new employer for a period generally not to exceed 60 days before the H–2B petition is approved by USCIS.

DHS has considered in accordance with its NEPA implementing procedures and has determined that this temporary final rule clearly fits within categorical exclusion A3(d) because it interprets or amends a regulation without changing its environmental effect. The amendments to 8 CFR part 214 would authorize up to an additional 64,716 visas for noncitizens who may receive H–2B nonimmigrant visas, of which 44,716 are for returning workers (persons issued H–2B visas or were otherwise granted H–2B status in Fiscal Years 2021, 2022, or 2023). The proposed amendments would also facilitate H–2B nonimmigrants to move to new employment faster than they could if they had to wait for a petition to be approved. The amendment’s operative provisions approving H–2B petitions under the supplemental allocation would effectively terminate after September 30, 2024 for the cap

increase, and at the end of January 24, 2025 for the portability provision. DHS believes amending applicable regulations to authorize up to an additional 64,716 H–2B nonimmigrant visas will not result in reasonably foreseeable effects that would necessitate an environmental assessment or environmental impact statement with respect to the current H–2B limit or in the context of a current U.S. population exceeding 333,287,557 (maximum temporary increase of 0.0194 percent).³⁰⁴ DHS has also considered and determined that this action would not have extraordinary circumstances that would require the preparation of an environmental assessment or environmental impact statement.

The amendment to applicable regulations is a stand-alone temporary authorization and not a part of any larger action, and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this action is categorically excluded and no further NEPA analysis is required.

H. Congressional Review Act

The Office of Information and Regulatory Affairs has determined that this temporary final rule is a “major rule” as defined by the Congressional Review Act (“CRA”) in 5 U.S.C. 804(2)(a) and is subject to both the CRA’s reporting requirement and the delayed effective date requirement, pursuant to 5 U.S.C. 801. However, as stated in section IV.A of this rule, the Departments have good cause to forgo APA’s requirements for notice and public comment (and a delayed effective date), pursuant to 5 U.S.C. 553. Therefore, the Departments also have good cause to forgo the CRA’s 60-day delayed effective date requirement, pursuant to 5 U.S.C. 808(2). This rule is effective upon publication. DHS has complied with the CRA’s reporting requirements and has sent this rule to Congress and to the Comptroller General as required by 5 U.S.C. 801(a)(1).

I. Paperwork Reduction Act

Attestation for Employers Seeking To Employ H–2B Nonimmigrants Workers Under Section 303 of Division O of the Consolidated Appropriations Act, 2023, Public Law 117–328, as Extended by Sections 101(6) and 106 of Division A of the Continuing Appropriations Act, 2024 and Other Extensions Act, Public Law 118–15, Form ETA–9142B–CAA–8

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. DOL has submitted the Information Collection Request (ICR) contained in this rule to OMB and obtained approval of a new form, Form ETA–9142B–CAA–8, using emergency clearance procedures outlined at 5 CFR 1320.13. The Departments note that while DOL submitted the ICR, both DHS and DOL will use the information provided by employers in response to this information collection.

Petitioners will use the new Form ETA–9142B–CAA–8 to make attestations regarding, for example, irreparable harm and the returning worker requirement (unless exempt because the H–2B worker is a national of one of the countries included in the country-specific allocation who is counted against the 20,000 returning worker exemption cap) described above. Petitioners will need to file the attestation with DHS until it announces that the supplemental H–2B cap has been reached. In addition, the petitioner will need to retain all documentation demonstrating compliance with this implementing rule, and must provide it to DHS or DOL in the event of an audit or investigation.

In addition to obtaining immediate emergency approval pursuant to 5 CFR 1320.13, DOL is seeking comments on this information collection pursuant to 44 U.S.C. 3506(c)(2)(A). Comments on the information collection must be received by January 16, 2024. This process of engaging the public and other Federal agencies helps ensure that requested data can be provided in the desired format, reporting burden (time

³⁰⁴ *See* U.S. Census Bureau Quick Facts, available at <https://www.census.gov/quickfacts/US> (accessed September 28, 2023).

Calculation: 64,716 additional visas/333,287,557 million people in the United States = 0.0194 (rounded) percent temporary increase in the population.

and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The PRA provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. *See* 44 U.S.C. 3501 *et seq.* In addition, notwithstanding any other provisions of law, no person must generally be subject to a 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.

In accordance with the PRA, DOL is affording the public with notice and an opportunity to comment on the new information collection, which is necessary to implement the requirements of this rule. The information collection activities covered under a newly granted OMB Control Number 1205-NEW are required under Section 303 of Division O of the FY 2023 Omnibus as extended by Public Law 118-15, which provides that “the Secretary of Homeland Security, after consultation with the Secretary of Labor, and upon the determination that the needs of American businesses cannot be satisfied . . . with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor,” may increase the total number of noncitizens who may receive an H-2B visa by not more than the highest number of H-2B nonimmigrants who participated in the H-2B returning worker program in any fiscal year in which returning workers were exempt from the H-2B numerical limitation. As previously discussed in the preamble of this rule, the Secretary of Homeland Security, in consultation with the Secretary of Labor, has decided to increase the numerical limitation on H-2B nonimmigrant visas to authorize the issuance of up to, but not more than, an additional 64,716 visas for FY 2024 for certain H-2B workers, for U.S. businesses that attest that they are suffering irreparable harm or will suffer impending irreparable harm. As with the previous supplemental rules, the Secretary has determined that the additional visas will only be available for returning workers, that is workers who were issued H-2B visas or otherwise granted H-2B status in FY 2021, 2022, or 2023, unless the worker is one of the 20,000 nationals of one of the countries included in the country-

specific allocation who are exempt from the returning worker requirement.

Commenters are encouraged to discuss the following:

- 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;
- 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;
- The quality, utility, and clarity of the information to be collected; and
- The burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

The aforementioned information collection requirements are summarized as follows:

Agency: DOL-ETA.

Type of Information Collection:

Extension of an existing information collection.

Title of the Collection: Attestation for Employers Seeking to Employ H-2B Nonimmigrants Workers Under *Section 303 of Division O of the Consolidated Appropriations Act, 2023, Public Law 117-328, as extended by sections 101(6) and 106 of Division A of the Continuing Appropriations Act, 2024 and Other Extensions Act, Public Law 118-15.*

Agency Form Number: Form ETA-9142-B-CAA-8.

Affected Public: Private Sector—businesses or other for-profits.

Total Estimated Number of Respondents: 4,358.

Average Responses per Year per Respondent: 1.

Total Estimated Number of Responses: 4,358.

Average Time per Response: 10.17 hours per application.

Total Estimated Annual Time Burden: 32,469 hours.

Total Estimated Other Costs Burden: \$2,195,689.

Request for Premium Processing Service, Form I-907

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control

Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. Form I-907, Request for Premium Processing Service, has been approved by OMB and assigned OMB control number 1615-0048. DHS is making no changes to the Form I-907 in connection with this temporary rule implementing the time-limited authority pursuant to Section 303 of Division O of the Consolidated Appropriations Act, 2023, Public Law 117-328 as extended by Public Law 118-15 (which expires on November 17, 2023). However, USCIS estimates that this temporary rule may result in approximately 4,325 additional filings of Form I-907 in fiscal year 2024. The current OMB-approved estimate of the number of annual respondents filing a Form I-907 is 815,773. USCIS has determined that the OMB-approved estimate is sufficient to fully encompass the additional respondents who will be filing Form I-907 in connection with this temporary rule, which represents a small fraction of the overall Form I-907 population. Therefore, DHS is not changing the collection instrument or increasing its burden estimates in connection with this temporary rule and is not publishing a notice under the PRA or making revisions to the currently approved burden for OMB control number 1615-0048.

List of Subjects

8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Penalties, Reporting and recordkeeping requirements, Students.

20 CFR Part 655

Administrative practice and procedure, Employment, Employment and training, Enforcement, Foreign workers, Forest and forest products, Fraud, Health professions, Immigration, Labor, Longshore and harbor work, Migrant workers, Nonimmigrant workers, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

For the reasons discussed in the joint preamble, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

DEPARTMENT OF HOMELAND SECURITY

PART 214—NONIMMIGRANT CLASSES

■ 1. The authority citation for part 214 continues to read as follows:

Authority: 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305, 1357, and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

■ 2. Effective November 17, 2023, through November 17, 2026, amend § 214.2 by adding entries for “(30)” and “(31)” to table 3 to paragraph (h) and adding paragraph (h)(6)(xiv), a reserved paragraph (h)(30), and paragraph (h)(31) to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(h) * * *

TABLE 3 TO PARAGRAPH (h)—PARAGRAPH CONTENTS

(30) [Reserved]

(31) Change of employers and portability for H–2B workers (January 25, 2024 through January 24, 2025).

* * * *

(6) * * *

(xiv) *Special requirements for additional cap allocations under Public Laws 117–328 and 118–15—(A) Public Law 117–328 and section 101(6) of Division A of Public Law 118–15, Continuing Appropriations Act, 2024 and Other Extensions Act—(1) Supplemental allocation for returning workers.* Notwithstanding the numerical limitations set forth in paragraph (h)(8)(i)(C) of this section, for fiscal year 2024 only, the Secretary has authorized up to an additional 64,716 visas for aliens who may receive H–2B nonimmigrant visas pursuant to section 303 of Division O of Public Law 117–328, the Consolidated Appropriations Act, 2023, and section 101(6) of Division A of Public Law 118–15, Continuing Appropriations Act, 2024 and Other Extensions Act. An alien may be eligible to receive an H–2B nonimmigrant visa under this paragraph (h)(6)(xiv)(A)(1) if she or he is a returning worker. The term “returning worker” under this paragraph (h)(6)(xiv)(A)(1) means a person who was issued an H–2B visa or was otherwise granted H–2B status in fiscal year 2021, 2022, or 2023. Notwithstanding § 248.2 of this chapter, an alien may not change status to H–2B nonimmigrant under this paragraph (h)(6)(xiv)(A)(1). The additional H–2B visas authorized under this paragraph will be made available to returning workers as follows:

(i) Up to an additional 20,716 visas for aliens who may receive H–2B nonimmigrant visas based on petitions requesting FY 2024 employment start dates on or before March 31, 2024.

(ii) Up to an additional 19,000 visas for aliens who may receive H–2B nonimmigrant visas based on petitions requesting FY 2024 employment start dates from April 1, 2024 to May 14, 2024.

(iii) Up to an additional 5,000 visas available for aliens with employment start dates from May 15, 2024 to September 30, 2024.

(2) *Supplemental allocation for nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica.* Notwithstanding the numerical limitations set forth in paragraph (h)(8)(i)(C) of this section, for fiscal year 2024 only, and in addition to the allocation described in paragraph (h)(6)(xiv)(A)(1) of this section, the Secretary has authorized up to an additional 20,000 visas for aliens who are nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica, who may receive H–2B nonimmigrant visas pursuant section 303 of Division O of the Consolidated Appropriations Act, 2023, Public Law 117–328, and section 101(6) of Division A of Public Law 118–15 Continuing Appropriations Act, 2024 and Other Extensions Act, based on petitions with FY 2024 employment start dates. Such workers are not subject to the returning worker requirement in paragraph (h)(6)(xiv)(A)(1). Petitioners must request such workers in an H–2B petition that is separate from H–2B petitions that request returning workers under paragraph (h)(6)(xiv)(A)(1) and must declare that they are requesting these workers in the attestation Form ETA–9142–B–CAA–8 required under 20 CFR 655.65(a)(1). A petition requesting returning workers under paragraph (h)(6)(xiv)(A)(1), which is accompanied

by an attestation indicating that the petitioner is requesting nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica, will be rejected, denied or, in the case of a non-frivolous petition, approved solely for the number of beneficiaries that are from the Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica. Notwithstanding § 248.2 of this chapter, an alien may not change status to H–2B nonimmigrant under this paragraph (h)(6)(xiv)(A)(2).

(B) *Eligibility.* In order to file a petition with USCIS under this paragraph (h)(6)(xiv), the petitioner must:

(1) Comply with all other statutory and regulatory requirements for H–2B classification, including, but not limited to, requirements in this section, under part 103 of this chapter, and under 20 CFR part 655 and 29 CFR part 503; and

(2) Submit to USCIS, at the time the employer files its petition, a U.S. Department of Labor attestation, in compliance with this section and 20 CFR 655.64, evidencing that:

(i) Its business is suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H–2B workers requested on the petition filed pursuant to this paragraph (h)(6)(xiv);

(ii) All workers requested and/or instructed to apply for a visa have been issued an H–2B visa or otherwise granted H–2B status in fiscal year 2021, 2022, or 2023, unless the H–2B worker is a national of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica who is counted towards the 20,000 cap described in paragraph (h)(6)(xiv)(A)(2) of this section;

(iii) The employer will comply with obligations and additional recruitment requirements outlined in 20 CFR 655.64(a)(3) through (5);

(iv) The employer will provide documentary evidence of the facts in paragraphs (h)(6)(xiv)(B)(2)(i) through (iii) of this section to DHS and/or DOL upon request; and

(v) The employer will agree to fully cooperate with any compliance review, evaluation, verification, or inspection conducted by DHS, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other individuals possessing pertinent information, and review of the employer's records related to the compliance with immigration laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2024 supplemental allocations outlined in paragraph (h)(6)(xiv)(B) of this section, as a condition for the approval of the petition.

(vi) The employer will fully cooperate with any audit, investigation, compliance review, evaluation, verification or inspection conducted by DOL, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other individuals possessing pertinent information, and review of the employer's records related to the compliance with applicable laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2024 supplemental allocations outlined in 20 CFR 655.64(a) and 655.65(a), as a condition for the approval of the H-2B petition. The employer must attest to this on Form ETA-9142-B-CAA-8 and must further attest on Form ETA-9142-B-CAA-8 that it will not impede, interfere, or refuse to cooperate with an employee of the Secretary of the U.S. Department of Labor who is exercising or attempting to exercise DOL's audit or investigative authority pursuant to 20 CFR part 655, subpart A, and 29 CFR 503.25.

(C) *Processing—(1) Petitions filed pursuant to paragraph (h)(6)(xiv)(A)(1)(a) requesting FY 2024 employment start dates on or before March 31, 2024.* USCIS will reject petitions filed pursuant to paragraph (h)(6)(xiv)(A)(1)(a) of this section requesting employment start dates on or before March 31, 2024 that are received after the applicable numerical limitation has been reached or after September 16, 2024.

(2) *Petitions filed pursuant to paragraph (h)(6)(xiv)(A)(1)(ii) of this section requesting FY 2024 employment*

start dates from April 1, 2024 to May 14, 2024. USCIS will reject petitions filed pursuant to paragraph

(h)(6)(xiv)(A)(1)(ii) of this section requesting employment start dates from April 1, 2024 to May 14, 2024 that are received earlier than 15 days after the INA section 214(g) cap for the second half FY 2024 has been met, or after the applicable numerical limitation has been reached or after September 16, 2024.

(3) *Petitions filed pursuant to paragraph (h)(6)(xiv)(A)(1)(iii) of this section requesting FY 2024 employment start dates from May 15, 2024 and September 30, 2024.* USCIS will reject petitions filed pursuant to paragraph (h)(6)(xiv)(A)(1)(iii) of this section requesting employment start dates from May 15, 2024 to September 30, 2024 that are received earlier than 45 days after the INA section 214(g) cap for the second half FY 2024 has been met, or after the applicable numerical limitation has been reached or after September 16, 2024.

(4) *Petitions filed pursuant to paragraph (h)(6)(xiv)(A)(2) requesting nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica with FY 2024 employment start dates.* USCIS will reject petitions filed pursuant to paragraph (h)(6)(xiv)(A)(2) of this section that have a date of need on or after April 1, 2024 and are received earlier than 15 days after the INA section 214(g) cap for the second half of FY 2024 is met, or after the applicable numerical limitation has been reached or after September 16, 2024.

(5) USCIS will not approve a petition filed pursuant to this paragraph (h)(6)(xiv) on or after October 1, 2024.

(D) *Numerical limitations under paragraphs (h)(6)(xiv)(A)(1) and (2) of this section.* When calculating the numerical limitations under paragraphs (h)(6)(xiv)(A)(1) and (2) of this section as authorized under Public Law 117-328, as extended by Public Law 118-15, USCIS will make numbers for each allocation available to petitions in the order in which the petitions subject to the respective limitation are received.

USCIS will make projections of the number of petitions necessary to achieve the numerical limit of approvals, taking into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions received (including the number of workers requested when necessary) and will notify the public of the dates that USCIS has received the necessary number of petitions (the "final receipt dates") under paragraph

(h)(6)(xiv)(A)(1) or (2). The day the public is notified will not control the final receipt dates. When necessary to ensure the fair and orderly allocation of numbers subject to the numerical limitations in paragraphs (h)(6)(xiv)(A)(1) and (2), USCIS may randomly select from among the petitions received on the final receipt dates the remaining number of petitions deemed necessary to generate the numerical limit of approvals. This random selection will be made via computer-generated selection. Petitions subject to a numerical limitation not randomly selected or that were received after the final receipt dates that may be applicable under paragraph (h)(6)(xiv)(A)(1) or (2) will be rejected. If the final receipt date is any of the first 5 business days on which petitions subject to the applicable numerical limits described in paragraph (h)(6)(xiv)(A)(1) or (2) may be received (in other words, if either of the numerical limits described in paragraph (h)(6)(xiv)(A)(1) or (2) is reached on any one of the first 5 business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those 5 business days.

(E) *Sunset.* This paragraph (h)(6)(xiv) expires on October 1, 2024.

(F) *Non-severability.* The requirement to file an attestation under paragraph (h)(6)(xiv)(B)(2) of this section is intended to be non-severable from the remainder of this paragraph (h)(6)(xiv), including, but not limited to, the numerical allocation provisions at paragraphs (h)(6)(xiv)(A)(1) and (2) of this section in their entirety. In the event that any part of this paragraph (h)(6)(xiv) is enjoined or held to be invalid by any court of competent jurisdiction, the remainder of this paragraph (h)(6)(xiv) is also intended to be enjoined or held to be invalid in such jurisdiction, without prejudice to workers already present in the United States under this paragraph (h)(6)(xiv), as consistent with law.

* * * * *

(30) [Reserved]

(31) *Change of employers and portability for H-2B workers.* (i) This paragraph (h)(31) relates to H-2B workers seeking to change employers during the time period specified in paragraph (h)(31)(iv) of this section. Notwithstanding paragraph (h)(2)(i)(D) of this section:

(A) An alien in valid H-2B nonimmigrant status whose new petitioner files a non-frivolous H-2B petition requesting an extension of the alien's stay on or after January 25, 2024,

is authorized to begin employment with the new petitioner after the petition described in this paragraph (h)(31) is received by USCIS and before the new H-2B petition is approved, but no earlier than the start date indicated in the new H-2B petition; or

(B) An alien whose new petitioner filed a non-frivolous H-2B petition requesting an extension of the alien's stay before January 25, 2024, that remains pending on January 25, 2024, is authorized to begin employment with the new petitioner before the new H-2B petition is approved, but no earlier than the start date of employment indicated on the new H-2B petition.

(ii)(A) With respect to a new petition described in paragraph (h)(31)(i)(A) of this section, and subject to the requirements of 8 CFR 274a.12(b)(34), the new period of employment described in paragraph (h)(31)(i) of this section may last for up to 60 days beginning on the Received Date on Form I-797 (Notice of Action) or, if the start date of employment occurs after the I-797 Received Date, for a period of up to 60 days beginning on the start date of employment indicated in the H-2B petition.

(B) With respect to a new petition described in paragraph (h)(31)(i)(B) of this section, the new period of employment described in paragraph (h)(31)(i) of this section may last for up to 60 days beginning on the later of either January 25, 2024, or the start date of employment indicated in the H-2B petition.

(C) With respect to either type of new petition, if USCIS adjudicates the new petition before the expiration of this 60-day period and denies the petition, or if the new petition is withdrawn by the petitioner before the expiration of the 60-day period, the employment authorization associated with the filing of that petition under 8 CFR 274a.12(b)(34) will automatically terminate 15 days after the date of the denial decision or 15 days after the date on which the new petition is withdrawn. Nothing in this paragraph (h)(31) is intended to alter the availability of employment authorization related to professional H-2B athletes who are traded between organizations pursuant to paragraph (h)(6)(vii) of this section and 8 CFR 274a.12(b)(9).

(iii) In addition to meeting all other requirements in paragraph (h)(6) of this section for the H-2B classification, to commence employment under this paragraph (h)(31):

(A) The alien must either:

(1) Have been in valid H-2B nonimmigrant status on or after January

25, 2024 and be the beneficiary of a non-frivolous H-2B petition requesting an extension of the alien's stay that is received on or after January 25, 2024, but no later than January 24, 2025; or

(2) Be the beneficiary of a non-frivolous H-2B petition requesting an extension of the alien's stay that is pending as of January 25, 2024; and

(B) The petitioner may not impede, interfere, or refuse to cooperate with an employee of the Secretary of the U.S. Department of Labor who is exercising or attempting to exercise DOL's audit or investigative authority under 20 CFR part 655, subpart A, and 29 CFR 503.25.

(iv) Authorization to initiate employment changes pursuant to this paragraph (h)(31) begins at 12 a.m. on January 25, 2024, and ends at the end of January 24, 2025.

* * * * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 3. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1105a, 1324a; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101-410, 104 Stat. 890, as amended by Pub. L. 114-74, 129 Stat. 599.

■ 4. Effective November 17, 2023, through November 17, 2026, amend § 274a.12 by adding paragraph (b)(34) to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(b) * * *

(34)(i) Pursuant to 8 CFR 214.2(h)(31) and notwithstanding 8 CFR 214.2(h)(2)(i)(D), an alien is authorized to be employed no earlier than the start date of employment indicated in the H-2B petition and no earlier than January 25, 2024, by a new employer that has filed an H-2B petition naming the alien as a beneficiary and requesting an extension of stay for the alien, for a period not to exceed 60 days beginning on:

(A) The later of the "Received Date" on Form I-797 (Notice of Action) acknowledging receipt of the petition, or the start date of employment indicated on the new H-2B petition, for petitions filed on or after January 25, 2024; or

(B) The later of January 25, 2024, or the start date of employment indicated on the new H-2B petition, for petitions that are pending as of January 25, 2024.

(ii) If USCIS adjudicates the new petition prior to the expiration of the 60-day period in paragraph (b)(34)(i) of this section and denies the new petition for extension of stay, or if the petitioner withdraws the new petition before the

expiration of the 60-day period, the employment authorization under this paragraph (b)(34) will automatically terminate upon 15 days after the date of the denial decision or the date on which the new petition is withdrawn. Nothing in this section is intended to alter the availability of employment authorization related to professional H-2B athletes who are traded between organizations pursuant to paragraph (b)(9) of this section and 8 CFR 214.2(h)(6)(vii).

(iii) Authorization to initiate employment changes pursuant to 8 CFR 214.2(h)(31) and paragraph (b)(34)(i) of this section begins at 12 a.m. on January 25, 2024, and ends at the end of January 24, 2025.

* * * * *

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Chapter V

Accordingly, for the reasons stated in the joint preamble, 20 CFR part 655 is amended as follows:

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 5. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; sec. 412(e), Pub. L. 105-277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106-95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107-296, 116 Stat. 2135, as amended; Pub. L. 109-423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115-218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C.

1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart E issued under 48 U.S.C. 1806.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

Subparts H and I issued under 8 U.S.C.

1101(a)(15)(H)(i)(b) and (b)(1), 1182(n), and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105-277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d),

Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

■ 6. Effective November 17, 2023, through September 30, 2024, add § 655.64 to read as follows:

§ 655.64 Special application filing and eligibility provisions for Fiscal Year 2024 under the November 17, 2023 supplemental cap increase.

(a) An employer filing a petition with USCIS under 8 CFR 214.2(h)(6)(xiv) to request H–2B workers with FY 2024 employment start dates on or before September 30, 2024, must meet the following requirements:

(1) The employer must attest on the Form ETA–9142–B–CAA–8 that its business is suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H–2B workers requested on the petition filed pursuant to 8 CFR 214.2(h)(6)(xiv). Additionally, the employer’s attestation must identify the types of evidence the employer is relying on and will retain to meet the irreparable harm standard, attest that the employer has created a detailed written statement describing how it is suffering irreparable harm or will suffer impending irreparable harm and describing how such evidence demonstrates irreparable harm, and attest that the employer will provide all documentary evidence of the applicable irreparable harm and the written statement describing how such evidence demonstrates irreparable harm to DHS and/or DOL upon request.

(2) The employer must attest on Form ETA–9142–B–CAA–8 that each of the workers requested and/or instructed to apply for a visa, whether named or unnamed, on a petition filed pursuant to 8 CFR 214.2(h)(6)(xiv), have been issued an H–2B visa or otherwise granted H–2B status during one of the last three (3) fiscal years (fiscal year 2021, 2022, or 2023), unless the H–2B worker is a national of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica and is counted towards the 20,000 cap described in 8 CFR 214.2(h)(6)(xiv)(A)(2).

(3) The employer must attest on Form ETA–9142–B–CAA–8 that the employer will comply with all the assurances, obligations, and conditions of employment set forth on its approved *Application for Temporary Employment Certification*.

(4) An employer that submits Form ETA–9142B–CAA–8 and the I–129 petition 30 or more days after the certified start date of work, as shown on its approved Form ETA–9142B, *Final*

Determination: H–2B Temporary Labor Certification Approval, must conduct additional recruitment of U.S. workers as follows:

(i) Not later than the next business day after submitting the I–129 petition for H–2B worker(s), the employer must place a new job order for the job opportunity with the State Workforce Agency (SWA), serving the area of intended employment. The employer must follow all applicable SWA instructions for posting job orders, concurrently inform the SWA and NPC that the job order is being placed in connection with a previously certified *Application for Temporary Employment Certification* for H–2B workers by providing the unique temporary labor certification (TLC) identification number, and receive applications in all forms allowed by the SWA, including online applications (sometimes known as “self-referrals”). The job order must contain the job assurances and contents set forth in § 655.18 for recruitment of U.S. workers at the place of employment, and remain posted for at least 15 calendar days;

(ii) During the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of this section for intrastate clearance, the employer must contact, by email or other available electronic means, the nearest comprehensive American Job Center (AJC) serving the area of intended employment where work will commence, request staff assistance advertising and recruiting qualified U.S. workers for the job opportunity, and provide the unique identification number associated with the job order placed with the SWA or, if unavailable, a copy of the job order. If a comprehensive AJC is not available, the employer must contact the nearest affiliate AJC serving the area of intended employment where work will commence to satisfy the requirements of this paragraph (a)(4)(ii);

(iii) Where the occupation or industry is traditionally or customarily unionized, during the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of this section for intrastate clearance, the employer must contact (by mail, email or other effective means) the nearest American Federation of Labor and Congress of Industrial Organizations office covering the area of intended employment and provide written notice of the job opportunity, by providing a copy of the job order placed pursuant to (a)(4)(i) of this section, and request assistance in recruiting qualified U.S. workers for the job;

(iv) During the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of this section for intrastate clearance, the employer must contact (by mail or other effective means) its former U.S. workers, including those who have been furloughed or laid off, during the period beginning January 1, 2022, until the date the I–129 petition required under 8 CFR 214.2(h)(6)(xiv) is submitted, who were employed by the employer in the occupation at the place of employment (except those who were dismissed for cause or who abandoned the worksite), disclose the terms of the job order placed pursuant to (a)(4)(i) of this section, and solicit their return to the job. The contact and disclosures required by this paragraph (a)(4)(iv) must be provided in a language understood by the worker, as necessary or reasonable, and in writing;

(v) During the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of this section for intrastate clearance, the employer must engage in the recruitment of U.S. workers as provided in § 655.45(a) and (b). The contact and disclosures required by this paragraph (a)(4)(v) must be provided in a language understood by the worker, as necessary or reasonable, in writing; and

(vi) During the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of this section for intrastate clearance, the employer must contact (by mail or other effective written means) all U.S. workers currently employed at the place of employment, disclose the terms of the job order placed pursuant to (a)(4)(i) of this section, and request assistance in recruiting qualified U.S. workers for the job. The contact, disclosure, and request for assistance required by this paragraph (a)(4)(vi) must be provided in a language understood by the worker, as necessary or reasonable, and in writing;

(vii) Where the employer maintains a website for its business operations, during the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of this section for intrastate clearance, the employer must post the job opportunity in a conspicuous location on the website. The job opportunity posted on the website must disclose the terms of the job order placed pursuant to (a)(4)(i) of this section, and remain posted for at least 15 calendar days;

(viii) The employer must hire any qualified U.S. worker who applies or is referred for the job opportunity until the date on which the last H–2B worker departs for the place of employment, or 30 days after the last date on which the

SWA job order is posted, whichever is later. Consistent with § 655.40(a), applicants can be rejected only for lawful job-related reasons.

(5) The employer must attest on Form ETA-9142-B-CAA-8 that it will fully cooperate with any audit, investigation, compliance review, evaluation, verification, or inspection conducted by DOL, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other individuals possessing pertinent information, and review of the employer's records related to the compliance with applicable laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2024 supplemental allocations outlined in this paragraph (a) and § 655.65(a), as a condition for the approval of the H-2B petition. Pursuant to this subpart and 29 CFR 503.25, the employer will not impede, interfere, or refuse to cooperate with an employee of the Secretary who is exercising or attempting to exercise DOL's audit or investigative authority.

(b) This section expires on October 1, 2024.

(c) The requirements under paragraph (a) of this section are intended to be non-severable from the remainder of this section; in the event that paragraph (a)(1), (2), (3), (4), or (5) of this section is enjoined or held to be invalid by any court of competent jurisdiction, the remainder of this section is also intended to be enjoined or held to be invalid in such jurisdiction, without prejudice to workers already present in

the United States under this part, as consistent with law.

■ 7. Effective November 17, 2023, through September 30, 2027, add § 655.65 to read as follows:

§ 655.65 Special document retention provisions for Fiscal Years 2024 through 2027 under the Consolidated Appropriations Act, 2023, as extended by Public Law 118–15.

(a) An employer that files a petition with USCIS to employ H-2B workers in fiscal year 2024 under authority of the temporary increase in the numerical limitation under section 303 of Division O, Public Law 117–328, as extended by Public Law 118–15 must maintain for a period of three (3) years from the date of certification, consistent with 20 CFR 655.56 and 29 CFR 503.17, the following:

(1) A copy of the attestation filed pursuant to the regulations in 8 CFR 214.2 governing that temporary increase;

(2) Evidence establishing, at the time of filing the I-129 petition, that the employer's business is suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H-2B workers requested on the petition filed pursuant to 8 CFR 214.2(h)(6)(xiv), including a detailed written statement describing the irreparable harm and how such evidence shows irreparable harm;

(3) Documentary evidence establishing that each of the workers the employer requested and/or instructed to

apply for a visa, whether named or unnamed on a petition filed pursuant to 8 CFR 214.2(h)(6)(xiv), have been issued an H-2B visa or otherwise granted H-2B status during one of the last three (3) fiscal years (fiscal year 2021, 2022, or 2023), unless the H-2B worker(s) is a national of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, or Costa Rica and is counted towards the 20,000 cap described in 8 CFR 214.2(h)(6)(xiv)(A)(2). Alternatively, if applicable, employers must maintain documentary evidence that the workers the employer requested and/or instructed to apply for visas are eligible nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, or Costa Rica as defined in 8 CFR 214.2(h)(6)(xiv)(A)(2); and

(4) If applicable, proof of recruitment efforts set forth in § 655.64(a)(4)(i) through (vii) and a recruitment report that meets the requirements set forth in § 655.48(a)(1) through (4) and (7), and maintained throughout the recruitment period set forth in § 655.64(a)(4)(viii).

(b) DOL and/or DHS may inspect the documents in paragraphs (a)(1) through (4) of this section upon request.

(c) This section expires on October 1, 2027.

Alejandro N. Mayorkas,
Secretary, U.S. Department of Homeland Security.

Julie A. Su,
Acting Secretary, U.S. Department of Labor.

[FR Doc. 2023–25493 Filed 11–16–23; 8:45 am]

BILLING CODE 9111–97–P; 4510–FP–P



FEDERAL REGISTER

Vol. 88

Friday,

No. 221

November 17, 2023

Part III

Department of Defense

Defense Acquisition Regulations System

48 Part 212, et al.

Defense Federal Acquisition Regulations; Final Rules and Proposed Rules

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 212, 219, and 252**

[Docket DARS–2018–0035; Req No. DARS–2024–00009–FR]

RIN 0750–AJ21

Defense Federal Acquisition Regulation Supplement: Inapplicability of Certain Laws and Regulations to Commercial Items (DFARS Case 2017–D010)**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).**ACTION:** Final rule.

SUMMARY: DoD is issuing a final rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to partially implement a section of the National Defense Authorization Act for Fiscal Year 2017 that addresses the inapplicability of certain laws and regulations to the acquisition of commercial products, including commercially available off-the-shelf items, and commercial services.

DATES: Effective November 17, 2023.**FOR FURTHER INFORMATION CONTACT:** Ms. Jeanette Snyder, telephone 703–508–7524.**SUPPLEMENTARY INFORMATION:****I. Background**

DoD published a proposed rule in the **Federal Register** at 83 FR 30646 on June 29, 2018, to amend the DFARS to implement section 874 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328). Section 874 amends 10 U.S.C. 2375 (redesignated as 10 U.S.C. 3452), Relationship of other provisions of law to procurement of commercial products and commercial services. Section 874–

- Requires DoD to address commercial item applicability for DoD-unique statutes and associated DFARS contract clauses issued after January 1, 2015;
- Restricts inclusion of contract clauses in contracts for commercial products, commercial services, and commercially available off-the-shelf (COTS) items and in subcontracts under contracts for the acquisition of commercial products, commercial services, and COTS items;
- Redefines “subcontract” and restricts inclusion of contract clauses to subcontracts under contracts for the acquisition of commercial products, commercial services, and COTS items.

Six respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

This final rule does not implement the definition of “subcontract” based on the section 874 update at 10 U.S.C. 3452(c)(3). A new DFARS case 2023–D022, Definition of Subcontract, will address 10 U.S.C. 3452(c)(3) and will be processed in parallel with the related Federal Acquisition Regulation (FAR) case 2018–006, Definition of “Subcontract”. FAR case 2018–006 implements section 820 of the NDAA for FY 2018 (Pub. L. 115–91) that updates 41 U.S.C. 1906(c)(1) to change the meaning of “subcontract” in certain circumstances. The updated text at 10 U.S.C. 3452(c)(3) and 41 U.S.C. 1906(c)(1) is the same, except for the stated applicability in each of the statutes to either DoD or Federal Government contracts, respectively.

DoD reviewed the public comments in the development of the final rule. One change was made to the proposed rule text as a result of the public comments. A discussion of the public comments and the changes made as a result of those comments is provided as follows:

A. Summary of Significant Changes From the Proposed Rule

As noted in the introductory text of section II of this preamble, this final rule does not implement the changes in the proposed rule related to the definition of “subcontract” based on the updates at 10 U.S.C. 3452(c)(3). Therefore, the comment to add the words “or subcontractor at any tier” at DFARS 212.001 in the definition of “subcontract” in paragraph (2), and in the clauses that include this definition, to clarify that the agreements exclusion applies to subcontractors at any tier, will be considered under the new DFARS Case 2023–D022, Definition of Subcontract. One change was made to add a sentence at DFARS 212.301, paragraph (f), to clarify the prohibition of the use of FAR and DFARS solicitation provisions and contract clauses by the contracting officer, where not required by the FAR or DFARS or consistent with customary commercial practices.

B. Analysis of Public Comments**1. General**

Comment: Several respondents expressed concerns regarding the implementation of the statute and whether all DFARS clauses should be reviewed under this rule.

Response: In addition to this DFARS Case 2017–D010, there are other FAR

and DFARS cases related to commercial contracts that are in process (FAR Cases 2018–013 and 2018–006; and DFARS Cases 2018–D074 and 2023–D022). FAR Case 2018–018, published at 86 FR 61017 (November 4, 2021), implemented section 836 of the NDAA for FY 2019 (Pub. L. 115–232) that revised 41 U.S.C. 103 to amend the definition of “commercial item” in the FAR. DFARS case 2018–D066, published at 88 FR 6578 (January 31, 2023), also implemented section 836 of the NDAA for FY 2019 in the DFARS to make similar changes to the term “commercial item”, as well as implementing sections 837(b) and (c) of the NDAA for FY 2019. Section 836 amended the definition of “commercial item”; and section 837(b) and (c) made conforming changes at 10 U.S.C. 2533a and 2533b, now 10 U.S.C. 4862 and 4863, respectively. Under this rulemaking (DFARS Case 2017–D010), DoD reviewed DFARS clauses as directed under section 874 of the NDAA for FY 2017. Section 874 limits the required review of the applicability of provisions of law and contract clauses to prime contracts for commercial products (including COTS items) and commercial services to those provisions of law and contract clauses enacted after January 1, 2015. DFARS Case 2018–D074 will include a review of DFARS clauses for applicability of provisions of law and contract clauses to prime contracts for commercial products (including COTS items) and commercial services for those provisions of law and contract clauses enacted after October 13, 1994.

2. Contracting Officer Clause Selection

Comment: One respondent stated that the DFARS should be amended to prohibit the use of DFARS provisions and clauses unless consistent with customary commercial practice or approved in accordance with FAR 12.302. The respondent also recommended the SF 1449 block 10 be revised so as to not confuse contracting officers due to the elimination of applicability of DFARS 252.219–7010, Notification of Competition Limited to Eligible 8(a) Participants—Partnership Agreement, to commercial item contracts.

Response: The proposed rule text has been revised to clarify at DFARS 212.301(f) that the use of provisions and clauses other than the DFARS part 212 provisions and clauses by the contracting officer is prohibited unless required by the FAR or DFARS or unless consistent with customary commercial practices. In addition, DFARS 212.370, Inapplicability of certain provisions and

clauses to contracts and subcontracts for the acquisition of commercial products, commercial services, and commercially available off-the-shelf items, is amended to remove 252.219–7010 from the proposed rule text. DFARS 219.811–3, paragraph (2), is amended to state that 252.219–7010 is used in solicitations and contracts, including those using FAR part 12 procedures for commercial products and commercial services, when using the competitive 8(a) procedures of FAR 19.805. This is necessary for DoD procurements of commercial products and commercial services that have been accepted by the Small Business Administration for competition under the 8(a) program.

3. Flowing Down Clauses to Subcontracts

Comment: Three respondents stated that the proposed rule should prohibit flowing down clauses to subcontracts by contractors (and higher-tier subcontractors). One respondent stated that the FAR should be amended to delete the language at FAR 52.244–6(c)(2) and should be amended to limit flowdown only to clauses that specifically require flowdown to subcontracts for commercial items with a prohibition on flowing down any additional clauses. Another respondent recommended that DoD bar contractors from wholesale flowdown of clauses. Another respondent stated that it is unclear what ramifications there will be if a FAR or DFARS clause is improperly flowed down.

Response: This final rule prohibits flowing down FAR or DFARS clauses by the prime contractor, under certain conditions, under DFARS clause 252.244–7000, Subcontracts for Commercial Products or Commercial Services. Also, the rule prohibits flowing down FAR or DFARS provisions and clauses by higher-tier subcontractors, under certain conditions, as DFARS clause 252.244–7000 has a flowdown requirement. The ramifications of improperly flowing down FAR or DFARS clauses would be determined in accordance with the terms of the contract.

4. Implementation

Comment: Two respondents stated that the proposed rule does not fully implement the amendment to 10 U.S.C. 2375 (now 10 U.S.C. 3452) by section 874 of the NDAA for FY 2017. The respondents objected to DoD's application of the date of January 1, 2015, which appears in 10 U.S.C. 3452(b)(2), to paragraphs (c) and (d). The respondents recommended that DoD not limit its review to only those

provisions and clauses enacted after January 1, 2015.

Response: The applicability of DFARS clauses published prior to January 1, 2015, to contracts and subcontracts for commercial products, commercial services, and COTS items is being reviewed under DFARS case 2018–D074.

5. Definitions of “subcontract” and “Subcontractor”

Comment: Several respondents commented on the definitions of “subcontract” and “subcontractor.” One respondent stated that the DFARS definitions of “subcontract” and “subcontractor” should be consistent with the FAR definitions and that the term “similar contractual instrument” should be defined. Two respondents stated that the proposed rule should rephrase the language regarding the exclusion from agreements that are “not identifiable to any particular contract”, as the term “identifiable” may be ambiguous. One respondent stated the language should be changed to state there is an exclusion from agreements “not identified to any particular contract under the contractor’s disclosed (if applicable) or otherwise established business practices.” A respondent stated that the terms “multiple contracts” and “other parties” need clarity. Two respondents stated the exclusion should be modified to clarify that it excludes contractor agreements at any level of the supply chain. One respondent stated the definition of subcontract in the proposed rule text will exclude agreements that would benefit from the flowdown of DFARS 252.225–7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals, and DFARS 252.225–7012, Preference for Certain Domestic Commodities, and recommended those clauses be amended to include language that removes the exclusion in the definition of “subcontract.” Three respondents stated that the term “commodities” should be defined. One respondent stated that the definition of “subcontract” should be moved from DFARS 212.001 to DFARS 244.101 to avoid limiting application of this definition to DFARS part 212 clauses.

Response: DoD agrees that the DFARS definitions of “subcontract” and “subcontractor” should be consistent with the FAR definitions. Therefore, DoD has initiated a separate DFARS Case 2023–D022 to implement the definition of “subcontract” in the DFARS to facilitate alignment with the proposed rule for FAR case 2018–006. The DFARS generally relies on the FAR

definitions of “subcontract” and “subcontractor.” The statutory language of 10 U.S.C. 3452(c)(3) is limited to DoD; however, FAR case 2018–006 will amend the definition of “subcontract” in the FAR to implement similar statutory language at 41 U.S.C. 1906(c)(1).

6. Statutory Separation of Commercial Products and Commercial Services

Comment: One respondent recommended ensuring that the proposed rule can be readily applied when future rulemaking transitions the DFARS to using the terms “commercial product” and “commercial service.”

Response: DFARS case 2018–D066, published at 88 FR 6578 (January 31, 2023), has implemented this change to the nomenclature in the DFARS.

7. Application to Existing Contracts and Subcontracts

Comment: One respondent stated that the proposed rule should be made to apply to existing DoD contracts and subcontracts.

Response: Contracting officers may use their discretion to apply this final rule to existing contracts; however, they are not required to do so. See FAR 1.108(d).

8. Outside the Scope of the Rule

Comment: One respondent stated that when COTS products are provided under services contracts, as well as services primarily for the installation and maintenance of COTS products, those subcontracts should also be excluded from flowdown obligations that are excluded from COTS item subcontracts. One respondent stated that none of the “best interest” determinations made in this rule adequately consider existing standard commercial practice and recommended publishing the determinations. Two respondents stated that the proposed rule impacts the environment.

Response: These comments are outside the scope of this rule. A commercial subcontract for services that delivers the installation and maintenance of COTS items is a contract for commercial services and not a contract for COTS items. The only way to extend a COTS item exclusion would be to change the definition of COTS item to include services that deliver the installation and maintenance of COTS products, which is outside the scope of this rule. The applicability of DFARS clauses to commercial contracts and commercial subcontracts that do not have an exemption from inapplicability at 10 U.S.C. 3452 (e)(1), (e)(2), or (e)(3), is being reviewed under DFARS case

2018–D074. The comment regarding environmental impact is unrelated to the proposed rule text.

C. Other Changes

All references to 10 U.S.C. 2375 in the proposed rule are changed in the final rule to 10 U.S.C. 3452. This change is a result of the final rule for DFARS Case 2022–D018, Reorganization of Defense Acquisition Statutes, published at 87 FR 76988 on December 16, 2022, which implemented the transfer and reorganization of the defense acquisition statutes.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Products, Including Commercially Available Off-the-Shelf Items, and Commercial Services

This final rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses or their applicability to contracts valued at or below the simplified acquisition threshold, for commercial products including COTS items, or for commercial services.

IV. Expected Impact of the Rule

This rule may impact any business, large or small, that is awarded a commercial contract by DoD. The rule does not add any new solicitation provisions or contract clauses. Rather, there may be a reduction in burden on contractors by the creation of two new sections in the DFARS that list solicitation provisions and contract clauses that are inapplicable to solicitations and contracts for commercial products, commercial services, and COTS items.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, as amended.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before a final rule takes effect, DoD will submit a copy of the final rule with the form, Submission of Federal Rules Under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VII. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* and is summarized as follows:

This final rule is required in order to implement part of section 874 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017. Section 874 amended 10 U.S.C. 2375, redesignated as 10 U.S.C. 3452, and required certain changes to the Defense Federal Acquisition Regulation Supplement (DFARS).

The objective of the final rule is to partially implement section 874 of the NDAA for FY 2017 to address the applicability of Defense-unique statutes to contracts and subcontracts for commercial products, commercial services, and commercially available off-the-shelf items.

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

DoD obtained data from the Federal Procurement Data System for contracts that were awarded in FY 2020 through FY 2022 using FAR part 12 procedures for the acquisition of commercial products and commercial services and that exceeded the micro-purchase threshold. The data indicate that DoD awarded this type of contract to approximately 13,952 unique small entities per year. DoD estimates there may be approximately twice that number of small entities receiving subcontracts for commercial products and commercial services. Any reductions in the applicability of solicitation provisions and contract clauses to contracts and subcontracts for the acquisition of commercial products and commercial services may be beneficial to these small entities.

This final rule does not include any new projected reporting, recordkeeping, or other compliance requirements for small entities.

DoD did not identify any significant alternatives that would minimize or reduce the impact on small entities while accomplishing the stated objectives of the applicable statute.

VIII. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 212, 219, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 219, and 252 are amended as follows:

■ 1. The authority citation for parts 212, 219, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

■ 2. Amend section 212.301 by adding a sentence at the end of paragraph (f) introductory text to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial products and commercial services.

* * * * *

(f) * * * The contracting officer shall not use other FAR or DFARS provisions and clauses unless required by the FAR or DFARS or consistent with customary commercial practices (section 874(b)(1)(A), Pub. L. 114–328).

* * * * *

■ 3. Add section 212.370 to read as follows:

212.370 Inapplicability of certain provisions and clauses to contracts and subcontracts for the acquisition of commercial products, commercial services, and commercially available off-the-shelf items.

The following provisions and clauses, not expressly authorized in law, are not applicable to contracts for the acquisition of commercial products and commercial services:

(a) FAR 52.204–22, Alternative Line Item Proposal.

(b) [Reserved]

■ 4. Add section 212.371 to read as follows:

212.371 Inapplicability of certain provisions and clauses to contracts for the acquisition of commercially available off-the-shelf items.

Commercially available off-the-shelf (COTS) items are a subset of commercial products. Therefore, the provisions and clauses listed in 212.370 as not applicable to contracts or subcontracts for the acquisition of commercial products are also not applicable to contracts or subcontracts for the acquisition of COTS items. In addition, the following provisions and clauses published after January 1, 2015, not expressly authorized in law, are not applicable to contracts for the acquisition of COTS items:

(a) FAR 52.204–21, Basic Safeguarding of Covered Contractor Information Systems.

(b) [Reserved]

■ 5. Revise section 212.505 to read as follows:

212.505 Applicability of certain laws to contracts for the acquisition of COTS items.

Commercially available off-the-shelf (COTS) items are a subset of commercial products. Therefore, any laws listed at FAR 12.503, FAR 12.504, 212.503, or 212.504 are also not applicable or modified in their applicability to contracts for the acquisition of COTS items. In addition to the laws listed at FAR 12.505 as specifically not applicable to COTS items, the following laws are not applicable to contracts for the acquisition of COTS items:

(1) 10 U.S.C. 391, Reporting on Cyber Incidents with Respect to Networks and Information Systems of Operationally Critical Contractors and Certain Other Contractors, and 10 U.S.C. 393, Reporting on Penetrations of Networks and Information Systems of Certain Contractors.

(2) Paragraph (a)(1) of 10 U.S.C. 4863, Requirement to buy strategic materials critical to national security from American sources, except as provided at 225.7003–3(b)(2)(i).

(3) Paragraph (a)(1) of 10 U.S.C. 4872, Prohibition on acquisition of sensitive materials from non-allied foreign nations, except as provided at 225.7018–3(c)(1).

PART 219—SMALL BUSINESS PROGRAMS

■ 6. Amend section 219.811–3 by revising paragraph (2) to read as follows:

219.811–3 Contract clauses.

* * * * *

(2) Use the clause at 252.219–7010, Notification of Competition Limited to Eligible 8(a) Participants-Partnership Agreement, in lieu of the clause at FAR

52.219–18, Notification of Competition Limited to Eligible 8(a) Participants, in competitive solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, when the acquisition is accomplished using the procedures of FAR 19.805 and processed in accordance with the PA cited in 219.800.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Revise section 252.244–7000 to read as follows:

252.244–7000 Subcontracts for Commercial Products or Commercial Services.

As prescribed in 244.403, use the following clause:

Subcontracts for Commercial Products or Commercial Services (NOV 2023)

(a) The Contractor shall not include the terms of any Federal Acquisition Regulation (FAR) clause or Defense Federal Acquisition Regulation Supplement (DFARS) clause in subcontracts for commercial products or commercial services at any tier under this contract, unless—

(1) For DFARS clauses, it is so specified in the particular clause; or

(2) For FAR clauses, the clause is listed at FAR 12.301(d) or it is so specified in paragraph (e)(1) of the clause at FAR 52.212–5 or paragraph (b)(1) of the clause at FAR 52.244–6, as applicable. (Section 847(b)(1)(B), Pub. L. 114–328)

(b)(1) In accordance with 10 U.S.C. 3457(c), the Contractor shall treat as commercial products any items valued at less than \$10,000 per item that were purchased by the Contractor for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract when purchased.

(2) The Contractor shall ensure that any items to be used in performance of this contract, that are treated as commercial products pursuant to paragraph (b)(1) of this clause, meet all terms and conditions of this contract that are applicable to commercial products or commercial services in accordance with the clause at FAR 52.244–6 and paragraph (a) of this clause.

(c) *Subcontracts.* The Contractor shall include the terms of this clause, including this paragraph (c), in subcontracts awarded under this contract, including subcontracts for the acquisition of commercial products or commercial services.

(End of clause)

[FR Doc. 2023–25158 Filed 11–16–23; 8:45 am]

BILLING CODE 6820–FR–P

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 211, 215, 223, 234, and 252**

[Docket DARS–2023–0001; Req No. DARS–2024–00013–FR]

Defense Federal Acquisition Regulation Supplement; Technical Amendments

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule; technical amendment.

SUMMARY: DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to make needed editorial changes.

DATES: Effective November 17, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, Defense Acquisition Regulations System, telephone 703–717–8226.

SUPPLEMENTARY INFORMATION: This final rule amends the DFARS to make needed editorial changes to 48 CFR parts 211, 215, 234, and 252 as follows:

1. Update the title of DoD Directive 5000.02 at DFARS 211.002, 234.003, and 234.7100.

2. At DFARS 215.404–75(b), remove an obsolete document reference “DoD FFRDC Management Plan” and replace it with the current reference “DoD Instruction 5000.77, DoD Federally Funded Research and Development Center Program”.

3. Update references to DoD Manual 4145.26 at DFARS 223.370–3 and 252.223–7002, and update references to DoD Manual 5100.76 at DFARS 223.7200, 223.7201, 223.7202, 223.7202, and 252.223–7007.

4. Provide a cross-reference to DFARS Procedures, Guidance, and Information 234.005–1 at DFARS 234.005–1.

5. Update the System for Award Management internet link at DFARS 252.204–7007.

6. Update internet links to the Basic NIST SP 800–171 DoD Assessment reference document at DFARS 252.204–7019 and 252.204–7020.

7. Update references to replace “Bahrainian” with “Bahraini” at DFARS 252.225–7013, 252.227–7017, 252.225–7018, 252.225–7035, 252.225–7036, 252.225–7045, and 252.227–7018.

8. Correct a reference at DFARS 252.227–7018 to “60 days”.

List of Subjects in 48 CFR Parts 211, 215, 223, 234, and 252

Government procurement.

Jennifer D. Johnson,
Editor/Publisher, Defense Acquisition
Regulations System.

Therefore, 48 CFR parts 211, 215, 223, 234, and 252 are amended as follows:

- 1. The authority citation for 48 CFR parts 211, 215, 223, 234, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 211—DESCRIBING AGENCY NEEDS

211.002 [Amended]

- 2. Amend section 211.002 by removing “Operation of the Defense Acquisition System” and adding “Operation of the Adaptive Acquisition Framework” in its place.

PART 215—CONTRACTING BY NEGOTIATION

215.404–75 [Amended]

- 3. Amend section 215.404–75 in paragraph (b) by removing “DoD FFRDC Management Plan” and adding “DoD Instruction 5000.77, DoD Federally Funded Research and Development Center Program” in its place.

PART 223—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

223.370–3 [Amended]

- 4. Amend section 223.370–3 in paragraph (b) by removing “DoD Manual 4145.26–M” and “these regulations” and adding “DoD Manual 4145.26” and “the ammunition and explosives regulation of the DoD component or installation” in their places, respectively.
- 5. Revise section 223.7200 to read as follows:

223.7200 Definition.

As used in this subpart—
Arms, ammunition, and explosives (AA&E) means those items within the scope of DoD Manual 5100.76, Physical Security of Sensitive Conventional Arms, Ammunition, and Explosives.

223.7201 [Amended]

- 6. Amend section 223.7201 in paragraphs (a) introductory text, (b) introductory text, and (b)(2) by removing “DoD 5100.76–M” and adding “DoD Manual 5100.76” in its place.

223.7202 [Amended]

- 7. Amend section 223.7202 in paragraph (b) by removing “DoD 5100.76–M” and adding “DoD Manual 5100.76” in its place.

223.7203 [Amended]

- 8. Amend section 223.7203 by removing “DoD 5100.76–M” and adding “DoD Manual 5100.76” in its place.

PART 234—MAJOR SYSTEM ACQUISITION

234.003 [Amended]

- 9. Amend section 234.003 by removing “Operation of the Defense Acquisition System” and adding “Operation of the Adaptive Acquisition Framework” in its place.
- 10. Amend section 234.005–1 by adding paragraph (4) to read as follows:

234.005–1 Competition.

* * * * *

(4) See PGI 234.005–1 for guidance on providing, upon request, the benefits derived from use of this competitive selection method.

234.7100 [Amended]

- 11. Amend section 234.7100 in paragraphs (a) and (b) by removing “Operation of the Defense Acquisition System” and adding “Operation of the Adaptive Acquisition Framework” in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.204–7007 [Amended]

- 12. Amend section 252.204–7007—
- a. By removing the clause date “(MAY 2021)” and adding “(NOV 2023)” in its place; and
- b. In paragraph (e) by removing “<https://www.acquisition.gov/>” and adding “<https://www.sam.gov/>” in its place.

252.204–7019 [Amended]

- 13. Amend section 252.204–7019—
- a. By removing the clause date “(MAR 2022)” and adding “(NOV 2023)” in its place; and
- b. In paragraph (b) by removing “<https://www.acq.osd.mil/asda/dpc/cp/cyber/safeguarding.html#nistSP800171>” and adding “<https://www.acq.osd.mil/asda/dpc/cp/cyber/docs/safeguarding/NIST-SP-800-171-Assessment-Methodology-Version-1.2.1-6.24.2020.pdf>” in its place.

252.204–7020 [Amended]

- 14. Amend section 252.204–7020—

- a. By removing the clause date “(JAN 2023)” and adding “(NOV 2023)” in its place; and

- b. In paragraphs (c) and (g)(2) by removing “<https://www.acq.osd.mil/asda/dpc/cp/cyber/safeguarding.html#nistSP800171>” and adding “<https://www.acq.osd.mil/asda/dpc/cp/cyber/docs/safeguarding/NIST-SP-800-171-Assessment-Methodology-Version-1.2.1-6.24.2020.pdf>” in its place.

- 15. Amend section 252.223–7002 by revising the section heading, clause date, and paragraph (b)(1) to read as follows:

252.223–7002 Safety Precautions for Ammunition and Explosives.

* * * * *

Safety Precautions for Ammunition and Explosives (NOV 2023)

* * * * *

(b) * * *

(1) The Contractor shall comply with the requirements of DoD Manual 4145.26, DoD Contractors’ Safety Manual for Ammunition and Explosives, hereafter referred to as “the manual,” in effect on the date of the solicitation for this contract. The Contractor shall also comply with any other additional requirements included in the schedule of this contract.

* * * * *

- 16. Amend section 252.223–7007—
- a. By revising the section heading, clause date, and paragraph (a);
- b. In paragraphs (b) and (c) by removing “DoD 5100.76–M” and adding “DoD Manual 5100.76” in its place wherever it appears;
- c. In paragraph (d) by removing “Defense Security Service (DSS)” and adding “Defense Counterintelligence and Security Agency (DCSA)” in its place;
- d. In paragraph (e) by removing “DSS” and adding “DCSA” in its place; and
- e. In paragraph (f) by adding a paragraph heading.

The revisions and addition read as follows:

252.223–7007 Safeguarding Sensitive Conventional Arms, Ammunition, and Explosives.

* * * * *

Safeguarding Sensitive Conventional Arms, Ammunition, and Explosives (NOV 2023)

(a) *Definition.* As used in this clause—
Arms, ammunition, and explosives (AA&E) means those items within the scope of DoD Manual 5100.76, Physical Security of Sensitive Conventional Arms, Ammunition, and Explosives.

* * * * *

(f) *Subcontracts.* * * *

* * * * *

252.225–7013 [Amended]

- 17. Amend section 252.225–7013—
 - a. By removing the clause date “(DEC 2022)” and adding “(NOV 2023)” in its place; and
 - b. In paragraph (a), in paragraphs (2) and (3) of the definition of “Eligible product”, by removing “Bahrainian” and adding “Bahraini” in its place.

252.225–7017 [Amended]

- 18. Amend section 252.225–7017—
 - a. By removing the clause date “(OCT 2023)” and adding “(NOV 2023)” in its place; and
 - b. In paragraph (a), in the definition of “Bahrainian photovoltaic device”, and paragraphs (c)(2) and (3) by removing “Bahrainian” and adding “Bahraini” in its place wherever it appears.

252.225–7018 [Amended]

- 19. Amend section 252.225–7018—
 - a. By removing the provision date “(DEC 2022)” and adding “(NOV 2023)” in its place; and
 - b. In paragraph (a) by removing “Bahrainian” and adding “Bahraini” in its place; and
 - c. In paragraphs (d)(4)(ii) and (d)(5)(ii) by removing “Bahrainian” and adding “Bahraini” in its place.

252.225–7035 [Amended]

- 20. Amend section 252.225–7035—
 - a. By removing the clause date “(DEC 2022)” and adding “(NOV 2023)” in its place;
 - b. In paragraphs (a), (b)(2), and (c)(2)(ii) by removing “Bahrainian” and adding “Bahraini” in its place;
 - c. In Alternate I introductory text by removing “Bahrainian” and adding “Bahraini” in its place wherever it appears;
 - d. In Alternate II—
 - i. By removing the clause date “(DEC 2022)” and adding “(NOV 2023)” in its place; and
 - ii. In paragraphs (a), (b)(2), and (c)(2)(ii) by removing “Bahrainian” and adding “Bahraini” in its place;
 - e. In Alternate III—

- i. By removing the clause date “(DEC 2022)” and adding “(NOV 2023)” in its place; and
- ii. In paragraph (c)(2)(ii) by removing “Bahrainian” and adding “Bahraini” in its place;
- f. In Alternate IV—
 - i. In the introductory text by removing “Bahrainian” and adding “Bahraini” in its place wherever it appears;
 - ii. By removing the clause date “(DEC 2022)” and adding “(NOV 2023)” in its place; and
 - iii. In paragraphs (a), (b)(2), and (c)(2)(ii) by removing “Bahrainian” and adding “Bahraini” in its place; and
- g. In Alternate V—
 - i. By removing the clause date “(DEC 2022)” and adding “(NOV 2023)” in its place; and
 - ii. In paragraphs (a), (b)(2), and (c)(2)(ii) by removing “Bahrainian” and adding “Bahraini” in its place.

252.225–7036 [Amended]

- 21. Amend section 252.225–7036—
 - a. By removing the clause date “(JAN 2023)” and adding “(NOV 2023)” in its place;
 - b. In paragraphs (a) and (c) by removing “Bahrainian” and adding “Bahraini” in its place wherever it appears;
 - c. In Alternate I—
 - i. By revising the clause title;
 - ii. By removing the clause date “(JAN 2023)” and adding “(NOV 2023)” in its place; and
 - iii. In paragraph (a), in the definition of “Bahrainian end product”, by removing “Bahrainian” and adding “Bahraini” in its place;
 - d. In Alternate II—
 - i. By removing the clause date “(JAN 2023)” and adding “(NOV 2023)” in its place; and
 - ii. In paragraphs (a) and (c) by removing “Bahrainian” and adding “Bahraini” in its place wherever it appears;
 - e. In Alternate III—
 - i. By removing the clause date “(JAN 2023)” and adding “(NOV 2023)” in its place; and

- ii. In paragraph (a), in the definition of “Bahrainian end product”, by removing “Bahrainian” and adding “Bahraini” in its place;
- f. In Alternate IV—
 - i. By removing the clause date “(JAN 2023)” and adding “(NOV 2023)” in its place; and
 - ii. In paragraphs (a) and (c) by removing “Bahrainian” and adding “Bahraini” in its place wherever it appears; and
- g. In Alternate V—
 - i. By removing the clause date “(JAN 2023)” and adding “(NOV 2023)” in its place; and
 - ii. In paragraphs (a) and (c) by removing “Bahrainian” and adding “Bahraini” in its place wherever it appears.

252.225–7045 [Amended]

- 22. Amend section 252.225–7045—
 - a. In Alternate I—
 - i. In the introductory text by removing “Bahrainian” and adding “Bahraini” in its place;
 - ii. By removing the clause date “(OCT 2023)” and adding “(NOV 2023)” in its place; and
 - iii. In paragraphs (a) and (b) and paragraph (c) introductory text by removing “Bahrainian” and adding “Bahraini” in its place.
 - b. In Alternate III—
 - i. By removing the clause date “(OCT 2023)” and adding “(NOV 2023)” in its place; and
 - ii. In paragraph (b) and paragraph (c) introductory text by removing “Bahrainian” and adding “Bahraini” in its place.

252.227–7018 [Amended]

- 23. Amend section 252.227–7018—
 - a. By removing the clause date “(MAR 2023)” and adding “(NOV 2023)” in its place; and
 - b. In paragraph (h)(2) by removing “sixty (6) days” and adding “60 days” in its place.

[FR Doc. 2023–25162 Filed 11–16–23; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 203, 204, 212, and 215**

[Docket DARS–2023–0043; Req No. DARS–2024–00011–FR]

RIN 0750–AK33

Defense Federal Acquisition Regulation Supplement: Inapplicability of Additional Defense-Unique Laws and Certain Non-Statutory DFARS Clauses to Commercial Item Contracts (DFARS Case 2018–D074)**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).**ACTION:** Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Acts for Fiscal Years 2018 and 2019 regarding applicability of certain solicitation provisions and contract clauses to contracts and subcontracts for commercial products, commercial services, and commercially available off-the-shelf items.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before January 16, 2024, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018–D074, using either of the following methods:

○ *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for “DFARS Case 2018–D074”. Select “Comment” and follow the instructions to submit a comment. Please include “DFARS Case 2018–D074” on any attached documents.

○ *Email:* osd.dfars@mail.mil. Include DFARS Case 2018–D074 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Jeanette Snyder, telephone 703–508–7524.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD is proposing to amend the DFARS to implement paragraphs (b) and (c) of section 849 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115–91). Section 849 paragraph (b) requires that DoD review the DFARS and propose revisions to eliminate certain contract clause requirements applicable to Federal Acquisition Regulation (FAR) part 12 commercial product and commercial service acquisitions, except for regulations required by law or Executive order, unless the Secretary of Defense determines that there is a specific reason not to eliminate the regulation. Section 849 paragraph (c) requires that DoD review the DFARS and propose revisions to eliminate certain contract clause requirements applicable to commercially available off-the-shelf (COTS) item subcontracts, except for regulations required by law or Executive order, unless the Secretary of Defense determines that there is a specific reason not to eliminate the regulation.

DoD also proposes to amend the DFARS to implement paragraph (a) of section 837 of the NDAA for FY 2019 (Pub. L. 115–232). Section 837 paragraph (a) revises 10 U.S.C. 2375(b)(2), redesignated as 10 U.S.C. 3452(b)(2), by deleting the date “January 1, 2015” and adding the date “October 13, 1994” (the date of the Federal Acquisition Streamlining Act (FASA) of 1994). See companion DFARS case 2017–D010 proposed rule, published in the **Federal Register** at 83 FR 30646 on June 29, 2018, which examined commercial product and commercial service applicability for DoD-unique statutes and associated contract clauses issued on or after January 1, 2015. This proposed rule under DFARS Case 2018–D074 implements the section 837(a) change to 10 U.S.C. 3452(b)(2) to extend the required review of applicability of provisions of law or contract clauses to prime contracts for commercial products and commercial services enacted after October 13, 1994. Paragraphs (c)(2) and (d)(2) of 10 U.S.C. 3452 contain similar requirements for subcontracts for commercial products and commercial services, and contracts for COTS items; however, the date of October 13, 1994, is not repeated in these sections. Following the precedent set in DFARS Case 2017–D010, for this proposed rule DoD has interpreted the date of October 13, 1994, as equally applicable to all three paragraphs, (b)(2), (c)(2), and (d)(2), since all three paragraphs are inter-related.

It should be noted that a clause that is inapplicable to a contract for commercial products is also inapplicable to a contract for COTS items, which are commercial products, but a clause that is applicable to a contract for commercial products may be inapplicable to a contract for COTS items. The reason for this distinction is because a COTS item, while a subset of commercial products, is unique in that it is offered to the Government without modification and in the same form in which it is sold in the commercial marketplace.

II. Discussion and Analysis

DoD identified the DFARS solicitation provisions and contract clauses published as interim or final rules after October 13, 1994, excluding those reviewed under DFARS case 2017–D010, and determined whether the provisions and clauses were based on statute, Executive order, or policy. New interim or final rules published after the publication of DFARS case 2017–D010 on June 29, 2018, were also identified and evaluated under this proposed rule. Provisions and clauses listed at DFARS section 212.301 as applicable to the acquisition of commercial products and commercial services were included in the review.

The proposed rule adds to the list of inapplicable provisions and clauses at DFARS 212.370, Inapplicability of Certain Provisions and Clauses to Contracts and Subcontracts for the Acquisition of Commercial Products, Commercial Services, and Commercially Available Off-the-shelf Items, two provisions and one clause that are removed from paragraph (f) at DFARS 212.301, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Products and Commercial Services. These provisions and clause will no longer be applicable to contracts and subcontracts for the acquisition of commercial products, commercial services, and COTS items:

- DFARS 252.203–7003, Agency Office of the Inspector General.
- DFARS 252.203–7005, Representation Relating to Compensation of Former DoD Officials.
- DFARS 252.215–7007, Notice of Intent to Resolicit.

The proposed rule updates the text at DFARS 212.371, Inapplicability of Certain Provisions and Clauses to Contracts for the Acquisition of Commercially Available Off-the-shelf Items, to conform to the change at 10 U.S.C. 3452(b)(2) by replacing the date of January 1, 2015, with October 13, 1994. In addition, two provisions and two clauses, listed at DFARS 212.301,

are included on the list at DFARS 212.371. This means that although these provisions and clauses are applicable to contracts for the acquisition of commercial products and commercial services, they are not applicable to contracts for the acquisition of COTS items:

- 252.204–7008, Compliance with Safeguarding Covered Defense Information Controls.
- 252.204–7019, Notice of NIST SP 800–171 DoD Assessment Requirements.
- 252.204–7020, NIST SP 800–171 DoD Assessment Requirements.
- 252.204–7021, Cybersecurity Maturity Model Certification Requirements.

The proposed rule revises the following prescriptions for two provisions and one clause to remove the requirement to include the provisions and clause in solicitations using FAR part 12 procedures for the acquisition of commercial products and commercial services:

- The prescription at DFARS 203.171–4(b) for the provision at DFARS 252.203–7005, Representation Relating to Compensation of Former DoD Officials.
- The prescription at DFARS 203.1004(a) for the clause at DFARS 252.203–7003, Agency Office of the Inspector General.
- The prescription at DFARS 215.371–6, for the provision at DFARS 252.215–7007, Notice of Intent to Resolicit.

DFARS 204.7403(b) is amended to add the phrase “that involve litigation support services” to clarify the application of the clause at 252.204–7015, Notice of Authorized Disclosure of Information for Litigation Support. At DFARS 212.301, the list of provisions and clauses under paragraph (f) is amended to add statutory references or expand on the existing references cited for several clauses and provisions.

Section 212.504, Applicability of Certain Laws to Subcontracts for the Acquisition of Commercial Products and Commercial Services, is amended to remove the reference to 10 U.S.C. 4871, Reporting Requirement Regarding Dealings with Terrorist Countries, which is obsolete. The reporting requirement expired on September 30, 1996.

For this proposed rule, DoD evaluated solicitation provisions or contract clauses in relation to 10 U.S.C. 3452 (e)(1), (e)(2), and (e)(3), *i.e.*, those that implement a statute that provides for criminal or civil penalties, implement 10 U.S.C. 4862 or 4863, or implement statutes that specifically referred to 10

U.S.C. 3452 and provided for applicability to contracts for commercial products and commercial services. DoD also identified pre-FASA provisions and clauses. A list of those provisions and clauses follows this paragraph. No provisions or clauses were identified as implementing statutes that specifically referred to 10 U.S.C. 3452.

The following provisions and clauses implement statutes that provide for criminal or civil penalties:

- 252.203–7000, Requirements Relating to Compensation of Former DoD Officials.
- 252.203–7002, Requirement to Inform Employees of Whistleblower Rights.
- 252.246–7007, Contractor Counterfeit Electronic Part Detection and Avoidance System. (Applies to subcontracts.)
- 252.246–7008, Sources of Electronic Parts.
- 252.247–7027, Riding Gang Member Requirements.

The following provisions and clauses implement 10 U.S.C. 4862 or 4863:

- 252.225–7006, Acquisition of the American Flag.
- 252.225–7008, Restriction on Acquisition of Specialty Metals.
- 252.225–7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals.
- 252.225–7010, Commercial Derivative Military Article-Specialty Metals Compliance Certificate.
- 252.225–7012, Preference for Certain Domestic Commodities.
- 252.225–7015, Restriction on Acquisition of Hand or Measuring Tools.
- 252.225–7029, Acquisition of Uniform Components for Afghan Military or Afghan National Police.

The following clauses existed prior to FASA (*i.e.*, before October 14, 1994).

- 252.205–7000, Provision of Information to Cooperative Agreement Holders.
- 252.219–7003, Small Business Subcontracting Plan (DoD Contracts).
- 252.225–7001, Buy American and Balance of Payments Program.
- 252.247–7023, Transportation of Supplies by Sea.
- 252.247–7025, Reflagging or Repair Work.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items, and for Commercial Services

This proposed rule does not create any new solicitation provisions or contract clauses. However, the proposed

rule proposes to change to the applicability of the following provisions and clause by making them inapplicable to contracts and subcontracts for the acquisition of commercial products, commercial services, and COTS items: (1) 252.203–7003, Agency Office of the Inspector General; (2) 252.203–7005, Representation Relating to Compensation of Former DoD Officials; and (3) 252.215–7007, Notice of Intent to Resolicit.

IV. Expected Impact of the Proposed Rule

This proposed rule, when finalized, could impact any large or small business that is awarded a commercial contract by DoD. The proposed rule does not add any new solicitation provisions or contract clauses. Rather, there may be a reduction in burden on contractors by making two solicitation provisions and one contract clause no longer applicable to solicitations and contracts for commercial products, commercial services, and COTS items.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, as amended.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule, when finalized, to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 and the NDAA for FY 2019 regarding applicability of certain solicitation provisions and contract clauses to contracts and subcontracts for commercial products, commercial

services, and commercially available off-the-shelf (COTS) items.

The objective of this proposed rule is to implement paragraphs (b) and (c) of section 849 of the NDAA for FY 2018 (Pub. L. 115–91). Section 849 paragraph (b) requires an amendment to the DFARS to eliminate certain contract clause requirements applicable to FAR part 12 commercial product and commercial service acquisitions, except for regulations required by law or Executive order, unless the Secretary of Defense determines that there is a specific reason not to eliminate the regulation. Section 849 paragraph (c) requires an amendment to the DFARS to eliminate certain contract clause requirements applicable to COTS item subcontracts, except for regulations required by law or Executive order, unless the Secretary of Defense determines that there is a specific reason not to eliminate the regulation.

This proposed rule also includes revisions to implement paragraph (a) of section 837 of the NDAA for FY 2019 (Pub. L. 115–232). Section 837 paragraph (a) revises 10 U.S.C. 2375(b)(2), redesignated as 10 U.S.C. 3452(b)(2), by deleting the date “January 1, 2015” and adding the date “October 13, 1994.” This proposed rule implements the change at 10 U.S.C. 3452(b)(2) by proposing an amendment to the DFARS to eliminate solicitation provisions and contract clauses enacted after October 13, 1994, not including the provisions or clauses referred to in 10 U.S.C. 3452 (e)(1), (e)(2), and (e)(3), from commercial product and commercial service solicitations and contracts, respectively, unless the Under Secretary of Defense for Acquisition and Sustainment makes a written determination that it would not be in the best interest of the Department of Defense to exclude them.

According to data from the Federal Procurement Data System for FY 2020 through FY 2022, DoD awarded approximately 31,968 contracts for commercial products, commercial services, or COTS items to an average of 13,952 unique small entities per year. The proposed rule applies to all entities that do business with DoD and is not expected to have a significant impact on these entities, regardless of business size.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small entities.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the proposed

rule that would meet the requirements of the applicable statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2018–D074), in correspondence.

VII. Paperwork Reduction Act

The proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203, 204, 212, and 215

Government procurement.

Jennifer D. Johnson,
Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 203, 204, 212, and 215 are proposed to be amended as follows:

- 1. The authority citation for parts 203, 204, 212, and 215 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

203.171–4 [Amended]

- 2. Amend section 203.171–4 in paragraph (b) by removing “solicitations using FAR part 12 procedures for the acquisition of commercial products and commercial services and”.

203.1004 [Amended]

- 3. Amend section 203.1004 in paragraph (a) by removing “, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services,”.

PART 204—ADMINISTRATIVE AND INFORMATION MATTERS

204.7403 [Amended]

- 4. Amend section 204.7403 in paragraph (b) by removing “contracts, including” and adding “contracts that involve litigation support services, including” in its place.

PART 212—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

- 5. Amend section 212.301—
 - a. In paragraph (f)(i)(B) by removing “section 847 of Pub. L. 110–181” and adding “section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181)” in its place;
 - b. By removing paragraphs (f)(i)(D) and (E);
 - c. By revising paragraphs (f)(ii)(B) through (D);
 - d. By removing paragraph (f)(vi)(C);
 - e. By redesignating paragraphs (f)(vi)(D), (E), and (F) as paragraphs (f)(vi)(C), (D), and (E), respectively;
 - f. By revising paragraph (f)(viii)(D);
 - g. By revising paragraphs (f)(x)(J) through (L), (T), and (Z);
 - h. In paragraph (f)(xi)(A) by removing “Pub. L.” and adding “Public Law” in its place;
 - i. By revising paragraph (f)(xi)(B);
 - j. In paragraph (f)(xii)(C) by removing “227.7102–4(c)” and adding “227.7102–4(c), to comply with 10 U.S.C. 3781–3786” in its place;
 - k. In paragraph (f)(xiv)(D) by removing “232.7102” and adding “232.7102, to comply with 26 U.S.C. 6331(h)” in its place;
 - l. By revising paragraphs (f)(xv)(A) and (B);
 - m. By revising paragraph (f)(xix)(B); and
 - n. By revising paragraph (f)(xx)(A) and (E).

The revisions read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial products and commercial services.

* * * * *

(f) * * *
(ii) * * *

(B) Use the provision at 252.204–7008, Compliance with Safeguarding Covered Defense Information Controls, as prescribed in 204.7304(a), to comply with section 941 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112–239) and section 1632 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113–291).

(C) Use the clause at 252.204–7009, Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information, as prescribed in 204.7304(b), to comply with section 941 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112–239) and section 1632 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113–291).

(D) Use the clause at 252.204–7012, Safeguarding Covered Defense

Information and Cyber Incident Reporting, as prescribed in 204.7304(c), to comply with section 941 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112–239) and section 1632 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113–291).

* * * * *

(viii) * * *

(D) Use the provision at 252.219–7012, Competition for Religious-Related Services, as prescribed in 219.270–3, to comply with section 898 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114–92).

* * * * *

(x) * * *

(J) Use the clause at 252.225–7016, Restriction on Acquisition of Ball and Roller Bearings, as prescribed in 225.7009–5, to comply with section 8065 of Public Law 107–117 and the same restriction in subsequent DoD appropriations acts.

(K) Use the clause at 252.225–7017, Photovoltaic Devices, as prescribed in 225.7017–4(a), to comply with section 846 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111–383).

(L) Use the provision at 252.225–7018, Photovoltaic Devices—Certificate, as prescribed in 225.7017–4(b), to comply with section 846 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111–383).

* * * * *

(T) Use the clause at 252.225–7029, Acquisition of Uniform Components for Afghan Military or Afghan National Police, as prescribed in 225.7703–4(d), to comply with section 826 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112–239).

* * * * *

(Z) Use the clause at 252.225–7039, Defense Contractors Performing Private Security Functions Outside the United States, as prescribed in 225.302–6, to comply with section 862 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181).

* * * * *

(xi) * * *

(B) Use the provision at 252.226–7002, Representation for Demonstration Project for Contractors Employing Persons with Disabilities, as prescribed in 226.7203, to comply with section 853 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136).

* * * * *

(xv) * * *

(A) Use the clause at 252.237–7010, Prohibition on Interrogation of

Detainees by Contractor Personnel, as prescribed in 237.173–5, to comply with section 1038 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84).

(B) Use the clause at 252.237–7019, Training for Contractor Personnel Interacting with Detainees, as prescribed in 237.171–4, to comply with section 1092 of the National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108–375).

* * * * *

(xix) * * *

(B) Use the clause at 252.246–7004, Safety of Facilities, Infrastructure, and Equipment for Military Operations, as prescribed in 246.270–4, to comply with section 807 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84).

* * * * *

(xx) * * *

(A) Use the clause at 252.247–7003, Pass-Through of Motor Carrier Fuel Surcharge Adjustment to the Cost Bearer, as prescribed in 247.207, to comply with section 884 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417).

* * * * *

(E) Use the provision at 252.247–7026, Evaluation Preference for Use of Domestic Shipyards—Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise or Noncontiguous Trade, as prescribed in 247.574(d), to comply with section 1017 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364).

* * * * *

■ 6. Amend section 212.370 by adding paragraphs (b) through (d) to read as follows:

212.370 Inapplicability of certain provisions and clauses to contracts and subcontracts for the acquisition of commercial products, commercial services, and commercially available off-the-shelf items.

* * * * *

(b) 252.203–7003, Agency Office of the Inspector General.

(c) 252.203–7005, Representation Relating to Compensation of Former DoD Officials.

(d) 252.215–7007, Notice of Intent to Resolicit.

■ 7. Amend section 212.371 by—

■ a. Revising the introductory text; and

■ b. Adding paragraphs (b) through (e).

The revision and additions read as follows:

212.371 Inapplicability of certain provisions and clauses to contracts for the acquisition of commercially available off-the-shelf items.

Commercially available off-the-shelf (COTS) items are a subset of commercial products. Therefore, the provisions and clauses listed in 212.370 as not applicable to contracts or subcontracts for the acquisition of commercial products are also not applicable to contracts or subcontracts for the acquisition of COTS items. In addition, the following provisions and clauses published after October 14, 1994, not expressly authorized in law, are not applicable or are modified in their applicability to contracts for the acquisition of COTS items:

* * * * *

(b) 252.204–7008, Compliance with Safeguarding Covered Defense Information Controls.

(c) 252.204–7019, Notice of NIST SP 800–171 DoD Assessment Requirements.

(d) 252.204–7020, NIST SP 800–171 DoD Assessment Requirements.

(e) 252.204–7021, Cybersecurity Maturity Model Certification Requirements.

212.504 [Amended]

■ 8. Amend section 212.504—

■ a. By removing paragraph (a)(xiii);

■ b. By redesignating paragraphs (a)(xiv) and (xv) as paragraphs (a)(xiii) and (xiv), respectively; and

■ c. In the newly redesignated paragraph (a)(xiv) by removing “(section 8065 of Pub. L. 107–117)” and adding “(section 8065, Pub. L. 107–117)” in its place.

212.505 [Amended]

■ 9. Amend section 212.505 introductory text by removing “or modified in their applicability” and adding “or are modified in their applicability” in its place.

PART 215—CONTRACTING BY NEGOTIATION

■ 10. Amend section 215.371–4—

■ a. In paragraph (a) introductory text by removing “section”; and

■ b. By adding paragraph (a)(7).

The addition reads as follows:

215.371–4 Exceptions.

(a) * * *

(7) Acquisitions of commercial products and commercial services using FAR part 12 procedures.

* * * * *

215.371–6 [Amended]

■ 11. Amend section 215.371–6 by removing “, including solicitations

using FAR part 12 procedures for the acquisition of commercial products and commercial services.”.

[FR Doc. 2023–25160 Filed 11–16–23; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 225, and 252

[Docket DARS–2023–0042; Req No. DARS–2024–00012–FR]

RIN 0750–AL40

Defense Federal Acquisition Regulation Supplement: Limitation on the Acquisition of Certain Goods Other Than United States Goods (DFARS Case 2021–D022)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement two sections of the National Defense Authorization Act for Fiscal Year 2021, one section of the National Defense Authorization Act for Fiscal Year 2022, one section of the National Defense Authorization Act for Fiscal Year 2023, and one section of the Consolidated Appropriations Act, 2023. These statutes remove limitations and restrictions on certain components that are no longer required, add new limitations on other components, subject to exceptions.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before January 16, 2024, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2021–D022, using any of the following methods:

○ *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for DFARS Case 2021–D022. Select “Comment” and follow the instructions to submit a comment. Please include “DFARS Case 2021–D022” on any attached documents.

○ *Email:* osd.dfars@mail.mil. Include DFARS Case 2021–D022 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check [https://](https://www.regulations.gov)

www.regulations.gov, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Kimberly Bass, telephone 703–717–3446.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement sections 845 and 1603 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116–283); section 816 of the NDAA for FY 2022 (Pub. L. 117–81); section 853 of the NDAA for FY 2023 (Pub. L. 117–263), and section 8016 of the Consolidated Appropriations Act of 2023 (Pub. L. 117–328). These sections amend 10 U.S.C. 2534, now 10 U.S.C. 4864, to require acquisition of certain items and components from the national technology and industrial base. The national technology and industrial base is defined at 10 U.S.C. 4801 as the United States, Australia, Canada, New Zealand, or the United Kingdom.

Section 845 of the NDAA for FY 2021 amends 10 U.S.C. 4864(a) to update the list of components for naval vessels at paragraphs (a)(2)(A) through (E). Subsequently, section 816 of the NDAA for FY 2022 added to the list of components for naval vessels welded shipboard anchor and mooring chain, without size restrictions, at 10 U.S.C. 4864(a)(2)(F). Section 845 also added components for T–AO 205 class vessels at 10 U.S.C. 4864(a)(4). Section 853 of the NDAA for FY 2023 added T–ARC class vessels at 10 U.S.C. 4864(a)(4) along with the component list for T–AO 205 class vessels. Section 1603 of the NDAA for FY 2021 added limitations on procurement of satellite star trackers at 10 U.S.C. 4864(a)(5). Section 8016 of the Consolidated Appropriations Act, 2023 provided waiver authority to the Secretary of the Service responsible for the procurement of welded shipboard anchor and mooring chain.

Section 845, in updating the list of components for naval vessels at 10 U.S.C. 4864, removed prior paragraphs (a)(2) through (5) and redesignated paragraph (a)(6), components for auxiliary ships (large medium-speed diesel engines), as paragraph (a)(3). The removed paragraphs were: (a)(2) chemical weapons antidote; (a)(3)(A) components for naval vessels consisting of air circuit breakers, welded shipboard anchor and mooring chain with a diameter of four inches or less, vessel propellers; and (a)(3)(B) components of vessel unique to marine applications of gyrocompasses, electronic navigation chart systems, steering controls, pumps,

propulsion and machinery control systems, and totally enclosed lifeboats; (a)(4), valves and machine tools; and (a)(5), ball bearings and roller bearings. Additionally, section 845 struck paragraph (j), Inapplicability to certain contracts to purchase ball bearings or roller bearings, and redesignated paragraph (k), Limitation on certain procurements application process, as paragraph (j).

II. Discussion and Analysis

Updates to 10 U.S.C. 2534, now 10 U.S.C. 4864, have been incrementally implemented over time in various DFARS sections under subpart 225.70 as follows: 225.7004, Restriction on acquisition of foreign buses; 225.7006, Restrictions on air circuit breakers for naval vessels; 225.7007, Restrictions on anchor and mooring chain; 225.7008, Waiver of restrictions of 10 U.S.C. 4864; and 225.7010, Restrictions on certain naval vessel and auxiliary ship components. This proposed rule aggregates the requirements subject to 10 U.S.C. 4864 under one comprehensive DFARS section at 225.7004 to facilitate comprehension of and compliance with the limitations, exceptions, and waivers applicable to acquisition of certain goods other than U.S. goods. As a result, DFARS sections 225.7006 through 225.7008 and section 225.7010 are proposed to be incorporated, as appropriate and in alignment with the statutory requirements being implemented, into a single DFARS section 225.7004 titled, “Restrictions on the procurement of goods other than U.S. goods.” Accordingly, sections 225.7006 through 225.7008 and 225.7010 would be removed and reserved. DFARS section 225.7009, Restriction on ball and roller bearings, remains as a standalone section as the authority for this section is derived from Appropriations Acts, and not from 10 U.S.C. 4864.

DFARS section 225.7004, Restrictions on the procurement of goods other than U.S. goods, is established as the framework for all coverage related to implementing 10 U.S.C. 4864. The current DFARS section 225.7004, Restriction on acquisition of foreign buses, is incorporated into this new redesignated section along with relevant coverage to implement the statutes addressed in section I, Background, of this preamble. The new DFARS section 225.7004 addresses the following:

- 225.7004–0, Scope; added to state that the section implements 10 U.S.C. 4864.
- 225.7004–1, Definitions; adds new definitions for “national technology and industrial base” and “star tracker.”

- 225.7004–2, Restrictions; addresses end items and components that must be acquired from the national technology and industrial base.

- 225.7004–3, Exceptions; provides the exceptions that apply to the end items and components described in 225.7004–1.

- 225.7004–4, Implementation of restriction on certain naval vessel components; implements 10 U.S.C. 4864(h) that prohibits the use of contract clauses or certifications to implement the restriction at 225.7004–1(b) for naval vessel components. Agencies must use management and oversight techniques that achieve the objectives of this section without imposing a significant management burden on the Government or the contractor involved.

- 225.7004–5, Additional restrictions on anchor and mooring chain; addresses additional requirements imposed by DoD Appropriations Acts, most recently by section 8016, Consolidated Appropriations Act, 2023 (Pub. L. 117.328). While 10 U.S.C. 4864 also restricts acquisition of welded shipboard anchor and mooring chain, when used as a component of a naval vessel, the Appropriations Act restriction takes precedence over the restriction of 10 U.S.C. 4864.

- 225.7004–6, Waiver of restrictions; addresses waivers that apply to the end items and components described in 225.7004–1.

- 225.7004–7, Contract clauses; provides clause prescriptions for DFARS 252.225–7019, Restriction on Acquisition of Anchor and Mooring Chain; DFARS 252.225–7062, Restriction on Acquisition of Large Medium-Speed Diesel Engines; new DFARS clause 252.225–70XX, Restriction on Acquisition of Components of T–AO 205 and T–ARC Class Vessels; and new DFARS clause 252.225–70YY, Restriction on Acquisition of Certain Satellite Components.

Additional changes are proposed to DFARS 212.301, Solicitation provisions and contract clauses for the acquisition of commercial products and commercial services. The removal of solicitation provision 252.225–7037, Evaluation of Offers for Air Circuit Breakers, and contract clause 252.225–7038, Restriction on Acquisition of Air Circuit Breakers, is proposed because section 845 of the NDAA for FY 2021 removed this component from 10 U.S.C. 4864. The addition of the following three clauses is proposed: 252.225–7019, Restriction on Acquisition of Anchor and Mooring Chain; 252.225–70XX, Restriction on Acquisition of

Components of T–AO 205 and T–ARC Class Vessels; and 252.225–70YY, Restriction on Acquisition of Certain Satellite Components.

DoD proposes to remove and reserve sections 225.7006 through 225.7008 and 225.7010 due to the new consolidated framework at DFARS 227.7004 for implementing 10 U.S.C. 4864. DFARS 225.7006, Restriction on air circuit breakers for naval vessels, is not incorporated into the new section 225.7004, because section 845 of the NDAA for FY 2021 removed this component from 10 U.S.C. 4864. Section 8100 of the Consolidated Appropriations Act, 2023, only addresses air circuit breakers in conjunction with a single Department of Navy program. Therefore, the section on air circuit breakers will not be retained in the DFARS in consonance with DFARS drafting conventions.

DFARS section 225.7009, Restriction on ball and roller bearings, is retained, notwithstanding its removal from 10 U.S.C. 4864 by section 845 in the NDAA for FY 2021, since it is needed to implement DoD Appropriations Act restrictions. See, for example, section 8033 of the Consolidated Appropriations Act, 2023.

Revisions to DFARS clause 252.225–7019, Restriction on Acquisition of Anchor and Mooring Chain, are proposed to update the prescription cross-reference in the introductory text to read “225.7004–7(a)” and remove from paragraphs (b) and (d) the phrase “four inches or less in diameter”. This language is not included in section 816 of the NDAA for FY 2022 that added this component to 10 U.S.C. 4864(a)(2)(F). This phrase is also not included in section 8016 of the Consolidated Appropriations Act, 2023 on this subject.

DFARS provision 252.225–7037, Evaluation of Offers for Air Circuit Breakers, and DFARS clause 252.225–7038, Restriction on Acquisition of Air Circuit Breakers, are proposed to be removed and reserved. Section 845 deleted this component from 10 U.S.C. 4864, and the Consolidated Appropriations Act, 2023, section 8100 only addresses air circuit breakers in conjunction with a single Department of Navy program.

Two new clauses are proposed to be added: 252.225–70XX, Restriction on Acquisition of Components of T–AO 205 and T–ARC Class Vessels; and 252.225–70YY, Restriction on Acquisition of Certain Satellite Components. In addition, the cross reference in the introductory text of DFARS 252.225–7062 is proposed to be

revised to reflect the new location of the clause prescription in 225.7004–7.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items, and for Commercial Services

This rule proposes to create two new contract clauses:

(1) DFARS clause 252.225–70XX, Restriction on Acquisition of Components of T–AO 205 Class Vessels, for use in solicitations and contracts requiring the acquisition of components of T–AO 205 and T–ARC class vessels, including solicitations and contracts that exceed the SAT and that use FAR part 12 procedures for the acquisition of commercial products, including COTS items, and for the acquisition of commercial services; and

(2) DFARS clause at 252.225–70YY, Restriction on Acquisition of Satellite Star Trackers, for use in solicitations and contracts requiring the acquisition of satellite star trackers, including solicitations and contracts that exceed the SAT and that use FAR part 12 procedures for the acquisition of commercial products, including COTS items, and for the acquisition of commercial services.

Sections 845 and 1603 of the NDAA for FY 2021 (Pub. L. 116–283) and section 852 of the NDAA for FY 2023 (Pub. L. 117–263), which amend 10 U.S.C. 4864, are implemented in this proposed rule. 10 U.S.C. 4864 does not apply to a contract or subcontract for an amount that does not exceed the SAT. Therefore, the clauses will not apply to acquisitions at or below the SAT. However, DoD intends to apply the clauses to contracts for the acquisition of commercial products including COTS items and for the acquisition of commercial services.

A. Applicability to Contracts for the Acquisition of Commercial Products Including COTS Items and for the Acquisition of Commercial Services

10 U.S.C. 3452 exempts contracts and subcontracts for the acquisition of commercial products, including COTS items, and commercial services from provisions of law enacted after October 13, 1994, unless the Under Secretary of Defense (Acquisition and Sustainment) (USD(A&S)) makes a written determination that it would not be in the best interest of DoD to exempt contracts for the procurement of commercial products and commercial services from the applicability of the provision or contract requirement, except for a provision of law that—

- Provides for criminal or civil penalties;
- Requires that certain articles be bought from American sources pursuant to 10 U.S.C. 4862 or that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. 4863; or

- Specifically refers to 10 U.S.C. 3452 and states that it shall apply to contracts and subcontracts for the acquisition of commercial products (including COTS items) and commercial services.

The statute implemented in this proposed rule does not impose criminal or civil penalties, does not require purchase pursuant to 10 U.S.C. 4862 or 4863, and does not refer to 10 U.S.C. 3452. Therefore, sections 845 and 1603 of the NDAA for FY 2021 and section 853 of the NDAA for FY 2023 will not apply to the acquisition of commercial services or commercial products including COTS items unless a written determination is made. Due to delegations of authority, the Principal Director, Defense Pricing and Contracting, is the appropriate authority to make this determination. DoD intends to make that determination to apply this statute to the acquisition of commercial products, including COTS items, and to the acquisition of commercial services.

B. Determination

Consistent with 10 U.S.C. 3452, and based on the findings above, not applying these clauses to contracts and subcontracts for the acquisition of commercial products including COTS items and for the acquisition of commercial services would exclude contracts intended to be covered by the statute and undermine the overarching purpose of the statute. Accordingly, DoD plans to apply the statute to contracts and subcontracts for the acquisition of commercial products including COTS items and for the acquisition of commercial services.

IV. Expected Impact of the Rule

The proposed rule adds procurement limitations on the acquisition of star trackers for certain national security satellites and certain components for T-AO 205 and T-ARC class vessels, requiring they are manufactured in the national technology and industrial base: the United States, Australia, Canada, New Zealand, or the United Kingdom in accordance with 10 U.S.C. 4864.

The proposed rule is not expected to have a significant impact on the Government, offerors, or contractors. The satellite star trackers and components for the T-AO 205 and T-ARC class of vessels are the types of items that are readily available in the

marketplace, so limitation to national technology and industrial base sources is not viewed as having a significant impact on the availability of sources. Further, the proposed rule provides waiver procedures to the limitation.

The domestic source restriction does not apply to—

- (1) Contracts or subcontracts that do not exceed the simplified acquisition threshold;

- (2) The acquisition of spare or repair parts needed to support components for naval vessels manufactured outside the United States; and

- (3) Large medium-speed diesel engines for icebreakers or special mission ships.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, as amended.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule, when finalized, to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule will continue to provide small businesses the opportunity to participate in the manufacture of star trackers for certain national security satellites and certain components for T-AO 205 and T-ARC class vessels in support of the national technology and industrial base. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement statutes that remove limitations and restrictions no longer required, and that require the procurement of star trackers for certain national security satellites, as well as certain components for T-AO 205 and T-ARC class vessels, from the national technology and industrial base: the United States, Australia, Canada, New Zealand, or the United Kingdom.

The objective of the proposed rule is to implement sections 845 and 1603 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116–283); section 816 of the NDAA for FY 2022 (Pub. L. 117–81); and section 853 of the NDAA for FY 2023 (Pub. L. 117–263). These NDAA sections are the legal basis for the proposed rule. Section 845 of the NDAA for FY 2021 amends 10 U.S.C. 4864(a) to update the list of components for naval vessels at paragraphs (a)(2)(A) through (E). Subsequently, section 816 of the NDAA for FY 2022 added to the list of components for naval vessels welded shipboard anchor and mooring chain, without size restrictions, at 10 U.S.C. 4864(a)(2)(F). Section 845 also added components for T-AO 205 class vessels at 10 U.S.C. 4864(a)(4). Section 853 of the NDAA for FY 2023 added T-ARC class vessels at 10 U.S.C. 4864(a)(4) along with the component list for T-AO 205 class vessels. Section 1603 of the NDAA for FY 2021 added limitations on procurement of satellite star trackers at 10 U.S.C. 4864(a)(5). DoD reviewed data from the Federal Procurement Data System for FY 2018, 2019, and 2020, excluding contracts that do not exceed the simplified acquisition threshold, for the following product service codes: 7G22, 2835, 2010, 3815, 1040, 5925, 2040, 2010, beginning with 70 (for example, information technology hardware and software), and 7435. DoD made an average of 651 awards per year, of which 385 were made to small entities, an average of 59 percent awarded to small entities over the three fiscal years.

It is expected that this proposed rule, when finalized, will benefit small businesses. The proposed rule will continue to provide small businesses the opportunity to participate in the manufacture of star trackers for certain national security satellites and certain components for T-AO 205 and T-ARC class vessels in support of the national technology and industrial base.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

The proposed rule exempts acquisitions equal to or less than the simplified acquisition threshold. There are no other known significant alternative approaches to the proposed rule that would meet the requirements of the statute.

DoD invites comments from small business concerns and other interested

parties on the expected impact of this proposed rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this proposed rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2021–D022), in correspondence.

VII. Paperwork Reduction Act

This proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 212, 225, and 252 Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 225, and 252 are proposed to be amended as follows:

- 1. The authority citation for 48 CFR parts 212, 225, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

- 2. Amend section 212.301 by—
- a. Removing paragraphs (f)(x)(X) and (Y);
- b. Redesignating paragraphs (f)(x)(M) through (W) as (f)(x)(N) through (X);
- c. Adding a new paragraph (f)(x)(M);
- d. Redesignating paragraphs (f)(x)(Z) through (NN) as paragraphs (f)(x)(Y) through (MM);
- e. In the newly redesignated paragraph (f)(x)(Y), removing “Pub. L.” and adding “Public Law” in its place;
- f. In the newly redesignated paragraph (f)(x)(MM), removing “225.7010–5” and adding “225.7004–7(b)” in its place; and
- g. Adding paragraphs (f)(x)(NN) through (OO).

The additions read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial products and commercial services.

* * * * *

(f) * * *

(x) * * *

(M) Use the clause at 252.225–7019, Restriction on Acquisition of Anchor and Mooring Chain, as prescribed in 225.7004–7(a), to comply with 10 U.S.C. 4864 and section 8041 of the Fiscal Year

1991 DoD Appropriations Act (Pub. L. 101–511) and similar sections in subsequent DoD appropriations acts.

* * * * *

(NN) Use the clause at 252.225–70XX, Restriction on Acquisition of Components of T–AO 205 and T–ARC Class Vessels, as prescribed in 225.7004–7(c), to comply with 10 U.S.C. 4864.

(OO) Use the clause at 252.225–70YY, Restriction on Acquisition of Certain Satellite Components, as prescribed in 225.7004–7(d), to comply with 10 U.S.C. 4864.

* * * * *

PART 225—FOREIGN ACQUISITION

225.7001 [Amended]

- 3. Amend section 225.7001 in the definition of “Component” by removing “225.7007” and adding “225.7004–2(b)(6)” in its place.

- 4. Revise section 225.7004 to read as follows:

225.7004 Restrictions on the procurement of goods other than U.S. goods.

- 5. Add section 225.7004–0 to read as follows:

225.7004–0 Scope.

This section implements 10 U.S.C. 4864.

- 6. Revise sections 225.7004–1 through 225.7004–4 to read as follows:

Sec.

* * * * *

225.7004–1 Definitions.

225.7004–2 Restrictions.

225.7004–3 Exceptions.

225.7004–4 Implementation of restriction on certain naval vessel components.

* * * * *

225.7004–1 Definitions.

As used in this section—

National technology and industrial base means the persons and organizations that are engaged in production activities conducted within the United States, Australia, Canada, New Zealand, and the United Kingdom of Great Britain and Northern Ireland (United Kingdom). (10 U.S.C. 4801)

Star tracker means a navigational tool used in a satellite weighing more than 400 pounds whose principal purpose is to support the national security, defense, or intelligence needs of the U.S. Government.

225.7004–2 Restrictions.

Except as provided in 225.7004–3, do not acquire any of the following items, either as end products or components, unless the manufacturer of the items is part of the national technology and industrial base:

(a) Buses, if multipassenger motor vehicles are purchased, leased, rented, or made available under contracts for transportation services.

(b) Components for naval vessels, to the extent they are unique to marine applications (see also 225.7004–4 for implementation of the restriction for naval vessels):

- (1) Gyrocompasses.
- (2) Electronic navigation chart systems.
- (3) Steering controls.
- (4) Propulsion and machinery control systems.

(5) Totally enclosed lifeboats.

(6) Welded shipboard anchor and mooring chain. See also 225.7004–5.

(c) Large medium-speed diesel engines for new construction of auxiliary ships using funds available for National Defense Sealift Fund programs or Shipbuilding and Conversion, Navy.

(d) For T–AO 205 and T–ARC class vessels:

- (1) Auxiliary equipment, including pumps, for all shipboard services.
- (2) Propulsion system components, including engines, reduction gears, and propellers.
- (3) Shipboard cranes.
- (4) Spreaders for shipboard cranes.
- (e) Star trackers.

225.7004–3 Exceptions.

(a) *Contracts under the simplified acquisition threshold.* The restrictions at 225.7004–2 do not apply to a contract or subcontract that does not exceed the simplified acquisition threshold.

(b) *Buses.* The restriction at 225.7004–2(a) does not apply in the following circumstances:

(1) Buses manufactured outside the national technology and industrial base are needed for temporary use because buses manufactured in the national technology and industrial base are not available to satisfy requirements that cannot be postponed. Such use may not, however, exceed the lead time required for acquisition and delivery of buses manufactured in the national technology and industrial base.

(2) The requirement for buses is temporary in nature. For example, to meet a special, nonrecurring requirement or a sporadic and infrequent recurring requirement, buses manufactured outside the national technology and industrial base may be used for temporary periods of time. Such use may not however, exceed the period of time needed to meet the special requirement.

(3) Buses manufactured outside the national technology and industrial base are available at no cost to the U.S. Government.

(c) *Components for naval vessels.* The restriction at 225.7004–2(b) does not apply to acquisition of spare or repair parts needed to support components for naval vessels manufactured outside the United States. Support includes the purchase of spare gyrocompasses, electronic navigation chart systems, steering controls, propulsion and machinery control systems, totally enclosed lifeboats, and welded shipboard anchor and mooring chain.

(d) *Components for auxiliary ships.* The restriction at 225.7004–2(c) does not apply to large medium-speed engines for icebreakers or special mission ships.

(e) *Star trackers.* The restriction at 225.7004–2(e) does not apply to acquisition programs that have received Milestone A approval as defined in 10 U.S.C. 4211 before October 1, 2021, as documented by the requiring activity official performing program management responsibilities. The contracting officer shall include the Milestone A approval documentation in the contract file.

225.7004–4 Implementation of restriction on certain naval vessel components.

(a) The statute at 10 U.S.C. 4864(h) prohibits the use of contract clauses or certifications to implement the restriction at 225.7004–2(b) for naval vessel components.

(b) Agencies shall accomplish implementation of the restriction at 225.7004–2(b) through use of management and oversight techniques that achieve the objectives of this section without imposing a significant management burden on the Government or the contractor involved.

■ 7. Add sections 225.7004–5 through 225.7004–7 to read as follows:

Sec.

* * * * *

225.7004–5 Additional restrictions on anchor and mooring chain.

225.7004–6 Waiver of restrictions.

225.7004–7 Contract clauses.

* * * * *

225.7004–5 Additional restrictions on anchor and mooring chain.

(a) In accordance with section 8041 of the Fiscal Year 1991 DoD Appropriations Act (Pub. L. 101–511) and similar sections in subsequent DoD appropriations acts, do not acquire welded shipboard anchor and mooring chain, unless—

(1) It is manufactured in the United States, including cutting, heat treating, quality control, testing, and welding (both forging and shot blasting process); and

(2) The cost of the components manufactured in the United States exceeds 50 percent of the total cost of components.

(b) The statute at 10 U.S.C. 4864 also restricts acquisition of welded shipboard anchor and mooring chain, when used as a component of a naval vessel; however, the Appropriations Act restriction described in paragraph (a) of this section takes precedence over the restriction of 10 U.S.C. 4864 cited in 225.7004–2(b)(6).

225.7004–6 Waiver of restrictions.

(a) *Welded shipboard anchor and mooring chain.* (1) In accordance with section 8016 of the Consolidated Appropriations Act, 2023 (Pub. L. 117–328), the secretary of the department responsible for acquisition may waive the restrictions in 225.7004–2(b)(6) and 225.7004–5, on a case-by-case basis, if—

(i) Sufficient domestic suppliers are not available to meet DoD requirements on a timely basis; and

(ii) The acquisition is necessary to acquire capability for national security purposes.

(2) Document the waiver in a written determination and findings containing—

(i) The factors supporting the waiver; and

(ii) A certification that the acquisition must be made in order to acquire capability for national security purposes.

(3) Provide a copy of the determination and findings to the House and Senate Committees on Appropriations.

(b) *Star trackers.* The waiver criteria at paragraph (c) of this section apply, except that the USD(A&S) may delegate the authority to waive a restriction for a star tracker for a particular foreign country to the service acquisition executive, without power of redelegation (section 1603, National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116–283)).

(c) *Waiver of restrictions of 10 U.S.C. 4864(a).* The restrictions on certain foreign purchases at 225.7004–2 may be waived, except as provided in paragraphs (a) and (b) of this section, as follows:

(1)(i) USD(A&S), without power of delegation, may waive a restriction for a particular item for a particular foreign country upon determination that—

(A) U.S. producers of the item would not be jeopardized by competition from a foreign country, and that country does not discriminate against defense items produced in the United States to a greater degree than the United States

discriminates against defense items produced in that country; or

(B) Application of the restriction would impede cooperative programs entered into between DoD and a foreign country, or would impede the reciprocal procurement of defense items under a memorandum of understanding providing for reciprocal procurement of defense items under 225.872, and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.

(ii) A notice of the determination to exercise the waiver authority shall be published in the **Federal Register** and submitted to the congressional defense committees at least 15 days before the effective date of the waiver.

(iii) The effective period of the waiver shall not exceed 1 year.

(iv) For contracts entered into prior to the effective date of a waiver, provided adequate consideration is received to modify the contract, the waiver shall be applied as directed or authorized in the waiver to—

(A) Subcontracts entered into on or after the effective date of the waiver; and

(B) Options for the procurement of items that are exercised after the effective date of the waiver, if the option prices are adjusted for any reason other than the application of the waiver.

(2) The head of the contracting activity may waive a restriction on a case-by-case basis upon execution of a determination and findings that any of the following applies:

(i) The restriction would cause unreasonable delays.

(ii) Satisfactory quality items manufactured in the national technology and industrial base are not available.

(iii) Application of the restriction would result in the existence of only one source for the item in the national technology and industrial base.

(iv) Application of the restriction is not in the national security interests of the United States.

(v) Application of the restriction would adversely affect a U.S. company.

(3) A restriction is waived when it would cause unreasonable costs. The cost of an item of national technology and industrial base origin is unreasonable if it exceeds 150 percent of the offered price, inclusive of duty, of items that are not of national technology and industrial base origin.

225.7004–7 Contract clauses.

(a) Unless a waiver has been granted, use the clause at 252.225–7019,

Restriction on Acquisition of Anchor and Mooring Chain, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, that exceed the simplified acquisition threshold and that require welded shipboard anchor or mooring chain.

(b) Use the clause at 252.225–7062, Restriction on Acquisition of Large Medium-Speed Diesel Engines, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, that exceed the simplified acquisition threshold and that require large medium-speed diesel engines for new construction of auxiliary ships using funds available for National Defense Sealift Fund programs or Shipbuilding and Conversion, Navy unless—

(1) An exception at 225.7004–3(d) applies; or

(2) A waiver has been granted.

(c) Unless a waiver has been granted, use the clause at 252.225–70XX, Restriction on Acquisition of Components of T–AO 205 and T–ARC Class Vessels, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, that exceed the simplified acquisition threshold and that require components of T–AO 205 and T–ARC class vessels.

(d) Use the clause at 252.225–70YY, Restriction on Acquisition of Certain Satellite Components, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, that exceed the simplified acquisition threshold unless—

(1) An exception at 225.7004–3(e) applies; or

(2) A waiver has been granted.

225.7006, 225.7006–1, 225.7006–2, 225.7006–3, and 225.7006–4 [Removed and Reserved]

■ 8. Remove and reserve sections 225.7006, 225.7006–1, 225.7006–2, 225.7006–3, and 225.7006–4.

225.7007, 225.7007–1, 225.7007–2, and 225.7007–3 [Removed and Reserved]

■ 9. Remove and reserve sections 225.7007, 225.7007–1, 225.7007–2, and 225.7007–3.

225.7008 [Removed and Reserved]

■ 10. Remove and reserve section 225.7008.

225.7009–1 [Amended]

■ 11. Amend section 225.7009–1 by removing “Section” and adding “section” in its place.

225.7010, 225.7010–1, 225.7010–2, 225.7010–3, 225.7010–4, and 225.7010–5 [Removed and Reserved]

■ 12. Remove and reserve sections 225.7010, 225.7010–1, 225.7010–2, 225.7010–3, 225.7010–4, and 225.7010–5.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 13. Amend section 252.225–7019—

■ a. By revising the section heading, introductory text, clause date, and paragraph (a);

■ b. In paragraph (b) by removing “, four inches or less in diameter,”; and

■ c. In paragraph (d) by removing “, four inches or less in diameter”.

The revisions read as follows:

252.225–7019 Restriction on Acquisition of Anchor and Mooring Chain.

As prescribed in 225.7004–7(a), use the following clause:

Restriction on Acquisition of Anchor and Mooring Chain (DATE)

(a) *Definition.* As used in this clause—
Component means an article, material, or supply incorporated directly into an end product.

* * * * *

252.225–7037 [Removed and Reserved]

■ 14. Remove and reserve section 252.225–7037.

252.225–7038 [Removed and Reserved]

■ 15. Remove and reserve section 252.225–7038.

252.225–7062 [Amended]

■ 16. Amend section 252.225–7062 introductory text by removing “225.7010–5” and adding “225.7004–7(b)” in its place.

■ 17. Add section 252.225–70XX to read as follows:

252.225–70XX Restriction on Acquisition of Components of T–AO 205 and T–ARC Class Vessels.

As prescribed in 225.7004–7(c), use the following clause:

Restriction on Acquisition of Components of T–AO 205 and T–ARC Class Vessels (DATE)

(a) *Restriction.*

(1) In accordance with 10 U.S.C. 4864, the following components of T–AO 205 and T–ARC class vessels must be manufactured in the United States, Australia, Canada, New Zealand, or the United Kingdom of Great Britain and Northern Ireland (United Kingdom):

(i) Auxiliary equipment, including pumps, for all shipboard services.

(ii) Propulsion system components, including engines, reduction gears, and propellers.

(iii) Shipboard cranes.

(iv) Spreaders for shipboard cranes.

(2) The Contractor shall deliver under this contract only T–AO 205 and T–ARC class vessel components, as described in paragraph (a)(1) of this clause, manufactured in the United States, Australia, Canada, New Zealand, or the United Kingdom (10 U.S.C. 4864).

(b) *Subcontracts.* The Contractor shall insert the substance of this clause, including this paragraph (b), in subcontracts for the components described in paragraph (a)(1) of this clause that exceed the simplified acquisition threshold, including subcontracts for commercial products and commercial services.

(End of clause)

■ 18. Add section 252.225–70YY to read as follows:

252.225–70YY Restriction on Acquisition of Certain Satellite Components.

As prescribed in 225.7004–7(d), use the following clause:

Restriction on Acquisition of Certain Satellite Components (DATE)

(a) *Definition.* As used in this clause—

Star tracker means a navigational tool used in a satellite weighing more than 400 pounds whose principal purpose is to support the national security, defense, or intelligence needs of the U.S. Government.

(b) *Restriction.* In accordance with 10 U.S.C. 4864, a star tracker must be manufactured in the United States, Australia, Canada, New Zealand, or the United Kingdom of Great Britain and Northern Ireland (United Kingdom). The Contractor shall deliver under this contract only star trackers manufactured in the United States, Australia, Canada, New Zealand, or the United Kingdom.

(c) *Subcontracts.* The Contractor shall insert the substance of this clause, including this paragraph (c), in subcontracts for star trackers that exceed the simplified acquisition threshold, including subcontracts for commercial products and commercial services.

(End of clause)

[FR Doc. 2023–25161 Filed 11–16–23; 8:45 am]

BILLING CODE 6820–ep–P

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 212, 225, and 252**

[Docket DARS–2023–0005; Req No. DARS–2024–00010–FR]

RIN 0750–AK35

Defense Federal Acquisition Regulation Supplement: Export-Controlled Items (DFARS Case 2018–D053)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule; withdrawal.

SUMMARY: DoD is withdrawing the proposed rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) for the case titled: Export-Controlled Items (DFARS Case 2018–D053). The decision not to proceed with a final rule has been made because of a change in the associated

policy requirements for certain contractors to provide export authorizations. Accordingly, this proposed rule is withdrawn, and the DFARS case is closed.

DATES: The proposed rule published on March 22, 2023, at 88 FR 17357 is withdrawn as of November 17, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly Bass, telephone 703–717–3446.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD published a proposed rule in the **Federal Register** on March 22, 2023, at 88 FR 17357 to amend the DFARS to implement a policy that would enable the Defense Contract Management Agency (DCMA) to obtain export authorizations from certain contractors, specifically, when a contract required government quality assurance surveillance oversight and had delivery to, or production or performance in, government quality assurance countries. The DMCA policy was to require the contractor to provide relevant export

authorizations (*i.e.*, export license exemptions, export license exceptions, export licenses, or other approvals) to the cognizant DCMA administrative contracting officer along with contact information for the empowered official or the export point of contact. Government quality assurance countries include the following countries: Australia, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Israel, Italy, Republic of Korea, Netherlands, Norway, Poland, Romania, Slovakia, Spain, Sweden, Turkey, and the United Kingdom.

The rule is withdrawn pending development of updated policy requirements.

List of Subjects in 48 CFR Parts 212, 225, and 252

Government procurement.

Jennifer D. Johnson,
Editor/Publisher, Defense Acquisition Regulations System.

[FR Doc. 2023–25159 Filed 11–16–23; 8:45 am]

BILLING CODE 6001–FR–P



FEDERAL REGISTER

Vol. 88

Friday,

No. 221

November 17, 2023

Part IV

Environmental Protection Agency

40 CFR Part 60

Adoption and Submittal of State Plans for Designated Facilities:
Implementing Regulations Under Clean Air Act Section 111(d); Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA-HQ-OAR-2021-0527; FRL-8606-01-OAR]

RIN 2060-AV48

Adoption and Submittal of State Plans for Designated Facilities: Implementing Regulations Under Clean Air Act Section 111(d)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing amendments to the regulations that govern the processes and timelines for state and Federal plans to implement emission guidelines under Clean Air Act (CAA) New Source Performance Standards for existing sources (the “implementing regulations”). The amendments include revisions to the timing requirements for state and the EPA actions related to plans; the addition of mechanisms to improve flexibility and efficiency in plan processes; and new requirements for demonstration of timely meaningful engagement with pertinent stakeholders—including, but not limited to, industry, small businesses, and communities most affected by and vulnerable to the impacts of the plan. This action additionally provides a process for states’ consideration of ‘remaining useful life and other factors’ (RULOF) in applying a standard of performance; amends the definition of standard of performance in the implementing regulations; and clarifies compliance flexibilities that states may choose to incorporate into state plans, including trading or averaging. Finally, this action adds requirements for the electronic submission of state plans and provides several other clarifications and minor revisions to the implementing regulations.

DATES: This final rule is effective on December 18, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2021-0527. All documents in the docket are listed on the <https://www.regulations.gov/> website. Although listed, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form.

Publicly available docket materials are available electronically through <https://www.regulations.gov/>.

FOR FURTHER INFORMATION CONTACT: For questions about this action contact Dr. Michelle Bergin, Sector Policies and Programs Division (Mail Code D205-01), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, 109 T.W. Alexander Drive, P.O. Box 12055, Research Triangle Park, North Carolina 27711; telephone number: (919) 541-2726; email address: bergin.michelle@epa.gov.

SUPPLEMENTARY INFORMATION: *Preamble acronyms and abbreviations.* We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

ACE Affordable Clean Energy Rule
ALA American Lung Association
BSER Best System of Emission Reduction
CAA Clean Air Act
CBI confidential business information
CDX Central Data Exchange
CFR Code of Federal Regulations
EG Emission Guideline
EGU electric generating unit
EJ environmental justice
EPA Environmental Protection Agency
FIP Federal Implementation Plan
ICR Information Collection Request
IoP Increments of Progress
NAAQS National Ambient Air Quality Standards
OAQPS Office of Air Quality Planning and Standards
OMB Office of Management and Budget
PRA Paperwork Reduction Act
PM_{2.5} fine particulate matter (2.5 microns and less)
RTC Response to Comments document
RFA Regulatory Flexibility Act
RIN Regulatory Information Number
RULOF remaining useful life and other factors
SIP State Implementation Plan
SpeCS State Planning Electronic Collaboration System
TAR Tribal Authority Rule
TAS Treatment as a State
TIP Tribal Implementation Plan
UMRA Unfunded Mandates Reform Act
U.S.C. United States Code

Organization of this document. The information in this preamble is organized as follows:

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I. General Information

A. Does this action apply to me?

This action applies for the development and adoption of plans for implementation of CAA section 111(d) final emission guidelines (EGs) published in the **Federal Register** after July 8, 2019. In particular, this action applies to states in the development and submittal of state plans and to the EPA in processing state plan submissions and to the EPA in promulgating Federal plans. After the EPA promulgates a final EG, each state that has one or more designated facilities must develop, adopt, and submit to the EPA a state plan under CAA section 111(d). The term “designated facility” means “any existing facility . . . which emits a designated pollutant and which would be subject to a standard of performance for that pollutant if the existing facility were an affected facility [i.e., a new source].” See 40 CFR 60.21a(b). If a state fails to submit a plan or if the EPA determines that a state plan is not

satisfactory, the EPA has the authority to establish a Federal CAA section 111(d) plan for designated facilities located in the state.

Under the Tribal Authority Rule (TAR), eligible tribes may seek approval to implement a plan under CAA section 111(d) in a manner similar to a state. See 40 CFR part 49, subpart A. Tribes may, but are not required to, seek approval for treatment in a manner similar to a state (treatment as a state; TAS) for purposes of developing a Tribal Implementation Plan (TIP) implementing an EG. If a tribe obtains approval and submits a TIP, the EPA will use similar timelines and criteria and will follow similar procedures as those for state plans. Tribes that choose to develop plans will have the same flexibilities available to states in this process. The TAR authorizes tribes to develop and implement one or more of its own air quality programs, or portions thereof, under the CAA; however, it does not require tribes to develop a CAA program. Tribes may implement programs that are most relevant to their air quality needs. A tribe with an approved TAS under TAR for CAA 111(d) is not required to resubmit TAS approval to implement an EG subject to subpart Ba.¹ If a tribe does not seek and obtain the authority from the EPA to establish a TIP, the EPA has the authority to establish a Federal CAA section 111(d) plan for designated facilities that are located in areas of Indian country. A Federal plan would apply to all designated facilities located in the areas of Indian country covered by the Federal plan unless and until the EPA approves a TIP applicable to those facilities.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this action is available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this final action at <https://www.epa.gov/stationary-sources-air-pollution/adoption-and-submittal-state-plans-designated-facilities-40-cfr>. Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the final rule, a memorandum showing the rule edits finalized in this action, and key supporting documents at this same website.

¹ See the EPA website, <https://www.epa.gov/tribal/tribes-approved-treatment-state-tas>, for information on those tribes that have treatment as a state for specific environmental regulatory programs, administrative functions, and grant programs.

C. Judicial Review and Administrative Review

Section 307(b)(1) of the CAA governs judicial review of final actions by the EPA. This section provides, in part, that petitions for review must be filed in the D.C. Circuit: (i) when the agency action consists of “nationally applicable regulations promulgated, or final actions taken, by the Administrator,” or (ii) when such action is locally or regionally applicable, but “such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.” For locally or regionally applicable final actions, the CAA reserves to the EPA complete discretion whether to invoke the exception in (ii) described in the preceding sentence.²

This action is “nationally applicable” within the meaning of CAA section 307(b)(1). The final rule governs the EPA’s promulgation of emission guidelines under CAA section 111(d), which are nationally applicable regulations for which judicial review is available only in the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) pursuant to CAA section 307(b)(1).³ Moreover, it revises the generally applicable, nationally consistent implementing regulations that govern the development and submission for all states of state plans and the EPA’s development of Federal plans pursuant to EGs under CAA section 111(d), as well as the EPA’s review of states’ plans.

In the alternative, to the extent a court finds this final action to be locally or regionally applicable, the Administrator is exercising the complete discretion afforded to him under the CAA to make and publish a finding that this action is based on a determination of “nationwide scope or effect” within the meaning of CAA section 307(b)(1).⁴ As

² *Sierra Club v. EPA*, 47 F.4th 738, 745 (D.C. Cir. 2022) (“EPA’s decision whether to make and publish a finding of nationwide scope or effect is committed to the agency’s discretion and thus is unreviewable”); *Texas v. EPA*, 983 F.3d 826, 834–35 (5th Cir. 2020).

³ See, e.g., *Nat’l Waste & Recycling Ass’n v. EPA*, No. 16–1371 (D.C. Cir. 2016) (consolidated challenges to the CAA section 111(d) emissions guidelines for municipal solid waste landfills in the D.C. Circuit); *Am. Lung Ass’n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021) (consolidated challenges to, among other things, the CAA section 111(d) emission guidelines for fossil fuel-fired electric generating units known as the Affordable Clean Energy Rule).

⁴ In deciding whether to invoke the exception by making and publishing a finding that an action is based on a determination of nationwide scope or effect, the Administrator takes into account a number of policy considerations, including his judgment balancing the benefit of obtaining the D.C. Circuit’s authoritative centralized review versus

explained above, this final action is revising a single set of nationally consistent implementing regulations that apply to every state that must develop a state plan submission pursuant to CAA section 111(d) and an EPA-issued EG, as well as apply to the EPA when it reviews state plan submissions. The regulations also govern the EPA’s development of EGs pursuant to CAA section 111(d), which apply to every state that contains designated facilities.

The Administrator finds that this is a matter on which national uniformity in judicial resolution of any petitions for review is desirable, to take advantage of the D.C. Circuit’s administrative law expertise, and to facilitate the orderly development of the law under the Act. The Administrator also finds that consolidated review of this action in the D.C. Circuit will avoid piecemeal litigation in the regional circuits, further judicial economy, and eliminate the risk of inconsistent results, and that a nationally consistent approach to implementation of EGs pursuant to CAA section 111(d) constitutes the best use of agency resources.

For these reasons, this final action is nationally applicable or, alternatively, the Administrator is exercising the complete discretion afforded to him by the CAA and finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1) and is publishing that finding in the **Federal Register**. Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by January 16, 2024. Under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce the requirements.

Additionally, pursuant to CAA section 307(d)(1)(V), the Administrator determines that this action is subject to the provisions of CAA section 307(d). The EPA made this determination at proposal and has complied with the applicable procedural requirements in the course of this rulemaking. Section 307(d)(1)(V) of the CAA provides that the provisions of CAA section 307(d) apply to “such other actions as the Administrator may determine.” Section 307(d)(7)(B) of the CAA further provides that “[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period

allowing development of the issue in other contexts and the best use of agency resources.

for public comment (including any public hearing) may be raised during judicial review.” This section also provides a mechanism for the EPA to convene a proceeding for reconsideration, “[i]f the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.” Any person seeking to make such a demonstration should submit a Petition for Reconsideration to the Office of the Administrator, U.S. Environmental Protection Agency, Room 3000, WJC South Building, 1200 Pennsylvania Ave. NW, Washington, DC 20460, with a copy to both the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

The EPA notes that the individual regulatory provisions it is revising or finalizing in this action are severable from one another because each is supported by an independent rationale. That is, the individual subsections within each of the sections of subpart Ba are generally justified independently and are therefore severable for purposes of judicial review.

II. Background

A. What is the statutory authority for this action?

The statutory authority for this action is provided by CAA section 111 (42 U.S.C. 7411). As described further in the next section, CAA section 111 requires the EPA to establish standards of performance for certain categories of stationary sources that, in the Administrator’s judgment, “cause[, or contribute] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” CAA section 111(b) provides the EPA’s authority to regulate new and modified sources, while CAA section 111(d) directs the EPA to “prescribe regulations which shall establish a procedure” for states to submit plans to the EPA that establish standards of performance for existing sources of certain air pollutants to which a standard would apply if such existing source were a new source. The EPA addresses its obligation under CAA

section 111(d) to establish a procedure for states to submit plans both through its promulgation of general implementing regulations, including those addressed by this action, and through promulgation of EGs for specific source categories. Additional statutory authority for this action is provided by section 301 of the CAA (42 U.S.C. 7601), which contains general provisions for the administration of the CAA, including the authority for the Administrator to “prescribe such regulations as are necessary to carry out [the] functions” of the CAA under section 301(a)(1).

B. What is the background for this action?

Clean Air Act section 111(d) governs the establishment of standards of performance for existing stationary sources. CAA section 111(d) directs the EPA to “prescribe regulations which shall establish a procedure similar to that provided by [CAA section 110]” for states to submit state plans that establish standards of performance for existing sources of certain air pollutants to which a standard of performance would apply if such an existing source were a new source under CAA section 111(b). Therefore, an existing source can only be regulated under CAA section 111(d) if it belongs to a source category that is regulated under CAA section 111(b). The EPA’s implementing regulations use the term “designated facility” to identify those existing sources. *See* 40 CFR 60.21a(b).

CAA section 111(b)(1)(A) requires that a source category be included on the list for regulation if, “in [the EPA Administrator’s] judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” Once a source category is listed, CAA section 111(b)(1)(B) requires that the EPA propose and then promulgate “standards of performance” for new sources in such source category. CAA section 111(a)(1) defines a “standard of performance” as “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.” This provision requires the EPA to determine both the best system of emission reduction (BSER) for the regulated source category and the degree of emission limitation achievable

through application of the BSER. The EPA must then, under CAA section 111(b)(1)(B), promulgate standards of performance for new sources that reflect that level of stringency.

Once the EPA promulgates standards of performance for new sources within a particular source category, the EPA is required, in certain circumstances, to regulate emissions from existing sources in that same source category.⁵ Under CAA section 111(d), the Agency has, to date, issued EGs regulating five pollutants from six source categories that are currently in effect (*i.e.*, sulfuric acid plants (acid mist), phosphate fertilizer plants (fluorides), primary aluminum plants (fluorides), kraft pulp plants (total reduced sulfur), municipal solid waste landfills (landfill gases)), and fossil fuel-fired electric generating units (greenhouse gases [GHGs]). *See* “Phosphate Fertilizer Plants; Final Guideline Document Availability,” 42 FR 12022 (March 1, 1977); “Standards of Performance for New Stationary Sources; Emission Guideline for Sulfuric Acid Mist,” 42 FR 55796 (October 18, 1977); “Kraft Pulp Mills, Notice of Availability of Final Guideline Document,” 44 FR 29828 (May 22, 1979); “Primary Aluminum Plants; Availability of Final Guideline Document,” 45 FR 26294 (April 17, 1980); “Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills,” 81 FR 59276 (August 29, 2016); “Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations,” 84 FR 32520 (July 8, 2019) (Affordable Clean Energy (ACE) Rule).⁶⁷ Additionally, the

⁵ In accordance with CAA section 111(d), states are required to submit plans to establish standards of performance for existing sources for any air pollutant: (1) the emission of which is subject to a Federal New Source Performance Standard; and (2) which is neither a pollutant regulated under CAA section 108(a) (*i.e.*, criteria air pollutants such as ground-level ozone and particulate matter, and their precursors, like volatile organic compound) or a hazardous air pollutant regulated from the same source category under CAA section 112. *See* also definition of “designated pollutant” in 40 CFR 60.21a(a).

⁶⁷ The EPA has also issued several EGs that have subsequently been repealed or vacated by the courts. The EPA regulated mercury from coal-fired electric power plants in a 2005 rule that was vacated by the D.C. Circuit, “Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units; Final Rule,” 70 FR 28606 (May 18, 2005) (Clean Air Mercury Rule), vacated by *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). The EPA also issued CAA section 111(d) EGs regulating GHG emissions from fossil fuel-fired electric power plants in a 2015 rule, “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule,” 80 FR 64662 (October 23, 2015)

EPA recently proposed EGs addressing GHG emissions from two different source categories. On November 15, 2021, the EPA proposed EGs to regulate GHG emissions (in the form of methane limitations) from sources in the oil and natural gas source category (86 FR 63110) and provided a supplemental proposal for that sector on December 6, 2022 (87 FR 74702). On May 23, 2023, the EPA proposed to repeal the existing EG for GHG emissions from certain fossil fuel-fired electric generating units (the ACE Rule) and to promulgate a new EG in order to regulate GHG emissions (in the form of carbon dioxide limitations) from existing fossil fuel-fired electric generating units. 88 FR 33240. Finally, the Agency has regulated additional pollutants from solid waste incineration units under CAA section 129 and in accordance with CAA section 111(d).⁸

The mechanism for regulating designated facilities⁹ under CAA section 111(d) differs from the mechanism for regulating new facilities under CAA section 111(b). Pursuant to CAA section 111(b), the EPA promulgates standards of performance that are directly applicable to new, modified, and reconstructed facilities in a specified source category. In contrast, CAA section 111(d) operates together with CAA section 111(a)(1) to collectively establish and define roles and responsibilities for both the EPA and the states in the regulation of designated facilities. Under the statutory framework, the EPA has the responsibility to determine the BSER for designated facilities, as well as the degree of emission limitation achievable through application of that BSER. The EPA identifies both the BSER and the degree of emission limitation as part of an EG, which it may typically reflect as

a presumptive standard of performance or methodology for calculating a presumptive standard of performance for designated facilities. States use the EPA's presumptive standards of performance as the basis for establishing requirements for designated facilities in their state plans. In addition to standards of performance, CAA section 111(d)(1) requires state plans to include provisions for the implementation and enforcement of such standards. CAA section 111(d)(1) also requires the EPA's regulations to permit states, in applying a standard of performance to particular sources, to take into account the source's remaining useful life and other factors, a process addressed in more detail in section III.E of this preamble.

CAA section 111(d) directs the EPA to establish a procedure for the submission of state plans, which the EPA addresses both through its promulgation of general implementing regulations for section 111(d) and through promulgation of EGs for specific source categories. While CAA section 111(d)(1) authorizes states to develop state plans that establish standards of performance and provides states with certain discretion in determining the appropriate standards, CAA section 111(d)(2) provides the EPA a specific oversight role with respect to such state plans. The states must submit their plans to the EPA, and the EPA must evaluate each state plan to determine whether each plan is "satisfactory." If a state fails to submit a plan or the EPA determines that a state plan is not satisfactory, the EPA has the "same authority" to prescribe a Federal plan as it has to promulgate a Federal Implementation Plan (FIP) under CAA section 110(c).

In 1975, the EPA issued the first general implementing regulations to prescribe the process for the adoption and submittal of state plans for designated facilities under CAA section 111(d) (codified at 40 CFR part 60, subpart B (subpart B)). 40 FR 53340 (November 17, 1975). Responding to the direction to "establish a procedure similar to that provided by" CAA section 110, in promulgating subpart B, the EPA aligned the timing requirements for state and Federal plans under CAA section 111(d) with the then-applicable timeframes for State Implementation Plans (SIPs) and FIPs prescribed in CAA section 110, as established by the 1970 CAA Amendments. The implementing regulations were not significantly revised after their original promulgation in 1975¹⁰ until 2019, when the EPA

promulgated a new set of implementing regulations codified at 40 CFR part 60, subpart Ba (subpart Ba). 84 FR 32520 (July 8, 2019).

In promulgating subpart Ba in 2019, the EPA intended to update and modernize the implementing regulations to align the procedures for CAA section 111(d) state and Federal plans with CAA amendments made after subpart B was first promulgated in 1975. Notably, subpart B did not align either with CAA section 111(d) as amended by Congress in 1977 or with the timelines in CAA section 110 as amended by Congress in 1990. The EPA therefore considered it appropriate to update the implementing regulations for CAA section 111(d) to make changes similar to CAA section 110, given that section 111(d)(1) of the CAA directs the EPA to "prescribe regulations which shall establish a procedure similar to that provided by section 110" of the CAA for states to submit plans to the EPA. In promulgating subpart Ba, the EPA directly aligned the timing requirements for CAA section 111(d) state and Federal plans (40 CFR 60.23a(a)(1) and 60.27a(c), respectively) with the timing requirements for SIPs and FIPs under CAA section 110 (see CAA section 110(a)(1) and 110(c)(1), respectively).

In promulgating subpart Ba, the EPA also added the definition of "standard of performance" (40 CFR 60.21a(f)) (defined under subpart B as "emission standard" (40 CFR 60.21(f))) and the "remaining useful life" provision (40 CFR 60.24a(e)) (referred under subpart B as the "variance" provision (40 CFR 60.24(f))). The EPA further added required minimum administrative and technical criteria for inclusion in state plans (40 CFR 60.27a(g)). Applying these criteria, the EPA determines whether a state plan or portion of a plan submitted is complete (referred to as a completeness review). Once a state plan or portion of a plan is determined to be complete, the EPA must approve or disapprove the plan or portions of the plan. For details on the EPA's rationale for the promulgation of these provisions, see 84 FR 32520 (July 8, 2019).

The EPA proposed minor revisions to the subpart Ba applicability provision and is finalizing those revisions largely as proposed (see section III.G.2.a. of this preamble). As finalized in 2019, subpart Ba was applicable to any final 111(d) EG published, or the implementation of which was ongoing, after July 8, 2019. The EPA proposed revisions to this provision for clarity, including to

(Clean Power Plan). The EPA subsequently repealed and replaced the 2015 rule with the ACE Rule.

⁷ The ACE Rule was initially vacated by *Am. Lung Ass'n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021). The Supreme Court subsequently reversed and remanded the D.C. Circuit's opinion, *West Virginia v. EPA*, 142 S. Ct. 2587 (June 30, 2022). On October 27, 2022, the D.C. Circuit amended its judgement and recalled the partial mandate vacating the ACE Rule, effectively reinstating ACE. Order, *ALA v. EPA*, No. 19–1140, ECF No. 1970895.

⁸ CAA section 129 directs the EPA Administrator to develop regulations under CAA section 111 limiting emissions of nine air pollutants from four categories of solid waste incineration units.

⁹ A "designated facility" is any existing facility which emits an air pollutant, the emissions of which are subject to a standard of performance for new stationary sources but for which air quality criteria have not been issued and that is not included on a list published under CAA section 108(a) or 112, and which would be subject to a standard of performance for that pollutant if the existing facility were a new facility. See 40 CFR 60.21a.

¹⁰ In 2012, the EPA revised several provisions of subpart B, mainly to include allowance systems as

a form of standard of performance. 77 FR 9303 (February 16, 2012).

remove the phrase “if implementation of such final guideline is ongoing.”¹¹ It did not propose to change the already-established applicability date. At the time of promulgation of this rule, there are no final EGs that have been published after July 8, 2019, so subpart Ba will not retroactively apply to the implementation of any EG. Specifically, the final EG for greenhouse gas emissions from existing electric utility generating units that was included in the ACE Rule was published on July 8, 2019;¹² thus, subpart Ba as revised will not apply to that EG. Regardless, the EPA proposed to repeal the ACE Rule on May 23, 2023,¹³ and intends to finalize its repeal, at which point neither states nor the EPA will have any obligations under the ACE Rule and the potential applicability of subpart Ba to this EG will be moot. In contrast, the EPA has recently proposed two EGs that would regulate GHG emissions from designated facilities in the oil and natural gas industry (86 FR 63110, November 15, 2021; 87 FR 74702, December 6, 2022) and in the power sector (88 FR 33240, May 23, 2023). If those EGs are finalized and to the extent that the final EGs do not contain EG-specific requirements superseding subpart Ba provisions, subpart Ba as revised in this action will apply. Subpart B continues to apply to CAA section 111 EGs promulgated on or prior to July 8, 2019, and to EGs issued pursuant to CAA section 129.

In January 2021, the D.C. Circuit vacated several provisions of subpart Ba related to timelines for state plans and Federal plans. *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 991. (D.C. Cir. 2021) (*ALA*).¹⁴ In this vacatur, the court identified several flaws in the EPA’s rationale for extending CAA section 111(d) state and Federal plan timelines. First, the court found that the EPA erred

in adopting the timelines for SIPs and FIPs in CAA section 110 without meaningfully addressing the differences in the scale of effort required for development and evaluation of CAA section 110 SIPs, as compared with the scale of effort needed for CAA section 111(d) state plans. *Id.* at 992–93. The court also concluded that in promulgating the timelines in subpart Ba, the EPA failed to justify why the shorter deadlines under subpart B were unworkable. *Id.* at 993. Further, the court held that the EPA was required to consider the effect of its subpart Ba timelines on public health and welfare, consistent with the statutory purpose of CAA section 111(d). In the court’s view, the EPA’s “complete failure to say anything at all about the public health and welfare implications of the extended timeframes” meant that the EPA failed to consider an important aspect of the problem. *Id.* at 992 (citing *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* 463 U.S. 29, 43 (1983)).

Based on these reasons, the court vacated the timeline for state plan submissions after publication of a final EG (40 CFR 60.23a(a)(1)), the EPA’s deadline for taking action on state plan submissions (40 CFR 60.27a(b)), the EPA’s deadline for promulgating a Federal plan (40 CFR 60.27a(c)), and the timeline associated with requirements for increments of progress (IoPs; 40 CFR 60.24 (a(d))). Because of the vacatur, subpart Ba currently does not provide generally applicable timelines for state plan submissions, a deadline for the EPA’s action on state plan submissions, a deadline for the EPA’s promulgation of a Federal plan, or a timeline associated with requirements for IoPs. The EPA notes that while it is finalizing generally applicable timelines for the implementing regulations, a particular EG may supersede those generally applicable timelines with its own specific timelines. 40 CFR 60.20a(a)(1). This may be appropriate, for example, based on the complexity of regulating a particular source category, such as a category with a large number of disparate facilities to be regulated.

C. What changes did we propose?

On December 23, 2022, the EPA proposed several revisions to subpart Ba both to address the vacatur of the timing provisions by the D.C. Circuit in *ALA* and to further improve the state and Federal plan development and implementation process. See 87 FR 79176 (December 23, 2022). In response to the *ALA* decision, the EPA proposed timeframes for (1) state plan submittal, (2) the timeline for the EPA to

determine completeness of state plans, (3) the EPA’s action on state plan submissions, (4) the EPA’s promulgation of a Federal plan, and (5) requirements to establish IoPs. Additionally, the EPA proposed to remove the publication in the **Federal Register** of a “finding of failure to submit” as the starting point for the clock to promulgate a Federal plan.

In addition, the EPA proposed revisions to subpart Ba that would enhance the provision of reasonable notice and opportunity for public participation by requiring that states, as part of the state plan development or revision process, undertake outreach and meaningful engagement with a broad range of pertinent stakeholders. The EPA proposed to define pertinent stakeholders as including communities most affected by and vulnerable to the impacts of the plan or plan revision. Increased vulnerability, as described in the proposal, may be attributable, among other reasons, to both an accumulation of negative and lack of positive environmental, health, economic, or social conditions within these populations or communities.

To improve flexibility and efficiency in the submission, review, approval, and implementation of state plans, the EPA proposed to include the following mechanisms in subpart Ba, all of which currently exist under CAA section 110: (1) partial approval/disapproval, (2) conditional approval, (3) allowance for parallel processing, (4) a mechanism for the EPA to call for plan revisions, and (5) an error correction mechanism.

The EPA also proposed revisions to the existing regulations governing the “remaining useful life and other factors” (RULOF) provision of the statute. These proposed revisions were intended to promote clarity and increase consistency in situations where states or the EPA consider RULOF when applying standards of performance to individual sources and to ensure that such standards fulfill the statutory requirements of CAA section 111(d).

Finally, the EPA proposed to require electronic submissions of state plans, as well as additional modifications and clarifications to subpart Ba. In particular, the EPA proposed clarifying amendments to the subpart Ba definition of standard of performance, along with a revised interpretation of CAA section 111(d) with respect to permissible compliance flexibilities. The EPA proposed to determine that, under appropriate circumstances, the Agency may approve state plans that authorize sources to meet their emission limits in the aggregate, such as through standards that permit compliance via

¹¹ 87 FR 79176, 79208–09 (Dec. 23, 2022). As explained in section III.G.2.a. of this preamble, the EPA is finalizing the removal of this phrase from 40 CFR 60.20a(a).

¹² 84 FR 32520 (July 8, 2019).

¹³ “New source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule,” 88 FR 33240 (May 23, 2023).

¹⁴ The Supreme Court subsequently reversed and remanded the D.C. Circuit’s opinion. *West Virginia v. EPA*, 142 S.Ct. 2587 (June 30, 2022). However, no Petitioner sought certiorari on, and the Supreme Court’s *West Virginia* decision did not implicate, the D.C. Circuit’s vacatur of portions of subpart Ba. See Amended Judgment, *ALA v. EPA*, No. 19–1140 (D.C. Cir. October 27, 2022), ECF No. 1970898 (ordering that petitions for review challenging the timing portion of implementing regulations be granted).

trading or averaging. In doing so, the EPA also proposed to conclude that CAA section 111 does not limit the BSEER to controls that can be applied at and to the source.

The EPA did not reopen any subpart Ba requirements other than the specific provisions that the EPA explicitly proposed to revise in the December 2022 notice of proposed rulemaking. Any comments received on the proposal that did not relate to the proposed revisions or additions are considered out of the scope of this action.

D. What outreach and engagement did the EPA conduct?

The EPA conducted both pre- and post-proposal outreach and meaningful engagement events with environmental justice (EJ) communities, small businesses, states, and Tribes. On July 7 and July 11, 2022, the EPA conducted two pre-proposal webinars for states addressing meaningful engagement for pertinent stakeholders, and on July 26, 2022, the Agency conducted a pre-proposal webinar for EJ communities and other key stakeholders about potential requirements for states to conduct meaningful engagement in developing their state plans. The EPA emailed an announcement of the subpart Ba proposal to Tribal nations and environmental justice communities via existing listservs on December 15, 2022. Post-proposal outreach during the public comment period with environmental justice communities included participation on the January 24, 2023 Environmental Justice National call and the January 26, 2023 National Tribal Air Association call. The EPA also conducted a public training webinar on January 31, 2023, for environmental justice community members and their representatives. Additionally, the EPA conducted post-proposal outreach with small businesses through the Small Business Environmental Assistance Program call on February 21, 2023, and with state environmental protection associations including the Association of Air Pollution Control Agencies on January 10, 2023, and the National Association of Clean Air Agencies on February 8, 2023.

III. What actions are we finalizing and what is our rationale for such decisions?

This action finalizes amendments to subpart Ba, including the timing requirements for state plan submittal, the EPA's action on state plan submissions, the EPA's promulgation of a Federal plan, and the establishment of IoPs; the addition of five regulatory

mechanisms to improve state plan processing: (1) partial approval/disapproval, (2) conditional approval, (3) allowance for parallel processing, (4) a mechanism for the EPA to call for plan revisions, and (5) an error correction mechanism; new requirements for meaningful engagement with pertinent stakeholders; and amended requirements for states' and the EPA's consideration of RULOF in applying a standard of performance in certain circumstances. This action also finalizes amendments to the subpart Ba definition of "standard of performance" and finalizes clarifications associated with CAA section 111(d) compliance flexibilities. Finally, this action finalizes requirements for the electronic submission of state plans and several other clarifications and minor revisions to the implementing regulations. While the EPA is finalizing most amendments as proposed, in response to comments submitted on the proposal, the EPA is extending the state plan submittal timeline and the timeline for requirement of IoPs; providing for additional flexibility and guidance for meaningful engagement; as well as revising and streamlining the requirements for accounting for RULOF in applying a less-stringent standard. There are also other provisions that we are finalizing with slight revisions relative to proposal. Further detail is provided in the following sections of this preamble and additional detailed responses to comments are located in the response to comment document (RTC).

While this action amends the generally applicable requirements of subpart Ba, the EPA has recognized that, under certain circumstances, some provisions of the implementing regulations may not fit the needs of a specific EG. Therefore, the existing implementing regulations provide that each EG may include specific implementing provisions in addition to or that supersede the requirements of subpart Ba. 40 CFR 60.20a(a)(1). The EPA will address source category-specific circumstances or facts that are not accommodated by the general provisions of subpart Ba through a specific EG, as the time and processes needed for development and adoption of state plans to implement the EG may be affected by unique characteristics of a source category. For example, if a proposed EG addresses a particularly large and complex source category that necessitates a relatively long timeframe for state planning, the EPA may provide a state plan submission deadline that is

longer than the 18 months being finalized for subpart Ba.¹⁵

A. Revised Implementing Timelines

As described in section II.A. of this preamble, the subpart Ba timing requirements were vacated by the D.C. Circuit in the *ALA* decision. These vacated timing requirements include: the timeline for state plan submissions, the timeline for the EPA to act on a state plan, the timeline for the EPA to promulgate a Federal plan, and the timeline that dictates when state plans must include IoPs. These timelines are all critical to ensuring that the emission reductions anticipated by the EPA when promulgating an EG become federally enforceable measures that are timely implemented by the designated facilities.

The EPA proposed the following timelines to replace those vacated in *ALA* (87 FR 79176, Dec. 23, 2022): 15 months for state plan submissions after publication of a final EG; 60 days after submission for the EPA to determine if a plan is complete; 12 months for the EPA to take final action on a complete state plan (*i.e.*, approve, disapprove); 12 months for the EPA to promulgate a Federal plan either after the state plan submission deadline if a state has failed to submit a complete plan, or after the EPA's disapproval of a state plan submission; and requiring state plans to include IoPs if the plan requires final compliance with standards of performance later than 16 months after the plan submission deadline.¹⁶

The EPA received numerous comments on these proposed timelines, most of which expressed support for timelines longer than those proposed. Some commenters asserted that the *ALA* decision does not direct the EPA to necessarily reduce timelines from those vacated, only to justify the timelines more fully. In particular, most commenters expressed the need for a longer state plan submittal timeline in order to accommodate state regulatory processes associated with plan submittals (*i.e.*, legislative and/or administrative state processes), as well as to accommodate technical development of the plans and to implement the proposed meaningful engagement requirements. However, a few commenters noted that the EPA should not accommodate all lengthy state administrative processes that would unnecessarily postpone emission-reduction obligations. Some

¹⁵ See, *e.g.*, 88 FR 33240, 33402–03 (May 23, 2023) (proposing a 24-month state plan submission deadline for the EG for GHG emissions from fossil fuel-fired electric generating units).

¹⁶ See 87 FR 79176, 79181–90 (Dec. 23, 2022).

commenters asserted that if the EPA were to finalize the state plan submittal timeline as proposed, the EPA should include a mechanism in the rule for states to request for extensions for state plan submittals.

While some commenters also asserted the need for longer timelines associated with the EPA's obligations to take action on a state plan submittal and to promulgate a Federal plan when required, as well as allowing a longer timeline before IoPs are required in the state plans, other commenters supported the proposed timelines for these milestones based, among other concerns, on the need for timely protection of health and welfare and in consideration of the EPA's ability to

extend timelines if warranted in a particular EG.

In consideration of these comments and for the reasons described in detail in the sections that follow, the EPA is finalizing extended timelines from those proposed for submission of state plans, for significant state plan revisions, and for when IoPs must be considered for inclusion in state plans. The EPA is finalizing the remaining timelines as proposed. The EPA determined that these timelines will appropriately balance the need to reasonably accommodate the processes generally required by states and the EPA to develop, evaluate, and adopt plans to effectuate the EG with the need to ensure that designated facilities control emissions of dangerous pollutants as

expeditiously as reasonably possible, consistent with the health and welfare-based objectives of CAA section 111(d). A summary of the timelines finalized in this action is shown in Table 1.

The final subpart Ba timelines are applicable to any final EG published pursuant to CAA section 111(d) after July 8, 2019, including, if finalized, those recently proposed to regulate GHG emissions from sources in the oil and natural gas industry (86 FR 63110, November 15, 2021¹⁷ and FR 74702, December 6, 2022) and those proposed to regulate GHG emissions from fossil fuel-fired electric generating units (88 FR 33240, May 23, 2023), to the extent that the final EGs do not contain provisions superseding any of these timelines in subpart Ba.¹⁷

TABLE 1—FINAL 40 CFR PART 60, SUBPART Ba, TIMELINE COMPARED WITH THOSE INITIALLY PROPOSED, VACATED FROM SUBPART Ba, AND FROM SUBPART B

Process step	2023 Subpart Ba final	2022 Subpart Ba proposal	Subpart Ba (2019) vacated timelines	Subpart B (1975)
State Plan submittal after publication of EG in the Federal Register .	18 months	15 months	36 months	9 months.
State Plan completeness determination.	60 days after State Plan submission.	60 days after State Plan submission.	*6 months after State Plan submission.	N/A.
State Plan evaluation	12 months after completeness.	12 months after completeness.	12 months after completeness.	4 months after State Plan submittal deadline.
EPA Federal Plan promulgation.	12 months after failure to submit or disapproval.	12 months after failure to submit or disapproval.	24 months after finding of failure to submit or disapproval.	6 months after State Plan submittal deadline.
Requirements for Increments of Progress after submittal deadline.	If compliance is >20 months.	If compliance is >16 months.	If compliance is >24 months.	If compliance is >12 months.

* Although the timeline for the state plan completeness determinations was not vacated, the EPA has evaluated this timeline light of the court vacatur of the related timelines.

As described in greater detail in section II. of this preamble, the D.C. Circuit's vacatur of the extended timelines in subpart Ba was based both on the EPA's failure to substantiate the necessity for the additional time at each step of the administrative process, and the EPA's failure to address how those extended implementation timelines would impact public health and welfare. Accordingly, the EPA has evaluated these factors and is finalizing timelines, as described in the following sections, based on the minimum administrative time reasonably necessary for each step in the implementation process, thus minimizing impacts on public health and welfare by proceeding as expeditiously as reasonably possible while accommodating the time needed for states or the EPA to develop an effective plan. This approach addresses

both aspects of the *ALA* decision because the EPA and states will take no longer than necessary to develop and adopt plans that impose requirements consistent with the overall objectives of CAA section 111(d).

The EPA acknowledges these timelines are not identical to those for SIPs under CAA section 110. This is consistent with the requirement of CAA section 111(d) that the EPA promulgate a procedure "similar" to that of CAA section 110, rather than an identical procedure. This is also consistent with the *ALA* decision, which requires the EPA to "engage meaningfully with the different scale" of CAA section 111(d) and 110 plans. 985 F.3d at 993. In proposing the revised timelines, the EPA evaluated each step of the state plan implementation process to independently determine the appropriate duration needed to

accomplish a given step as part of the overall process. After receiving comments on the proposed timelines, the EPA again evaluated each step in light of the new information; the timelines being finalized in this action represent the Agency's revised assessment of the most reasonably expeditious timelines that are appropriate to provide as a default for EGs under these generally applicable implementing regulations.

The EPA recognizes that, under certain circumstances, the timelines being finalized in this action may not fit the needs of a specific EG because of the specific characteristics of an EG. The EPA will address source category-specific circumstances or facts that are not accommodated by the timelines of subpart Ba through a specific EG. Examples of circumstances that may require consideration for different

¹⁷ Under each of these EGs the EPA proposed to supersede the 15-month state plan submittal

timeline in proposed subpart Ba based on the size and complexity of the source sectors at issue.

timelines could include EGs that require states to perform extensive engineering and/or economic analyses before submitting their plans; EGs with an exceptional need to expedite implementation (e.g., in order to address immediate health and welfare impacts); EGs that apply to an extraordinary number of disparate designated facilities; or EGs that are novel and/or unusually complex. For situations like these, 40 CFR 60.20a(a)(1) provides that an EG may supersede any aspect of the implementing regulations, including the implementation timelines. It is within the EPA's discretion to determine whether a proposed change in implementation time may be justified within an individual EG based on these or other appropriate factors. For EGs that supersede implementation timelines, the EPA will, in the EG, both provide a justification for the differing timelines and address how the change in timeline will impact health and welfare.

1. State Plan Submission Timelines

This section discusses the amount of time states will have to submit plans and plan revisions to the EPA following the publication of a final or revised EG in the **Federal Register**. As described in further detail in section III.E of this preamble, under CAA section 111(d), the EPA first determines a BSER and the degree of emission limitation for designated facilities and promulgates these determinations in an EG. CAA section 111(a)(1), 40 CFR 60.22a(b)(5). It is then each state's obligation to submit a plan to the EPA which establishes standards of performance based on the EG for each designated facility. See CAA section 111(d)(1), 40 CFR 60.24a(c). The implementing regulations promulgated in 1975 under subpart B provide that states have 9 months to submit a state plan after publication of a final EG. 40 CFR 60.23(a)(1). In 2019, the EPA promulgated subpart Ba and provided 3 years for states to submit plans or plan revisions for subsequently promulgated or revised EGs, consistent with the timelines provided for submission of SIPs pursuant to CAA section 110(a)(1). This 3-year timeframe was vacated by the D.C. Circuit in the *ALA* decision, and thus currently there is no applicable deadline for state plan submissions and revisions required under EGs subject to subpart Ba.

As laid out in the notice of proposed rulemaking and summarized below, in evaluating the appropriate timeline for plan submittal to replace the vacated provisions in subpart Ba, the EPA reviewed steps that states need to carry out to develop, adopt, and submit a state

plan to the EPA, and its history in implementing EGs under the timing provisions of subpart B. The EPA further evaluated the statutory deadlines and processes for relatively comparable state plans under CAA section 129, and attainment planning SIPs submitted pursuant CAA sections 189(a)(2)(B) and 189(b)(2) for the 2012 National Ambient Air Quality Standards (NAAQS) for fine particulate matter (PM_{2.5}). 78 FR 3085 (January 15, 2013). Finally, the EPA incorporated consideration of the *ALA* decision addressing expediency in implementation of EGs for protection of public health and welfare.

To develop a CAA section 111(d) state plan, a state must complete a series of steps to ensure that the plan will meet all applicable requirements. Subpart Ba specifies the elements that must be included in a state plan submission (see 40 CFR 60.24a, 60.25a, 60.26a) as well as certain processes that a state must undertake in adopting and submitting a plan (see 40 CFR 60.23a). In addition to the requirements of these implementing regulations, there are also state-specific processes applicable to the development and adoption of a state plan, including the administrative processes (e.g., permitting processes, regulatory development, legislative approval) necessary to develop and adopt enforceable standards of performance. State plan development generally involves several phases, including providing notice that the state agency is considering adopting a rule; taking public comment; and approving or adopting a final rule. The process required to formally adopt a rule at the state level differs from state to states.¹⁸

As previously mentioned, subpart B provides 9 months for states to submit plans after publication of a final EG. The EPA's review of state's timeliness for submitting CAA section 111(d) plans under the 9-month timeline indicated that most states either did not submit plans or submitted plans that were substantially late.¹⁹ The EPA also noted that the plans submitted under subpart

B were not subject to additional requirements for meaningful engagement and consideration of RULOF, which may add time to the state development process relative to plans developed and submitted under subpart B. For these reasons, the EPA found that 9 months is not a reasonable amount of time for most states to adequately develop a plan for an EG.

To help inform the proposal for the state plan submission deadline, the EPA also reviewed CAA section 129's statutory deadline and requirements for state plans, and the timeliness and responsiveness of states under CAA section 129 EGs. CAA section 129 references CAA section 111(d) in many instances, creating considerable overlap in the functionality of the programs. The processes for CAA sections 111(d) and 129 are similar in that states are required to submit plans to implement and enforce the EPA's EGs. However, there are some key distinctions between the two programs, most notably that CAA section 129(b)(2) specifies that state plans be submitted no later than 1 year from the promulgation of a corresponding EG, whereas the statute does not specify a particular timeline for state plan submissions under CAA section 111(d). Moreover, CAA section 129 plans are required by statute to be at least as protective as the EPA's EGs, without exception. CAA section 129(b)(2). While CAA section 111(d) permits states to take into account remaining useful life and other factors to set less stringent standards for particular sources. This suggests that the development of a CAA section 111(d) plan could involve more complicated analyses than a CAA section 129 plan and that a longer timeframe is likely reasonable for state plans under CAA section 111(d) than the 1-year timeframe the statute provides under CAA section 129.

Additionally, the EPA found that a considerable number of states have not made timely state plan submissions in response to previous CAA section 129 EGs. In instances where states submitted CAA section 129 plans, a significant number of states submitted plans between 14 to 17 months after the promulgated EG.²⁰ This again suggests that states will typically need more than

¹⁸ In many states, the agency must submit its rule to a particular independent commission or the legislature for review and approval before the rule is finally adopted. Generally, adopted rules are filed with a state entity, such as the secretary of state, and eventually published in a register and placed into the state's administrative code. State law establishes when an adopted rule is effective.

¹⁹ The EPA reviewed the information available in 40 CFR part 62. The supporting information reviewed is available at Docket ID No. EPA-HQ-OAR-2021-0527. Part 62 codifies the Administrator's approval and disapproval of state plans for the control of pollutants and facilities under CAA section 111(d), and under CAA section 129 as applicable, and the Administrator's promulgation of such plans or portions of plans thereof.

²⁰ The EPA reviewed the information available in 40 CFR part 62. The supporting information reviewed is available at Docket ID No. EPA-HQ-OAR-2021-0527. Part 62 codifies the Administrator's approval and disapproval of state plans for the control of pollutants and facilities under CAA section 111(d), and under CAA section 129 as applicable.

one year to develop a state plan to implement an EG.

In the 2019 promulgation of subpart Ba, the EPA mirrored CAA section 110 by giving states 3 years to submit plans. As previously described, the D.C. Circuit faulted the EPA for adopting the CAA section 110 timelines without accounting for the differences in scale and scope between CAA section 110 and 111(d) plans. Therefore, in proposing the revised timelines the EPA closely evaluated other statutory deadlines and requirements for state implementation plans to determine what is feasible for a CAA section 111(d) state plan submission timeline. The EPA specifically focused on statutory SIP submission deadlines and requirements in the context of attainment plans for the 2012 PM_{2.5} NAAQS under CAA section 189 because it provided a comparable process. CAA section 189(a)(2)(B) requires states to submit attainment planning SIPs within 18 months after an area is designated nonattainment and there is a record of successful state submittals pursuant to this timeline. The 2012 PM_{2.5} NAAQS attainment plans were, in most cases, more complicated for states to develop when compared to a typical plan that may be required under CAA sections 111(d). For example, attainment plans require states to determine how to control a variety of sources, based on extensive modeling and analyses, in order to bring a nonattainment area into attainment of the PM_{2.5} NAAQS by a specified date. Identification of contributing emission sources and the development of effective control strategies can be challenging because particulate matter pollution is comprised of both primary emissions and secondary particle formation. By contrast, under CAA section 111(d), it is clear which designated facilities are subject to a state plan, in general what control methods are available for the designated pollutant from that facility, and that the standards of performance for these sources must reflect the level of stringency for the facility as determined by the EG unless a state chooses to account for RULOF.

Informed by these analyses, the EPA proposed to require that each state adopt and submit to the Administrator a plan for the control of the designated pollutant(s) to which the EG applies within 15 months of publication of a final EG. Some commenters supported the proposed timeline based on the need for urgency in achieving the emission reductions targeted by an EG. Additionally, some commenters noted that, in comparison with NAAQS SIP requirements, states are generally well-

positioned to address the source sectors historically regulated under CAA section 111(d) and have access to information about control strategies and regulatory approaches for controlling emissions. Most commenters on this issue were state agencies or other state-related entities that generally expressed the need for a longer state plan submittal timeline in order to accommodate state regulatory processes associated with plan submittals (*i.e.*, legislative and/or administrative state processes), as well as to accommodate technical development of the plans and to implement the proposed meaningful engagement requirements. Approximately 10 states responded to the EPA's request with information about their state processes. The information received indicates that states argued that they need anywhere from 15 months to 36 months to adopt and submit state plans. As discussed further below, the EPA is finalizing a state plan submittal timeline of 18 months. It is doing so after consideration of comments received on the proposal and recognizing the need to protect public health and welfare. The EPA has determined that 18 months is the appropriate timeline for these general implementing regulations; for a generic EG, this represents a reasonable balance between providing states sufficient time to develop and submit a plan that satisfies the applicable requirements and ensuring that the emission reductions contemplated in an EG are achieved as expeditiously as practicable. Consistent with the existing regulations of subpart Ba, 40 CFR 60.20a(a)(1), the EPA may supersede this 18-month state plan submittal timeline in an individual EG.

The proposed 15-month submittal timeline was based on the EPA's proposed determination that this was a reasonably expeditious deadline that would provide states and stakeholders sufficient time to develop and submit an approvable state plan. However, based on public comments received, we no longer believe that 15 months will provide sufficient time to complete the substantive and procedural requirements under subpart Ba. For example, the EPA is revising subpart Ba to require that states demonstrate meaningful engagement as part of their state plan development. While the time needed to conduct meaningful engagement will depend highly on the source category, the designated pollutant, and the types of impacts associated with designated facilities and potential controls, as well as on the pertinent stakeholders under a given EG

within each state, it is very likely to require additional time relative to the existing public notice and hearing requirements under CAA section 110 and subpart Ba. We received comments that 15 months would be insufficient time to identify pertinent stakeholders, develop public participation strategies, and conduct outreach and engagement. Some commenters also pointed out that adding requirements, such as meaningful engagement and RULOF, without a corresponding extension of time to develop plans may undermine states' abilities to submit timely, approvable plans. While some commenters requested 36 months to submit state plans, several indicated that a minimum timeframe of 18 months would be appropriate for a state plan under a generic EG. Given the preponderance of comments suggesting that 15 months was not a reasonable amount of time to develop an approvable state plan and in recognition of the need to promulgate a timeline that achieves emission reductions as expeditiously as practicable, the EPA believes 18 months is the most reasonable timeline to include in these generally applicable implementing regulations.

The EPA acknowledges that, as commenters asserted, state regulatory and legislative processes and resources can vary significantly and influence the time needed to develop and submit state plans (*e.g.*, legislative procedures and timelines vary by state). Some commenters opposed to a shorter state plan submission timeline asserted that they need 36 months to complete their administrative and legislative processes. However, because the CAA contains numerous, long-standing requirements under other programs for states to develop and submit plans within 18 months (or fewer),²¹ the EPA believes that states should be well positioned to accommodate an 18-month submittal timeline for plans under section 111(d). In designing a submittal deadline for state plans, it is reasonable to look to what Congress has determined are appropriate timelines for SIPs and to assume that states should be able to accommodate comparable timelines under CAA section 111(d). Indeed, some commenters recommend that the EPA not defer to lengthy state administrative processes, and expressed concern that some states have adopted, or may adopt, procedures that are longer than necessary and that will unnecessarily postpone Federal emission-reduction obligations. To this point, extending

²¹ See, *e.g.*, CAA sections 110(k)(5); 129; 179(d)(1); 189.

state plan submittal timelines to account for any and all unique state procedures would inappropriately delay reductions in emissions that have been found under CAA section 111 to endanger health or the environment.

Some commenters asserted that the *ALA* decision does not preclude the EPA from adopting a 36-month time frame for state plan submittals and that the Agency need only justify a longer timelines more fully. However, the EPA recognizes that the D.C. Circuit, in *ALA*, faulted the Agency for failing to consider the potential impacts to public health and welfare associated with extending planning deadlines. In response, the EPA is promulgating a state plan submittal timeline that reflects the generally expeditious period of time for states to develop and submit a plan per the corresponding emission guidelines that is both comprehensive and legally sound. The EPA does not interpret the court's direction to require a quantitative measure of impact, but rather consideration of the importance of meeting the public health and welfare goals when determining appropriate deadlines for implementation of regulations under CAA section 111(d). Based on EPA's assessment of the time it will take for states to develop and submit plans under these general implementing regulations, both in the notice of proposed rulemaking and this preamble and after consideration of comments received, the EPA has determined that 18 months represents the generally expeditious period of time.

Some commenters stated that reduction of the designated pollutants addressed by currently proposed emission guidelines (*i.e.*, GHG) is not urgent based on the fraction of global GHG reduced by currently proposed emission guidelines, so a longer state plan timeline would be justified. The EPA disagrees with the commenters' characterizations of the threat posed by elevated concentrations of greenhouse gases in the atmosphere. The EPA has determined that greenhouse gas air pollution may reasonably be anticipated to endanger public health or welfare²² and has explained that "scientific assessments, EPA analyses, and documented observed changes in the climate of the planet and of the U.S. present clear support regarding the current and future dangers of climate change and the importance of GHG emissions mitigation."²³ Moreover, subpart Ba applies to any EG promulgated after July 8, 2019, not only to the recently proposed EGs addressing

GHG emissions from two source categories. The EPA regulates source categories, through EGs, that emit pollutants the Agency has determined under CAA section 111(d) to cause or significantly contribute to an endangerment of public health or welfare. Accordingly, consistent with *ALA*, it is appropriate for the EPA to set an expeditious but reasonable schedule in these general provisions for state plan development and submission to ensure that emission reductions occur in a timely manner.

Finally, some commenters asserted that if the EPA were to finalize the state plan submittal timeline as proposed, the EPA should include a mechanism in subpart Ba for states to ask for extensions of the state plan submittal deadline. However, as we are providing additional time for state plan submittals relative to proposal, we are not providing a mechanism for states to request deadline extensions in subpart Ba. Additionally, the EPA has the ability to supersede the timelines in subpart Ba in individual EGs and will take into account any unique considerations that may result in the need for longer or shorter timelines on an EG-by-EG basis.

In summary, while the EPA proposed a 15-month state plan submittal timeline, after consideration of comments, the EPA is finalizing 40 CFR 60.23a(a)(1) to provide an 18-month timeline for the submission of state plans following publication in the **Federal Register** of a final EG. The EPA has determined that this is the generally expeditious period in which states can create and submit a plan per the EPA's corresponding EGs that is both comprehensive and legally sound. In considering the appropriate timeline, the EPA has evaluated data from previously implemented EGs and the statutory deadlines and data from analogous programs (*e.g.*, CAA sections 129 and 189). We have also considered comments that some of the requirements the EPA had proposed for subpart Ba would require additional time to implement, as well as comments asserting that certain states need up to 36 months to complete their administrative and legislative processes. While a reasonable state plan submittal timeline must provide states sufficient time to develop and submit plans that comport with the applicable requirements, the EPA also believes that state processes should be able to accommodate an 18-month timeline because the CAA already contains numerous deadlines that require SIP submissions to be developed and submitted to the Agency within 18 or fewer months. Thus, this finalized

timeline should provide states reasonable time to adopt and submit approvable plans, and is also sufficiently expeditious to protect against significant adverse impacts to health and welfare resulting from foregone emission reductions during the state planning process. Providing states sufficient time to develop feasible implementation plans for their designated facilities that adequately address public health and environmental objectives also ultimately helps ensure more timely implementation of an EG, and therefore achievement in actual emission reductions, than would an unattainable deadline. Because 18 months is an expeditious time period, it follows that the EPA has appropriately considered the potential impacts to public health and welfare associated with this extension of time by providing no more time than the states reasonably need to ensure a plan is comprehensive and timely.

The EPA is also finalizing the proposed amendment to 40 CFR 60.27a(a) replacing the word "shorten" with "amend". The applicability provision at 40 CFR 60.20a(a)(1) states that "each emission guideline may include specific provisions in addition to or that supersede requirements of this subpart." However, the existing provision in 40 CFR 60.27a(a) only provides for the Administrator to "shorten the period for submission of any plan or plan revision or portion thereof." To make these two provisions consistent in light of the timelines for plan submission finalized in this action, the EPA is replacing the word "shorten" with "amend." One commenter opposed the amendment stating there is no regulatory certainty for the state in state plan submittal if the Administrator can simply change the timeline as he deems necessary. However, the appropriate timeline would undergo notice and comment rulemaking as the EG is proposed and finalized so that states would have sufficient notice of the timeline. To the extent the EPA considers deviating from this 18-month timeframe in promulgating an EG in the future, the EPA will consider the public health and welfare impacts associated with extending the state plan submission timeline, consistent with the D.C. Circuit's direction in *ALA*.

The EPA is also finalizing two amendments to 40 CFR 60.28a(a), which addresses plan revisions by the state. First, the EPA is finalizing the proposed clarification that meaningful engagement requirements apply to any significant plan revision by the state. Second, the EPA is finalizing revisions

²² See, *e.g.*, 80 FR 64510, 64530 (Oct. 23, 2015).

²³ 88 FR 33240, 33252 (May 23, 2023).

to the timeline for state plan revisions required in response to a revised emission guideline. At proposal, the EPA indicated in the revised regulatory text that it was proposing to shorten the timeline for state plan revisions in this specific circumstance from three years to 12 months.²⁴ The EPA received comments on this proposed revision asserting that the same process-related challenges that apply to initial state plan submissions, including conducting meaningful engagement and RULOF procedures and working through states' administrative and legislative processes, also apply to state plan revisions. Commenters requested that the EPA extend the timeline for state plan revisions in response to revised emission guidelines; one commenter specifically requested that the EPA leave it at 36 months. However, the EPA anticipates that, in most instances, plan revisions required in response to a revised emission guideline would be narrower in scope than the initial state plan and would not require states to reevaluate standards of performance or conduct significant new analysis. For example, the EPA may revise an emission guideline to provide for additional or updated monitoring or compliance protocols or to clarify applicability provisions. In such instances, the full period of time provided for initial state plan development and submission would not be necessary.²⁵ Thus, the EPA believes it is reasonable to set a default timeline for the submission of state plan revisions in these general implementing guidelines that is shorter than the timeline for initial state plan submission. Because the EPA is providing an additional three months for state plan submission in this final rule relative to the proposed timeline (18 months versus 15 months), it is finalizing a timeline for the submission of state plan revisions in response to a revised emission guideline of fifteen months, which is also three months longer than the twelve months proposed. Additionally, in recognition that some state plan revisions in response to a revised emission guideline may in fact be more complex or necessitate additional analysis or rulemaking, the EPA is finalizing the

provision at 40 CFR 60.28a(a) to allow the Agency to determine a different timeline for the submission of revised state plans, which it will provide in the revised emission guideline.

2. Timeline for the EPA To Determine Completeness of State Plans

Once a state plan has been submitted to the EPA, the EPA reviews the plan for "completeness" to determine whether it includes certain elements necessary to ensure that the EPA can substantively evaluate the plan. The EPA determines completeness by comparing the state's submission against the administrative and technical criteria specified in subpart Ba to determine whether the submission contains the specified elements (see 40 CFR 60.27a(g)(2) for completeness criteria). The timeline to make completeness determinations in the version of subpart Ba the EPA promulgated in 2019 mirrored the language for SIPs in CAA section 110(k)(1)(B): "Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria [for completeness] have been met." Like CAA section 110(k)(1)(B), subpart Ba also provided that a state plan would be deemed complete by operation of law if the EPA had not made an affirmative determination by the date 6 months after receipt of the plan submission. 40 CFR 60.27a(g)(1).

After a state plan is deemed complete through either an affirmative determination or by operation of law, the EPA will act on the state plan submission through notice-and-comment rulemaking. The timeline for the EPA to act on a state plan submission runs from the date a submission is deemed complete; more on this timeline can be found in section III.A.3. of this preamble.

If a state plan submission does not contain the elements required by the completeness criteria, the EPA would find that the state has failed to submit a complete plan and notify the state through a letter. The determination of incompleteness treats the state as if the state has made no submission at all. The determination that a submission is incomplete and that the state has failed to submit a plan is ministerial in nature.

As part of the EPA's overall effort to set implementation timelines under CAA section 111(d) that are as expeditious as possible, the EPA proposed to revise the timing element of the completeness review at 40 CFR 60.27a(g)(1). In light of the ministerial

nature of the completeness determination, the EPA proposed a maximum of 60 days from receipt of the state plan submission for the EPA to make a determination of completeness. The EPA additionally proposed that any state plan or plan revision submitted to the EPA that has not received a completeness determination within 60 days of receipt, shall on that date be deemed, by operation of law, to meet the completeness criteria, which will trigger the EPA's obligation to take substantive action on the state plan. Sixty days provides an expeditious timeframe for the EPA to evaluate state plans for completeness and to notify the states of the determination. Because the EPA may be required to evaluate up to 50 state plans during this period, in addition to plans submitted by territories and tribes, the EPA explained at proposal that it did not find that this timeframe could reasonably be shortened any further.

While most commenters supported the 60-day completeness period, some commenters expressed concern that a state plan that is automatically deemed complete by operation of law as of the allotted 60 days could cause unnecessary turbulence in state plan implementation if the plan is later disapproved by the EPA due to missing information. Other commenters noted that if a plan is determined to be incomplete, a 60-day period will not allow states sufficient time to correct the deficiency and submit a complete plan. First, the EPA notes that the completeness determination is ministerial in nature and does not affect the Agency's subsequent responsibility and authority to substantively review a state plan submission against the requirements of the Act and applicable regulations, including this subpart Ba and the relevant EG. That is, a determination that a state plan is complete does not signify that it necessarily satisfies the substantive requirements. The commenters fail to explain how deeming a state plan submission complete by operation of law, in this case after 60 days, and later finding it does not satisfy an applicable requirement is a new phenomenon or would cause unnecessary turbulence in state plan implementation. Rather, a shorter period for deeming plans complete by operation of law would be less disruptive than a longer period in this instance because the EPA will complete its substantive evaluation of the plan sooner and the state will have notice earlier on of any deficiencies. Additionally, because states may submit plan revisions at any time, states may

²⁴ "Docket memo outlining proposed changes to regulatory text.pdf," available at <https://www.epa.gov/stationary-sources-air-pollution/adoption-and-submittal-state-plans-designated-facilities-40-cfr>, as well as Docket ID No. EPA-HQ-OAR-2021-0527-0002.

²⁵ The EPA's response to comments that the state plan submission timelines should accommodate every state's unique administrative and legislative processes is also relevant here and is provided elsewhere in this section of the preamble.

work collaboratively with the EPA on any portions of a plan identified as being deficient during both the completeness determination period and the period for the EPA's substantive review of the plan. Thus, again, a shorter completeness determination period that includes a cutoff for deeming submissions complete by operation of law merely keeps the state plan review process moving expeditiously and does not foreclose any state opportunities to correct or supplement submissions at any point in the EPA's review process.

Moreover, the EPA intends to review for completeness as soon as possible after submittal. Although the EPA believes that it will be able to provide a timely completeness determination for most if not all state plan submissions, providing for completeness through operation of the law will help ensure that the EPA's action on state plans does not significantly delay plan processing or implementation.

The EPA is therefore finalizing the completeness provision at 40 CFR 60.27a(g)(1) as proposed. The EPA notes that if the EPA determines a plan is incomplete, the EPA is required to promulgate, through notice-and-comment rulemaking, a Federal plan. See sections III.A.4. and III.B. for the discussion and final amendments associated with the timeline and triggers of the Federal Plan respectively. If a state submits a plan prior to the state plan submission deadline and the EPA also makes a determination that the plan is incomplete prior to that deadline, the EPA will treat the state as if the state has made no submission at all, but this determination does not yet trigger further action by the EPA. Instead, because the state still has an opportunity to submit a complete plan before the state plan submission deadline, the EPA's authority to promulgate a Federal plan is only triggered if the state fails to timely submit a new plan to replace the incomplete plan by the state plan deadline.

3. Timeline for the EPA's Action on State Plans

After a state plan has been determined to be complete or is deemed complete by operation of law, CAA section 111(d) provides that the EPA must evaluate whether the plan is "satisfactory"; that is, whether the components of the plan meet all the requirements of the statute, these implementing regulations, and the corresponding EG. The EPA does so by evaluating a plan (or plan revision) to determine whether the plan or plan revision is approvable, in part or in

whole (see section III.D.1. of this preamble for discussion on partial plan approvals), through a notice-and-comment rulemaking process. After the EPA proposes an action on a state plan submission (e.g., approval, partial approval/partial disapproval, disapproval) and reviews comments on the proposed action, the EPA will finalize its action on the plan. If the EPA approves a state plan, the standards of performance and other components of that state plan become federally enforceable. If the state plan is disapproved, in part or in whole, the EPA is obligated to promulgate a Federal plan for designated facilities within the state that were covered by the disapproved portions of the plan (see section III.A.4. of this preamble below for the EPA's timeline to publish a Federal plan).

Subpart B requires the EPA to take action on applicable state plans (e.g., approve or disapprove) within 4 months after the date required for submission. 40 CFR 60.27(b). In the development of subpart Ba, the EPA contended that 4 months was an inadequate time to review and take action on state plans and therefore instead provided a deadline of 12 months for final action on a state plan (mirroring the maximum time permitted under CAA section 110(k)(1)(2) for the EPA's action on complete SIPs). 84 FR 32520, July 8, 2019. In the ALA decision, the D.C. Circuit vacated this revised timeline in subpart Ba on the basis that the EPA did not adequately justify the extended timeframes and did not consider the public health and welfare impacts of extending the implementation times. As is discussed below, the EPA has in this rulemaking closely evaluated the process, steps, and timeframes for the EPA to substantively review and act upon each state plan submission through a public notice-and-comment rulemaking process. After considering the time anticipated to be necessary for generally expeditious EPA action on state plans, the EPA again proposed that it must take final action on a state plan or plan revision submission within 12 months after a plan is determined to be complete or becomes complete by operation of law.²⁶

In the notice of proposed rulemaking, the EPA explained that the first step it takes once a state plan submittal has been deemed "complete" under 40 CFR 60.27a(g) is for an intra-agency workgroup to review the plan components to determine whether they

conform to the applicable regulatory requirements. The workgroup may require a broad range of expertise in legal, technical, and policy areas, potentially including attorneys, engineers, scientists, economists, air monitoring experts, health and welfare analysts, and/or policy analysts from across a variety of the EPA programs. After review and coordination, the workgroup then develops recommendations for approval or disapproval of each plan component and presents them to Agency decision-makers for review. Once the Agency completes its internal decision-making process, the workgroup proceeds to prepare a written notice of proposed rulemaking. The notice of proposed rulemaking contains the EPA's legal, policy, and technical bases for its proposed action on a state plan submission, which must be thoroughly developed and explained in writing to provide clear and concise information and reasoning to support the public in understanding the Agency's decision and the justification for that decision, and so that the public may provide informed comments on the proposal. The EPA may further develop technical support documents as record support for the proposal. The draft proposed rulemaking and any record support then undergo a multi-layered review process across the EPA offices and levels of management before being processed for signature. The process to evaluate the state plan, draft a proposed action on a CAA section 111(d) state plan, and get the proposed action edited, reviewed, and signed typically requires a minimum of between 6 to 8 months to complete. The signed notice of proposed rulemaking is then submitted for publication in the **Federal Register**, which may require several weeks of review and processing prior to publication.

The publication of the proposed rulemaking triggers the start of a public comment period of at least 30 days with possible extension, if requested by commenters. Because of the types of sources and pollutants regulated under CAA section 111(d), the EPA reasonably anticipates that many of its proposed actions on state plans will garner significant public interest from individuals, industry, states, and environmental and public health advocates. After completion of the comment period, the EPA then reviews all comments and determines whether, based on any information provided by the comments, it should alter its proposed action or further augment the legal, policy, and technical rationales

²⁶ The deadlines for the EPA action under subpart Ba would apply to any state plan submission regardless of when it is submitted.

supporting that action. Comments received on a proposed action may include technical information that was not available to the EPA at the time of proposal. In the event technical data are received as part of comments on the proposed action, the EPA would then be required to review the new data and evaluate whether and how it should affect the EPA's proposed conclusions regarding the state plan. If a substantive comment is raised that merits reconsideration of the EPA's proposed action, the EPA may determine that it is necessary to revise and repropose its action on the state plan or it may go to the state for more information to help the Agency determine how to proceed.

Once this review of comments is complete, the workgroup drafts and presents updated recommendations for action for internal review and consideration by Agency decision-makers. Once the Agency completes its internal decision-making process, the workgroup then drafts a notice of final rulemaking on the plan submission, which includes responses to comments, any necessary record support, and may also include final regulatory text. The draft final action is then reviewed by senior management and other interested EPA offices within the Agency prior to signature of the final rulemaking approving or disapproving, in whole or in part, a state plan. It is reasonable to permit at least 4 to 7 months for evaluation of the comments received, any necessary technical analysis, decision-making, and drafting and review of the final action.

The duration of each step in this deliberative process varies. The amount of time the EPA needs to review a state plan submission and the time it needs to finalize a notice of proposed rulemaking depends in part on the plan's complexity and the nature of the technical, policy, and legal issues that it implicates. For example, a state plan submission that includes standards of performance for dozens of facilities on different compliance schedules would be more complex and time consuming to review than a plan that simply establishes standards of performance reflecting the presumptive level of stringency for all sources. Similarly, the amount of time needed to respond to comments and issue a final rulemaking depends in part on the number and type of comments received on the EPA's proposed rulemaking. Additionally, the EPA reasonably anticipates that it will be required to review multiple plan submissions at a given time, and these phases of review for a given plan are impacted by the EPA's review of other state plan submissions, as the EPA will

need to assure its review across multiple plans and regional offices is consistent from a legal, technical, and policy perspective.

While some commenters supported 12 months as an expeditious timeframe for the EPA review and action on state plan submissions, several noted that 12 months may be insufficient. These commenters asserted that the EPA must meaningfully evaluate and take action on a state plan and a 12-month timeframe may be too short for this process. However, as detailed in the discussion above, the EPA has a mapped out the time necessary to take action on a generic plan submission and believes that 12 months is the most expeditious and therefore the most appropriate period to provide for these generally applicable implementing regulations. Additionally, the EPA has completed hundreds of actions on CAA section 110 SIPs within 12 months over the past 4 years. Given that the EPA may choose to supersede the requirements of subpart Ba as necessary in an individual EG, we believe that providing the shortest period here is consistent with considering health and welfare impacts by designing timelines to achieve state plan implementation as expeditiously as reasonably possible.

The EPA is therefore finalizing as proposed 40 CFR 60.23a(b) to provide that it will take action on a state plan or plan revision within 12 months of a determination of a complete plan pursuant to 40 CFR 60.27a(g). This is a reasonably expeditious timeframe to accommodate the EPA action on a state plan or plan revision submission and the considerations described above, while ensuring that an EG is expeditiously implemented. The process and steps described in this action highlight the fact that it would be unreasonable, if not impossible, to accomplish all of the steps in a legally and technically sound manner within a 4-month timeframe as required under subpart B. Particularly, any proposed action by the EPA has to be open for public comment for at least 30 days, and therefore the 4-month timeline provided in subpart B only gave the EPA 3 months to do the substantive work of both the proposed and final actions, including evaluating the state plan submission, drafting preamble notices, responding to comments, and developing record support at both the proposed and final action stages. A 12-month timeframe after a plan is determined to be complete more

reasonably accommodates the process and steps described in this action.²⁷

As explained at proposal, the EPA recognizes that the court in *ALA* faulted the Agency for failing to consider the potential impacts to public health and welfare associated with extending planning deadlines. The EPA does not interpret the court's direction to require a quantitative measure of impact, but rather consideration of the importance of the public health and welfare goals of CAA section 111(d) when determining appropriate deadlines. Because 12 months is an adequate period of time in which the EPA can both expeditiously act on a plan submission *and* ensure that its action is technically and legally sound, it follows that the EPA has appropriately considered the potential impacts to public health and welfare associated with this extension of time by providing no more time than the EPA reasonably needs to ensure a plan submission contains appropriate and protective emission reduction measures. If the EPA does not have adequate time to evaluate a state plan submission, its ability to ensure the plan contains appropriate measures to satisfactorily implement and enforce the standards necessary to comply with the EG may be compromised, which would in turn compromise the EPA's ability to ensure that the public health and welfare objectives of the EG are satisfied.

Although several commenters noted that the review of some plans may require a more in depth analysis, the EPA believes 12 months is a both reasonable and expeditious timeframe to evaluate and act on most state plans. Accordingly, in order to ensure that the public health and welfare objectives of CAA section 111 are timely realized, and consistent with the direction in *ALA*, the EPA does not believe it would be appropriate to finalize a timeframe longer than 12 months for the EPA action on state plans.

4. Timeline for the EPA To Promulgate a Federal Plan

CAA section 111(d)(2) provides that the EPA has the same authority to prescribe a Federal plan for a state that fails to submit a satisfactory plan as it does for promulgating a FIP under CAA section 110(c). Accordingly, the EPA's obligation to promulgate a Federal plan is triggered in three situations: where a state does not submit a plan by the plan

²⁷ While the EPA would have the discretion to act on a state's submission more quickly than 12 months where specific circumstances allow (*e.g.*, where there are no public comments on the proposed action), the EPA does not believe that it would be reasonably possible to act significantly more quickly than 12 months in most cases.

submission deadline; where the EPA determines a portion or all of a state plan submission did not meet the completeness criteria and the time period for state plan submission has elapsed and, therefore, the state is treated as having not submitted a required plan; and where the EPA disapproves a state's plan. 40 CFR 60.27a(c). The EPA is finalizing as proposed the revisions to 40 CFR 60.27a(c) providing that the Agency will promulgate a Federal plan at any time within 12 months of any of the triggers in § 60.27a(c)(1) and (2) (see section III.B. of this preamble for discussion).²⁸

The EPA is obligated to promulgate a Federal plan for states that have not submitted a plan by the submission deadline. Once the obligation to promulgate a Federal plan is triggered, it can only be tolled by the EPA's approval of a state plan. If a Federal plan is promulgated, a state may still submit a plan to replace the Federal plan. A Federal plan under CAA section 111(d) is a means to ensure timely implementation of EGs, and a state may choose to accept a Federal plan for their sources rather than submit a state plan. While the EPA encourages states to timely submit plans for EGs, there are no sanctions associated with failing to timely submit an approvable plan or with the implementation of a Federal plan.²⁹

The original implementing regulations in subpart B provided the EPA with 6 months to promulgate a Federal plan once its obligation to do so was triggered. 40 CFR 60.27(d). When the EPA promulgated subpart Ba in 2019, it concluded that this amount of time was insufficient and consequently extended the time for the EPA to promulgate a Federal plan to 24 months, mirroring the timeframe permitted for promulgation of a FIP under CAA

section 110. 84 FR 32520, July 8, 2019. In the ALA decision, the D.C. Circuit vacated this revised timeline in subpart Ba on the basis that the EPA did not adequately justify the extended timeframe and did not consider the health and welfare impacts of extending the implementation timeframe.

At proposal, the EPA reevaluated the process, steps, and timeframes for the EPA to promulgate a Federal plan through a public notice-and-comment rulemaking process and proposed a 12-month timeframe to promulgate a Federal plan once its obligation to do so is triggered.³⁰ As explained in the notice of proposed rulemaking, a Federal plan must meet the requirements of CAA section 111(d) and therefore contain the same components as a state plan, namely standards of performance for designated facilities and measures that provide for the implementation and enforcement of such standards. CAA section 111(d)(2)(B) also explicitly requires the EPA to consider RULOF in promulgating a standard of performance under a Federal plan. Additionally, Federal plans containing standards of performance are subject to the procedural requirements of CAA section 307(d), such as the requirements for proposed rulemaking and opportunity for public hearing. CAA section 307(d)(1)(C). The EPA's regulations at 40 CFR 60.27a implement these various statutory requirements and contain general regulatory requirements for the EPA's promulgation of a Federal plan. The process, and steps for the EPA to promulgate a Federal plan consistent

with these applicable requirements is described in the following paragraphs.

Once the EPA's obligation to promulgate a Federal plan is triggered, the EPA establishes an intra-agency workgroup to develop the rulemaking action to address that obligation. The workgroup first develops recommendations for the components of the Federal plan to be proposed, and on legal, policy, and technical rationales that support the recommendations. These components are identified in subpart Ba as well as in the corresponding EG and are generally the same as those required for a state plan. One of these fundamental components is the determination of standards of performance for designated facilities. Based on the requirements of CAA sections 111(d) and 111(a)(1), these standards must generally reflect the degree of emission limitation achievable through application of the BSER as determined by the EPA as part of the EG. Depending on the form of the BSER and the degree of emission limitation in a particular EG, the EPA may need to do additional work to calculate standards of performance that reflect this level of stringency. For example, an EG may translate the degree of emission limitation into a presumptive standard in the form of numerical emission rates, which a Federal plan could simply adopt as the requisite standards of performance. However, if an EG provides the degree of emission limitation in a form other than presumptive numerical standards, and the EPA may need to calculate appropriate standards of performance in the context of a Federal plan. Further, CAA section 111(d)(2) requires the EPA to consider RULOF for sources in the source category in setting standards of performance as part of a Federal plan which requires the EPA to identify whether the remaining useful lives of relevant designated facilities, among other appropriate factors, merit the EPA establishing different standards of performance for those facilities. The development of a Federal plan may also necessitate that the EPA determine appropriate testing, monitoring, reporting, and recordkeeping requirements to implement the standard if the EG does not provide presumptive requirements to address those aspects of implementation. Further, the EPA will need to consider associated compliance times for designated facilities in circumstances where they are not provided by an EG, or in cases where a standard of performance is adjusted to account for RULOF. There may also be situations where IoPs are warranted,

²⁸ The EPA has discretion to address its obligation to promulgate a Federal plan in a variety of ways for states that do not have an approved state plan. For example the EPA may initially promulgate a single Federal plan that applies to all appropriate states and then update that Federal plan as necessary to accommodate the inclusion of other states that trigger the need for a Federal plan in the future (e.g., a Federal plan that applies to states that fail to submit a plan can be updated to include applicability for states that later have a plan disapproved); or the EPA may promulgate separate Federal plans each time its authority to do so has been triggered (e.g., the EPA will promulgate a Federal plan for all states that fail to submit a plan and another Federal plan for all states that have their plan disapproved).

²⁹ CAA section 179 provides that sanctions should be applied in states that fail to submit approvable SIPs for certain specified requirements for NAAQS implementation. The EPA has not promulgated any similar sanctions provisions governing the submission of state plans pursuant to section 111(d).

³⁰ The EPA reviewed the information available in 40 CFR part 62 associated with the promulgation of Federal Plans under CAA section 111(d). The supporting information reviewed is available at Docket ID No. EPA-HQ-OAR-2021-0527. Under the provisions of CAA section 111 and subpart B, the EPA promulgated Federal plans for municipal solid waste landfills EG 40 CFR part 60, subpart Cc (Federal plan codified at 40 CFR part 62, subpart GGG) and municipal solid waste landfills EG 40 CFR part 60, subpart Cf (Federal plan codified at 40 CFR part 62, subpart OOO).

The EPA also reviewed information available in 40 CFR part 62 associated with the promulgation of Federal Plans under CAA 129. The supporting information reviewed is available at Docket ID No. EPA-HQ-OAR-2021-0527. Under the provisions of CAA sections 111 and 129 and subpart B, the EPA has promulgated Federal plans for large municipal waste combustors EG 40 CFR part 60, subpart Cb (Federal plan codified at 40 CFR part 62, subpart FFF); small municipal waste combustors EG 40 CFR part 60, subpart BBBB (Federal plan codified at 40 CFR part 62, subpart JJJ); hospital, medical, and infectious waste incinerators EG 40 CFR part 60, subpart Ce (Federal plan codified at 40 CFR part 62, subpart HHH); commercial and industrial solid waste incinerators EG 40 CFR part 60, subpart DDDD (Federal plan codified at 40 CFR part 62, subpart III) and sewage sludge incinerators EG 40 CFR part 60, subpart MMMM (Federal plan codified at 40 CFR part 62, subpart LLL).

and the EPA will correspondingly need to identify and determine the appropriate IoPs. The development of a Federal plan with these components, or of significant revision to a Federal plan, will also include elements of meaningful engagement, as finalized in this action including revision to section 40 CFR 60.29a and as further described in section III.C. of this preamble.

Once the recommendations for each component are developed, the workgroup presents them to Agency decision-makers for review. After the Agency completes its internal decision-making process, the workgroup proceeds to prepare a written notice of proposed rulemaking. The proposal must include the following elements, as required by CAA section 307(d)(3): the factual data on which the proposed rulemaking is based; the methodology used in obtaining the data and in analyzing the data; and the major legal interpretations and policy considerations underlying the proposed rulemaking. These elements must be thoroughly developed and explained in the proposal to meaningfully provide the public adequate information to comment on the proposal. The EPA may further develop a technical support document as record support for the proposal.

The draft proposed rulemaking and any record support are then reviewed by the relevant EPA offices and processed for signature. The signed notice of proposed rulemaking is then submitted for publication in the **Federal Register**. To develop the proposed Federal plan rulemaking, establish unique standards for RULOF, allow review of materials by senior management, go through an interagency review process and have the package signed typically requires a minimum of between six to nine months to complete.

As previously noted, the EPA's promulgation of a Federal plan is subject to the requirements of CAA section 307(d), which includes providing the public with an opportunity to provide an oral presentation at a public hearing. CAA section 307(d)(5). The Federal Register Act requires the EPA to provide sufficient notice of a public hearing, which (in the absence of a different time specifically prescribed by the relevant Act of Congress) is satisfied if the EPA provides at least 15 days' notice. 44 U.S.C. 1508. Section 307(d)(5) of the CAA further provides that the EPA must keep the record for the proposed action open for public comment for 30 days after any public hearing for the submission of rebuttal and supplemental information. Because the

EPA reasonably expects to provide notice of the required public hearing at the time its proposed action is published in the **Federal Register**, in order to allow for both a 15-day notice of the public hearing and a subsequent 30-day comment period on the open record, the EPA should allow for at least 45 days for public comment on the notice of proposed action.

As with state plans, because of the types of sources and pollutants regulated under CAA section 111(d), the EPA reasonably anticipates that many of its proposed actions on a Federal plan will garner significant public interest from individuals, industry, states, and environmental and public health advocates. After completion of the comment period, the EPA then reviews all comments and determines whether, based on any comment, it should alter any components of the proposed Federal plan, or further augment the legal, policy, and technical rationales supporting that proposed action. Additionally, in the EPA's experience, comments may include technical information that was not in front of the Agency at the time of proposal. In the event technical data are received as part of comments on the proposed action, the EPA would then be required to review the new data and evaluate whether and how it should affect the EPA's proposed Federal plan. If a substantive comment is raised that merits reconsideration of any component in the proposed Federal plan, the EPA would need to repropose the plan.

Once this review of comments is complete, the workgroup drafts and presents updated recommendations for internal review and decision making. Once the Agency completes its internal decision-making process, the workgroup then drafts a notice of final rulemaking, which includes responses to comments and any necessary record support, and final regulatory text as the Federal plan directly regulates certain designated facilities. The draft final action is then reviewed by relevant offices within the Agency prior to signature of the final rule promulgating the Federal plan. The EPA typically anticipates that the process of reviewing comments received, making corresponding changes to the rulemaking, and promulgating the final Federal plan to be between 4 and 8 months.

The duration of each step in this deliberative process varies. The amount of time the EPA needs to develop, propose, and finalize a Federal plan depends in part of the plan's complexity and the nature of the technical, policy, and legal issues that it implicates. For

example, some states needing a Federal plan may have thousands, if not hundreds of thousands, of designated facilities for which the EPA will need to establish standards of performance and implementation measures, while other Federal plans may be significantly smaller in scale. Similarly, the amount of time needed to respond to comments and issue a final rule depends in part on the number and type of comments received on the EPA's proposed rulemaking. Additionally, the EPA reasonably anticipates that it may need to promulgate a Federal plan for multiple states at a given time, which can amplify the amount of time and work needed.

In response to this proposed timeline, several commenters asserted that the EPA should provide itself more than the proposed 12 months to promulgate a Federal plan, with some commenters noting additional time needed for the EPA to provide for meaningful engagement and consideration of RULOF. However, based on the assessment as presented in the preceding paragraphs, recognizing that much of the evaluation needed for promulgating a Federal plan will be performed by the EPA during development of the EG, considering the need for expeditious implementation of EGs, and noting that RULOF is expected to only be needed for certain limited circumstances, the EPA is finalizing the requirement that it promulgate a Federal plan within 12 months once its obligation to do so is triggered, *i.e.*, either the date required for submission of a state plan (for states that fail to submit a complete plan) or the date the EPA disapproves a state's plan. As with the other timelines in subpart Ba, the EPA may supersede the 12 month timeline for a Federal plan as appropriate depending on the circumstances of the applicable EG.

The EPA also recognizes that some commenters stated that the EPA need not and should not wait for its Federal plan obligation to be "triggered" to begin developing such a plan. The EPA agrees that early development of the Federal plan, where possible before the EPA's obligation is formally triggered, could provide the EPA with additional time to meet this deadline. The EPA notes that to further streamline the timeline associated to the issuance of a Federal plan, the EPA is also finalizing the proposed change to the trigger for the EPA's obligation and timeline to provide a Federal plan for states that do not submit a timely plan. That discussion is found in section III.B. of this preamble.

Thus, the EPA is finalizing as proposed the revisions to 40 CFR 60.27a(c) providing that the Agency will promulgate a Federal plan at any time within 12 months of any of the triggers in § 60.27a(c)(1) and (2). While retaining the authority to supersede this timeline in an EG if appropriate, the EPA has determined that 12 months reasonably accommodates the amount of time that the EPA needs to undertake the process, steps, and the considerations described above, while ensuring that an EG is expeditiously implemented. The process and steps described earlier that the EPA must be taken in promulgating a Federal plan highlight the fact that it would be unreasonable, if not an impossibility, to accomplish all of the steps in a legally and technically sound manner within a 6-month timeframe as required under subpart B.³¹

As with the EPA's finalized timeline to act on state plan submissions, 12 months is generally the period of time in which the EPA can both expeditiously complete a Federal plan *and* ensure it is technically and legally sound. Therefore, this time period considers potential impacts to public health and welfare by giving the EPA a reasonably expeditious timeframe to promulgate a Federal plan that contains appropriate and protective emission reduction measures. This is especially true in the context of a Federal plan, where there is otherwise no state plan in place that is adequately protective of public health and welfare. If the EPA does not have adequate time to promulgate a Federal plan, its ability to ensure the plan contains appropriate measures to satisfactorily implement and enforce the standards necessary to comply with the EG may be compromised, which would in turn compromise the EPA's ability to ensure that the public health and welfare objectives of the EG are satisfied.

The EPA notes that a state may submit a plan to replace a Federal plan, even after the state plan submission deadline. However, once the EPA's authority and obligation to promulgate a Federal plan has been triggered, the act of a state submitting a plan alone does not abrogate the EPA's authority or obligatory timeline to promulgate a Federal plan. Only an approved state plan can supplant an already promulgated Federal plan or abrogate the EPA's responsibility to timely

promulgate a Federal plan. Where a state submits a late plan, that may have the practical effect of concurrent timelines for promulgation of the Federal plan and the EPA's action on that late state plan; the EPA is not obligated to act on a late state plan prior to promulgating a Federal plan (40 CFR 60.27a(d)).

5. Timeline for Increments of Progress (IoPs)

As part of the EPA's statutory responsibility to determine the degree of emission limitation achievable through application of the BSEER and to include it in an EG, the EPA also determines in an EG "the time within which compliance with standards of performance can be achieved." 40 CFR 60.22a(b)(5). Accordingly, state plans must include both standards of performance for designated facilities and compliance schedules for achieving those standards of performance.³²

In 1975, the EPA defined in subpart B "compliance schedule" as "a legally enforceable schedule specifying a date or dates by which a source or category of sources must comply with specific standards of performance contained in a plan or with any increments of progress to achieve such compliance." In subpart B the EPA also defined "increments of progress" as steps to achieve compliance which must be taken by an owner or operator of a designated facility including: (1) submittal of a final control plan for the designated facility to the appropriate air pollution control agency; (2) awarding of contracts for emission control systems or for process modifications, or issuance of orders for the purchase of component parts to accomplish emission control or process modification; (3) initiation of on-site construction or installation of emission control equipment or process change; (4) completion of on-site construction or installation of emission control equipment or process change; and (5) final compliance. The EPA adopted these definitions without change when it promulgated subpart Ba in 2019.

Subpart B requires that each state plan include emission standards and compliance schedules. 40 CFR 60.24a. In addition, subpart B specifies in 40 CFR 60.24(e)(1) that any compliance schedule extending more than 12 months from the date required for submittal of the plan must include legally enforceable increments of progress to achieve compliance for each designated facility or category of

facilities. Unless otherwise specified in the applicable subpart, increments of progress must include, where practicable, each increment of progress specified in § 60.21(h) and must include such additional increments of progress as may be necessary to permit close and effective supervision of progress toward final compliance. The provision in 40 CFR 60.24(e)(1) was amended in 2000.³³ The 2000 amendments to 40 CFR 60.24(e)(1) added the words "Unless otherwise specified in the applicable subpart" to the requirements associated with IoPs. The EPA described in the 1999 proposal that the purpose of this amendment was to allow the EPA, in a specific subpart, discretion in the number of IoPs that a designated facility must meet. Without this amendment subpart B required designated facilities to meet all five IoPs specified in the IoP definition. In the 1999 proposal the EPA recognized that while for some categories of designated facilities the five increments are appropriate, all five IoPs may not be necessary to ensure compliance for other categories of designated facilities. Therefore, EPA proposed and finalized amendments to 40 CFR 60.24(e) to allow discretion and flexibility in establishing IoPs for a particular subpart.

In promulgating subpart Ba in 2019, the EPA largely carried over the requirement of subpart B at 40 CFR 60.24(e)(1) in a new provision 40 CFR 60.24a(d).³⁴ However, to align the trigger of IoPs in 40 CFR 60.24a(d) to the updated timelines it was finalizing in subpart Ba, in 2019 the EPA adopted a timeframe trigger for IoPs of 24-months instead of the 12-months as in subpart B. Per the finalized 2019 subpart Ba provision at 40 CFR 60.24a(d), unless otherwise specified in the applicable subpart, any compliance schedule extending more than 24 months from the date required for submittal of the plan must include legally enforceable IoPs to achieve compliance for each designated facility or category of facilities. As discussed previously, the D.C. Circuit vacated the extended implementation timelines in subpart Ba, including the 24-months timeline trigger for IoPs in 40 CFR 60.24a(d).³⁵

³³ 65 FR 76380 (Dec 6, 2000).

³⁴ In promulgating Ba in 2019, the EPA specified that for "For those provisions that are being carried over from the existing implementing regulations into the new implementing regulations, the EPA is not intending to substantively change those provisions from their original promulgation and continues to rely on the record under which they were promulgated." 84 FR 32520 (July 8, 2019).

³⁵ Petitioners did not challenge, and the court did not vacate in *ALA*, the substantive requirement for or definition of increments of progress.

³¹ While the EPA would have the discretion to promulgate a Federal plan more quickly than 12 months where specific circumstances allow (*e.g.*, where there are no public comments on the proposed action), the EPA does not believe that would be reasonably possible to act significantly more quickly than 12 months in most cases.

³² "Each plan shall include standards of performance and compliance schedules." 40 CFR 60.24a(a).

To address the vacated timeline trigger of IoPs in 40 CFR 60.24a(d), the EPA proposed in 2022 that, unless otherwise specified in the applicable subpart, any compliance schedule extending more than 16 months from the date required for submittal of the plan must include legally enforceable IoPs to achieve compliance for each designated facility or category of facilities. The proposed 16-month trigger for IoPs overlapped with the EPA's proposed 60-day completeness review following a state plan submittal and the proposed 12-month period for the EPA to review and take action on the state's plan and would have further provided a 2-month buffer after the timeline for the EPA's action on a state plan (occurring no later than 14 months after the plan submission deadline under these general implementing regulations). In the 2022 proposal the EPA recognized the proposed 16-month timeframe trigger for IoPs provided a 2-month time buffer between the EPA's action on a state plan and the trigger of IoPs. As proposed, this 2-months buffer was less than both the 8 months previously provided by subpart B and the 6-month buffer provided by the vacated subpart Ba timeline.

In response to the proposed 16-month IoPs timeframe trigger, several commenters asserted the proposed 2-month buffer from the time of the EPA's action on a state plan to the trigger of IoPs is not practically workable. Some commenters argued that, assuming that there could be a required increment of progress right after the 16-months trigger and the EPA has 14 months to take final action on a state plan, the designated facilities would have only two months to comply with the requirement after it becomes federally enforceable. Other commenters similarly noted that if final compliance was required just after the 16-month trigger, designated facilities would similarly have only two months to complete any IoPs. The commenters explained that it is unduly burdensome for sources to expend resources on developing hypothetical final control plans and committing resources to construction projects that may ultimately be inconsistent with the EPA's action on a state plan. Several commenters that opposed the 16-months proposed timeframe trigger for IoPs suggested that the EPA extend the trigger to more than 24-months, consistent with the previously vacated subpart Ba. Some commenters argued that 24 months is the minimum time necessary to develop control strategies, design plans, procure construction

materials and/or equipment, and complete the installations often necessary for compliance. Other commenters suggested that a 10-month buffer from the EPA action on a state plan to the trigger for IoPs would also be acceptable and even preferred, should the EPA miss its approval deadlines.

After consideration of comments and accounting for the discretion that EPA has in establishing IoPs in a particular EG, the EPA is extending the buffer associated with the trigger of IoPs from 2 months to 6 months, so that, unless otherwise specified in the applicable subpart, any compliance schedule extending more than 20 months from the date required for submittal of the plan must include legally enforceable IoPs to achieve compliance for each designated facility or category of facilities.

The EPA emphasizes that the timeline for the trigger for IoPs merely signals when the gap between state plan submission and final compliance is long enough that the EPA must consider whether IoPs are necessary. It is not the case that any EG with a final compliance date after the trigger for consideration of IoPs will necessarily require all of the increments listed in 40 CFR 60.21a(h). The EPA is required, per 40 CFR 60.22a(b)(4), to include within an EG "[i]ncremental periods of time normally expected to be necessary for the design, installation, and startup of identified control systems." These incremental periods are determined within an EG through notice and comment rulemaking, providing an opportunity for appropriate consideration of the reasonable time needed for the designated facilities to meet the requirements associated with the pertinent standards of performance. As provided by subpart Ba, the EPA will determine in an individual EG whether IoPs are needed to achieve final compliance with the standards of performance and, if increments are needed, how many and the timeframes associated with compliance of such IoPs. However, the EPA also believes that the trigger requirement for IoPs should attach to plans that contain compliance periods that are longer than the period provided for the EPA's review of such plans and in addition provide a reasonable buffer after the EPA has acted on such plans so that designated facilities could reasonably comply with required increments. After further consideration, the EPA believes that a default 2-month buffer between an EPA action on a state plan and a hypothetical compliance deadline for a

full set of IoPs is not generally sufficient.

In 2019, the EPA promulgated a trigger for IoPs of 24-months given that it was finalizing a period of up to 18 months for its action on state plans (*i.e.*, 12 months from the determination that a state plan submission is complete, which could occur up to six months after receipt of the state plan). The 24-month period would have provided a 6-month buffer for designated sources to comply with any IoPs after the EPA acted on state plans. In this action, the EPA is finalizing a trigger for consideration of IoPs that provides the same buffer provided by the EPA in the 2019 vacated increment of progress timeline trigger. The EPA believes a 6-month buffer is generally needed to appropriately balance ensuring designated facilities control emissions of harmful pollutants as expeditiously as reasonably possible with the need for designated facilities to have reasonable certainty regarding their federally enforceable regulatory compliance obligations with sufficient time before those obligations are due. In addition, the EPA determines that the 6-months buffer provides a reasonable time to come into compliance with any potential increment of progress when compliance date that extends more than 20 months from the date required for submittal of the plan. Per the EPA's assessment of the comments and in light of the ALA court decision, the EPA determines that a 6-month timeframe buffer before the trigger for requirements associated with IoPs provides is the most reasonable expeditious period of time associated with the requirements for IoPs in 40 CFR 60.24a(d). While some commenters argued more time is necessary to develop control strategies, design plans, procure construction materials and/or equipment, and complete the installations often necessary for compliance, the final requirements in subpart Ba does not express the EPA's intent to require that states require designated facilities to complete all potential IoPs in a 6-month period.

Several commenters also urged the EPA to link the timelines for IoPs to the date on which the EPA takes final action on a state plan, instead of with the state plan submittal deadline. However, given that there will typically be a single final compliance date specified in an EG but the dates on which the EPA takes final action on individual states plans are likely to be many and varied based on, *inter alia*, when each state plan was submitted to the Agency, such an approach would create unnecessary confusion about whether IoPs must be

implemented and potentially uneven application of the requirement for state plans to include IoPs. It could also create a perverse incentive for states to delay submission of their state plans. Additionally, the timeline for IoPs initiates from the state plan submittal deadline because it is the earliest instance when all standards of performance in all timely state plans will be enforceable. It is a requirement of state plans, when submitted, to be enforceable at the state level and thus all designated facilities subject to a standard of performance in a state plan will have assurance of their requirements at the state level and can start planning for compliance while the EPA reviews and acts on the state plan.

The timeline for IoPs finalized in this action will ensure standards of performance are implemented as expeditiously as possible so that the intended emission reductions are achieved, and the public health and welfare are protected.

B. Federal Plan Authority and Timeline Upon Failure To Submit a Plan

CAA section 111(d)(2)(A) provides that the EPA has the same authority “to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan.” The original implementing regulations in subpart B provide that the EPA is to “promptly prepare and publish proposed regulations setting for a plan, or portion thereof, for a State if:” a state fails to submit a plan within the time prescribed, the state fails to submit a plan revision within the time prescribed or the Administrator disapproves a state plan or plan revision or any portion thereof. 40 CFR 60.27(c). Subpart B further requires the EPA to promulgate the plan proposed under paragraph (c) “within six months after the date required for submission of a plan or plan revision . . . unless, prior to such promulgation, the State has adopted and submitted a plan or plan revision which the Administrator determines to be approvable.” 40 CFR 60.27(d).

In promulgating subpart Ba in 2019, the EPA incorporated language in the provisions associated with the Actions by the Administrator in 40 CFR 60.27a(c) from CAA sections 110(c)(1)(A) and 110(k)(1)(B) addressing the circumstances which trigger the EPA’s authority under CAA section 111(d)(2) for promulgating a Federal plan. Specifically, in 2019 the EPA adopted language at 40 CFR 60.27a(c)(1) that requires the EPA to promulgate a

Federal plan after it “[f]inds that a state fails to submit a required plan or plan revision or *finds* that the plan or plan revision does not satisfy the minimum criteria under” 40 CFR 60.27a(g), *i.e.*, the completeness criteria (emphasis added). Pursuant to the amendments being finalized in this action, the EPA will be required, under 40 CFR 60.27a(g), to determine whether completeness criteria have been met no later than 60 days after the date by which a state is required to submit a plan (see section III.A.2. of this preamble). These provisions under subpart Ba taken together would mean that, no later than 60 days after the state plan submission deadline has passed, the EPA must make a finding (often referred to as a “finding of failure to submit”) as to whether any states have failed to submit a plan that meets the completeness criteria, and such finding is what triggers the EPA’s obligation and timeline to promulgate a Federal plan.³⁶

At proposal, the EPA acknowledged that in the CAA section 110 context, it has not always timely met its obligation to issue a finding of failure to submit, which in turn delays the timing for when the EPA promulgates a FIP to achieve the necessary emission reductions. Accordingly, the EPA proposed to streamline the process in the subpart Ba context to ensure that the emission reductions anticipated by the EG are realized in a timely way through the promulgation of any necessary Federal plan. In particular, the EPA proposed revisions to 40 CFR 60.27a(c)(1) consistent with the framework and requirements that have been effective in subpart B since 1975. As proposed the Administrator would issue a Federal plan if a state fails to submit a plan within the time prescribed without requiring the EPA to affirmatively issue a finding of failure to submit before the EPA’s obligation to issue a Federal plan is triggered.

As explained in the notice of proposed rulemaking, as part of evaluating ways to streamline the steps leading to promulgation of a final Federal plan, the EPA considered the value and role of issuing findings of failure to submit in this process. A finding of failure to submit was intended to serve three purposes under subpart Ba, consistent with its purpose

³⁶Note that this procedure does not address circumstances when the EPA promulgates a Federal plan for states whose plan is disapproved. In these circumstances, the state has submitted a plan so no finding of failure to submit is issued. The EPA’s obligation and timeline to promulgate a Federal plan in this instance arises from the EPA’s disapproval based on its conclusion that the state plan submission was unsatisfactory.

under CAA section 110: to notify the public of the status of state plan submissions (*i.e.*, providing transparency to the process); to notify states that the EPA has not received a plan; and to formally start the clock for the EPA to promulgate a Federal plan. While these concepts may have some utility as part of the overall Federal plan development and implementation process, the EPA finds that in the CAA section 111(d) context there is minimal value in coupling the notification aspects of a finding of failure with the initiation of the clock for the EPA to promulgate a Federal plan. These aspects are not inextricably linked to one another in that nothing about a formal finding of failure to submit substantively informs the development of a Federal plan; the EPA has the information it needs to know which states have and have not submitted complete plans. By decoupling the timeline from the finding of failure to submit, the EPA’s obligation to promulgate a Federal plan can be triggered without the interim step and potential lag associated with issuing a formal finding of failure to submit notification. By removing this interim process, the EPA will be required to promulgate the Federal plan more expeditiously, and, in turn, overall implementation of the corresponding EG will be timelier. Finalizing this amendment is also consistent with the spirit of the *ALA* decision, where the D.C. Circuit emphasized the need for implementation timelines that consider potential impacts on public health and welfare. By expeditiously and efficiently promulgating a Federal plan and by removing an interim step of a finding of failure, the EPA is further addressing the potential impacts of implementation times on health and welfare.

Some commenters requested that the EPA retain a separate “finding of failure to submit” action as the trigger for starting the timeline on a Federal plan. They note that the “finding of failure” provides notification to the states, regulated community, and public of the failure, as state submissions can be difficult to track. Commenters also note that the need to first provide the finding also provides additional time for the states to submit plans or revisions. One commenter noted that the EPA should retain the “finding of failure to submit” procedure and avoid establishing automatic deadlines for itself on a schedule that, based on past experience, it is almost certain to miss.

First, the EPA notes that where a state has failed to timely submit a state plan, the absence of a state plan submission should be easy to track for the state,

regulated community, and public; many, if not all, states maintain public websites on which they document their submissions to the EPA. The EPA expects that notification and tracking capabilities will also generally be much improved through the use of electronic submittal (see section III.F. of this preamble) and increasing public access to online information.

Second, the EPA stresses that the purpose of using a finding of failure to submit as the trigger for Federal plan development was not to give states time to develop and submit their state plans in excess of the regulatorily allotted timeframes. In this action, the Agency is finalizing timeframes for state plan submissions that are reasonably achievable and that may be superseded where necessary. Decoupling the finding of failure to submit and the trigger of state plan development should therefore not impact states' abilities to develop and submit satisfactory state plans. States always have the ability to submit state plans and state plan revisions at any time. Additionally, while the EPA recognizes that it has not always provided timely Federal plans, the Agency does not believe that changing the starting point for its Federal plan clock from a finding of failure to submit to the day after state plan submission are due will have an appreciable impact on its ability to do so. Notably, the trigger for its timeline will not change the length of time the EPA has to promulgate a plan. While the commenter implies that the EPA would use the time before it has made a finding of failure to submit to start working on a Federal plan, it is not reasonable to assume that the Agency is in a position to start developing such a plan before it has had a chance to determine if a state plan is incomplete. Therefore, the EPA is finalizing its proposed approach of removing from subpart Ba a finding of failure to submit as the trigger for starting the timeline for a Federal plan. The approach being finalized in subpart Ba is consistent with the framework and requirements that have been effective in subpart B since 1975. The regulatory text at 40 CFR 60.27a(c)(1) is being revised slightly relative to proposal to clarify that the 12-month clock starts running the day after the state plan submission deadline for instances in which a state fails to submit a plan or plan revision by that deadline, and the day after state plan submissions would be deemed complete by operation of law (*i.e.*, 60 days after the state plan submission deadline) for instances in which a state plan has been submitted

but deemed incomplete.³⁷ These revisions merely clarify the EPA's intent at proposal to ensure that all states and stakeholders have a clear understanding of the timeline for promulgation of a Federal plan. As discussed in section III.A.4. of this preamble, the EPA is finalizing the requirement that it will have 12 months from the state plan deadline to promulgate a Federal plan for states that do not submit a plan. Note, the EPA is also finalizing a deadline of 12 months to promulgate a Federal plan for states whose plans are disapproved, but in those instances the EPA's obligation and timeline to provide a Federal plan are triggered off of its disapproval of a state plan.

The EPA notes that this amendment to subpart Ba does not affect the EPA's obligation under CAA section 110(c) to promulgate a FIP within 2 years of making a finding that a state has failed to submit a complete SIP. In the case of the CAA section 110, the obligation for the EPA to first make a finding of failure to submit is derived from the statute, whereas nothing in CAA section 111(d) obligates the EPA to make such a finding before promulgating a Federal plan. CAA section 111(d)(1) directs the EPA to promulgate a process "similar" to that of CAA section 110, rather than a process that is identical. Therefore, the fact that a finding of failure to submit serves as the legal predicate for the EPA's obligation to issue a FIP under CAA section 110 does not mean that the EPA is also required to treat such a finding as a legal predicate for a Federal plan under CAA section 111(d).

In summary, while recognizing that a finding of failure to submit can have value in notifying states and the public of the status of plans, the EPA does not find that it is integral to the process of promulgating a Federal plan for states that do not submit plans. Further, the requirement for the EPA to issue a finding of failure can result in significant unwarranted delays in EG implementation. The EPA is therefore finalizing the proposed amendment that this finding will no longer be the event that triggers the timeline for the EPA's issuance of a Federal plan. 40 CFR 60.27a(c)(1). While the EPA will not publish a formal finding of failure to submit in the **Federal Register**, the Agency will notify the states and the

public of a failure to submit expeditiously following the state plan submission deadline or deadline for EPA determinations of completeness, as applicable. Additionally, the EPA notes that the completeness criteria in 40 CFR 60.27a(g) were promulgated in 2019, 84 FR 32520, 32578 (July 8, 2019), and, while the EPA is removing finding of failure to submit as the trigger for promulgation of a Federal rule, it emphasizes that states may have discussions with the EPA and submit revised state plans at any point. That is, there remains within this framework ample opportunity for iterative state plan development.

The regulatory provision at 40 CFR 60.27a(c)(1), as finalized, is consistent with the requirement that applies regarding the EPA's issuance of a Federal plan under subpart B. In subpart B (*i.e.*, applicable to implementing regulations for CAA section 111(d) EGs promulgated on or prior to July 8, 2019, and currently applicable implementing regulations for CAA section 129 EGs), the EPA's obligation to promulgate a Federal plan is triggered by the state plan submission deadline.

C. Outreach and Meaningful Engagement

The fundamental purpose of CAA section 111 is to reduce emissions from certain stationary sources that cause or significantly contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. Therefore, a key consideration in the state's development of a state plan, in any significant plan revision,³⁸ and in the EPA's development of a Federal plan or significant plan revision, pursuant to an EG promulgated under CAA section 111(d) is the potential impact of the proposed plan requirements on public health and welfare. A robust and meaningful public participation process is critical to ensuring that the full range of these impacts are understood and considered.

States often rely primarily on public hearings as the foundation of their public engagement in their state plan development process because a public hearing has always been explicitly required pursuant to the applicable regulations. The existing provisions in subpart Ba (40 CFR 60.23a(c) through (f)) detail the public participation requirements associated with the development of a state plan. Per these implementing regulations, states must

³⁷ As discussed in section III.A.2., if a state submits a plan but that submission does not contain the elements required by the completeness criteria, the EPA would find that the state has failed to submit a complete plan and notify the state through a letter. That letter is for notification only and, although the EPA intends to issue such letters expeditiously, it does not start the clock for a Federal plan.

³⁸ A significant state plan revision includes, but is not limited to, any revision to standards of performance or to measures that provide for the implementation or enforcement of such standards.

provide certain notice of, and conduct one or more public hearings on, their state plan before such plan is adopted and submitted to the EPA for review and action.³⁹ The EPA is not reopening these basic and long-standing public hearing requirements in this rulemaking. However, as explained in the notice of proposed rulemaking,⁴⁰ robust and meaningful public involvement in the development of a plan should sometimes go beyond the minimum requirement to hold a public hearing depending on who may be most affected by and vulnerable to the impacts being addressed by the plan. Because the CAA section 111(d) program addresses existing facilities, some of which may be decades old, it is possible that impacted communities may not have had a voice in the process when the source was originally constructed, or previous outreach may have focused largely on engaging the industry. The EPA proposed amendments to 40 CFR part 60, subpart Ba, were intended to strengthen the public participation provisions and ensure that all affected members of the public, not just a particular subset, have an opportunity to participate in the pollution control planning process by requiring meaningful engagement with pertinent stakeholders in the state's development of a state plan, in any significant plan revision, and in the EPA's development of a Federal plan pursuant to an EG promulgated under CAA section 111(d).

The EPA proposed to add meaningful engagement with pertinent stakeholders in 40 CFR 60.23a(i) and 60.27a(f) and add the definition of meaningful engagement and of pertinent stakeholders in 40 CFR 60.21a. The EPA proposed to define meaningful engagement as it applies to this subpart as timely engagement with pertinent stakeholder representation in the plan development or plan revision process. Such engagement must not be disproportionate nor favor certain stakeholders. It must include the development of public participation strategies to overcome linguistic, cultural, institutional, geographic, and other barriers to participation to assure pertinent stakeholder representation, recognizing that diverse constituencies may be present within any particular stakeholder community. It must include early outreach, sharing information, and soliciting input on the state plan. The EPA also proposed to evaluate the

approvability of state plans based on the components of the meaningful engagement definition.

The EPA proposed that pertinent stakeholders “. . . include, but are not limited to, industry, small businesses, and communities most affected by and vulnerable to the impacts of the plan or plan revision.” Additionally, to ensure that a robust and meaningful public engagement process occurs as the states develop their CAA section 111(d) plans, the EPA proposed to amend the requirements in 40 CFR 60.27a(g) to include, as part of the completeness criteria, the requirement for states to demonstrate in their plan submittal how they provided meaningful engagement with the pertinent stakeholders. The state would be required to provide, in their plan submittal: (1) a list of the pertinent stakeholders identified by the state; (2) a summary of engagement conducted; and (3) a summary of the stakeholder input received.

Most of the comments received on the proposed meaningful engagement requirements and proposed definitions were supportive of including meaningful engagement in the development of the state plans. Several commenters stated that they supported the inclusion of environmental justice considerations in Federal programs, including requirements for meaningful engagement. In particular, one commenter stated that outreach and meaningful engagement with stakeholders, specifically including communities most affected by and vulnerable to the pollution that would be reduced by a state plan, is an important and overdue step to ensuring that impacted communities have a voice in a process that directly impacts their health and welfare. While several commenters affirmed the EPA's authority to require meaningful engagement, some commenters said that the EPA lacks such authority. One of the commenters argued that the EPA lacks authority to require consideration of public health and welfare under CAA section 111(d) because CAA section 111 was devised as a technology-based approach to controlling emissions from stationary sources, not one predicated on the setting of standards directly and exclusively based on public health and welfare needs. One of the commenters stated the EPA lacks the authority to pass judgment on state plans submitted pursuant to CAA section 111(d) based on public engagement and argued that the only statutory requirement in CAA section 110 (which 111(d) cross-references) is the requirement that states provide “reasonable notice and public

hearings” prior to adoption of a state plan.

Several commenters supported the EPA's definition of meaningful engagement and the proposed meaningful engagement requirement. Additionally, some comments supported the state plan approvability requirements for meaningful engagement and recommended that the EPA also require an accounting of what states have done with stakeholder input and how that input was used or not used in their state plan.

Several commenters expressed the need for additional resources in order to conduct meaningful engagement, both for states and communities. Some of the comments stated that the EPA needs to consider how these increased requirements may strain already limited state resources. One commenter said that resources needed to fulfill the requirements for meaningful engagement, including costs associated with identifying and contacting stakeholders, renting of rooms or spaces for multiple public meetings, travel, and associated staff time, will be significant and burdensome to states.

There were several comments requesting clarification on the definition of meaningful engagement, and on the proposed approvability requirements for meaningful engagement. Some commenters requested that the rule provide more clarity on what states need to do for meaningful engagement and provide a clear path for states to develop an approvable meaningful engagement demonstration. Similarly, other commenters recommended the EPA establish a more detailed definition and provide examples of best practices for states to follow in implementing meaningful engagement, particularly with vulnerable communities, and further clarify what is meant by meaningful engagement with pertinent stakeholders. Some commenters cited lack of clarity in expressing their concern with meaningful engagement being a requirement for state plan approvability.

Based on comments received, the EPA has revised the proposed definition of meaningful engagement and is finalizing revisions that are flexible enough to serve the unique needs of states and their stakeholders, rather than relying on the more prescriptive approach of the proposal. The EPA recognizes that states will generally be in the best position to understand how to meaningfully engage pertinent stakeholders within their borders as they develop state plans. The EPA also believes that states and the Federal Government may learn from each

³⁹ States may cancel a public hearing if no request for one is received during the required notification period. 40 CFR 60.23a(e).

⁴⁰ 87 FR 79176, 79190–92 (Dec. 23, 2022).

other's efforts to meaningfully engage pertinent stakeholders. The EPA further recognizes that appropriate approaches to meaningful engagement, as well as the time and resources needed, will be highly dependent on characteristics of the source category—such as the number and location of designated facilities—as well as on the type of health or environmental impacts of the emissions addressed by an EG. Additionally, as noted by a number of commenters, states are highly diverse in, among other things, their local conditions, resources, and established practices of engagement. Also as noted by commenters, vulnerable communities are highly diverse in, among other things, their technical capacities, access to resources for meaningful participation (*e.g.*, geographic distribution, transportation, childcare), languages, and available representation.

For these reasons, rather than finalizing prescriptive substantive requirements for how states should conduct meaningful engagement, the EPA is requiring in subpart Ba that states, in their state plan submissions or significant plan revisions, describe the efforts they undertook to meaningfully engage pertinent stakeholders, what input they received from stakeholders, and how that input was used or not used in their state plan. The EPA will also include this information when promulgating Federal plans or significant plan revisions. In addition, the EPA is describing some current best practices for meaningful engagement in this preamble that states may consider, that and which the Agency expects will continue to develop as states experiment with different types of meaningful engagement and share their experiences through state plans.

Consistent with these changes, the EPA is finalizing the definition of meaningful engagement, as it applies to subpart Ba, as follows: “. . . timely engagement with pertinent stakeholders and/or their representatives in the plan development or plan revision process. Such engagement should not be disproportionate in favor of certain stakeholders and should be informed by available best practices.” States should therefore make a good faith effort to ensure that they are engaging in a proportionate manner with all pertinent stakeholders. The EPA is also finalizing, as proposed, a definition of “pertinent stakeholders.” Pertinent stakeholders “include, but are not limited to, industry, small business, and communities most affected by and/or vulnerable to the impacts of the plan or plan revision.” Finally, the EPA is

including in subpart Ba the three proposed completeness criteria requirements for meaningful engagement at 40 CFR 60.27a(g)(2)(ix) and adding a fourth completeness criterion, which will require state to include in their plans a description of how stakeholder input was considered in the development of the state plan or plan revisions.

The EPA expects that the finalized approach to meaningful engagement in state plans will provide the flexibility needed to allow states to address specific and unique issues in their states and to appropriately communicate with and respond to their stakeholders during the notice and comment process. As revised, the meaningful engagement component finalized here strengthens the framework for public participation in state plan development, a long-standing cornerstone of the cooperative federalism structures of CAA sections 110 and 111(d). The meaningful engagement component finalized here is intended to promote equitable opportunities to participate in the planning process for all stakeholders, as opposed to dictating a specific approach or set of practices that constitute meaningful engagement.

To support the goals outlined above, and in response to comments received, the EPA is finalizing the proposed completeness criteria that require documentation of meaningful engagement, including adding a fourth completeness criterion, but the EPA is not finalizing specific requirements for what types of outreach meaningful engagement must include in subpart Ba. The fourth completeness criterion will require states to include a description of how stakeholder input from the meaningful engagement process was considered in the development of the plan, which the EPA expects will both bolster accountability to stakeholders and assist states in ensuring that their meaningful engagement processes are additive to the public hearing and notification processes which has always been required under subpart Ba. See 40 CFR 60.27a(g)(1)(ix). While the EPA finds that the requirements finalized in this action are sufficient and appropriate for the general CAA section 111(d) implementing regulations, the EPA may provide additional guidance pertaining to meaningful engagement in specific EGs.

While the EPA is revising the definition of meaningful engagement relative to proposal, the definition of pertinent stakeholders is being finalized as proposed. Pertinent stakeholders include, among other stakeholders, industry, small business, and

communities—in particular, communities who are most affected by and vulnerable to the health or environmental impacts of pollution from the designated facilities addressed by the plan or plan revision. Increased vulnerability of communities may be attributable to, among other reasons, an accumulation of negative environmental, health, economic, or social conditions within these populations or communities, and a lack of positive conditions. Examples of such communities have historically included, but are not limited to, communities of color (often referred to as “minority” communities), low-income communities, Tribal and indigenous populations, and communities in the United States that potentially experience disproportionate health or environmental harms and risks as a result of greater vulnerability and/or exposure to environmental hazards. For example, populations lacking the resources and representation to combat the effects of climate change—which could include populations exposed to greater drought or flooding, or damaged crops, food, and water supplies—experience greater vulnerability to environmental hazards. Sensitive populations (*e.g.*, infants and children, pregnant women, the elderly, and individuals with disabilities exacerbated by environmental hazards) may also be most affected by and vulnerable to the impacts of the plan or plan revision depending on the pollutants or other factors addressed by an EG.

Communities in neighboring states or neighboring Tribal nations may also be impacted by a state plan and, if so, are pertinent stakeholders. In addition, to the extent a designated facility would qualify for a less stringent standard through consideration of RULOF as described in section III.E. of this preamble, the pertinent stakeholders would include the communities most affected by and vulnerable to the health and environmental impacts from the designated facility considered in a state plan for RULOF provisions.

The EPA has determined that the definitions of meaningful engagement and pertinent stakeholders in subpart Ba provide the states sufficient specificity while allowing for flexibility in the implementation of meaningful engagement. Meaningful engagement is an enhancement of the existing public notice and comment requirements and is intended to promote the sharing of relevant information with, and the soliciting of input from, pertinent stakeholders at critical junctures during plan development. In particular, the

processes for meaningful engagement should allow for fair and balanced participation, including opportunities for communities most affected by and vulnerable to the impacts of a plan an opportunity to be informed of and weigh in on that plan. These procedural requirements, in turn, help ensure that a plan will adequately address the potential impacts to public health and welfare that are the core concern of CAA section 111. Meaningful engagement can provide valuable information regarding health and welfare impacts experienced by the public (e.g., recurring respiratory illness, missed work or school days due to illness associated with pollution, and other impacts) and allow regulatory authorities to explore additional options to improve public health and welfare. Because the CAA section 111(d) program is designed to address widely varying types of air pollutants that may have very different types of impacts, from highly localized to regional or global, what constitutes fair and balanced participation among a broad set of pertinent stakeholders will be highly dependent on which stakeholders are directly impacted by a particular state plan.

The EPA's authority for finalizing procedural requirements to strengthen the public participation provisions of the implementing regulations is provided by the authority of both CAA sections 111(d) and 301(a)(1). Under CAA section 111(d), one of the EPA's obligations is to "establish a procedure similar to that provided by" CAA section 110, under which states submit plans that implement emission reductions consistent with the BSER. CAA section 110(a)(1) requires states to adopt and submit SIPs after "reasonable notice and public hearings."⁴¹ The Act does not define what constitutes "reasonable notice and public hearings" under CAA section 110, and the EPA has reasonably interpreted this requirement in promulgating a process under which states submit state plans.⁴²

Subpart Ba currently includes certain requirements for notice and public hearing in 40 CFR 60.23a(c) through (f). The notice requirements include prominent advertisement to the public of the date, time, and place of the public hearing, 30 days prior to the date of such hearing, and the advertisement requirement may be satisfied through publication to the internet. *Id.* at paragraph (d). A state may choose to cancel a public hearing if no request for

one is received during the required notification period. *Id.* at paragraph (e).

A fundamental purpose of the Act's notice and public hearing requirements is to ensure that all affected members of the public are able to participate in pollution control planning processes that impact their health and welfare.⁴³ In order to effectuate this purpose of the Act's notice and public hearing requirements, the notice of the proposed plans and of the public hearings should be reasonably adequate in its ability to reach affected members of the public. While many states provide for notification of public engagement through the internet consistent with the current requirements under the CAA section 111(d) implementing regulations, such notification may not be adequate to reach all those who are impacted by a CAA section 111(d) state plan and would benefit the most from participating in the state planning process. For example, data shows that as many as 30 million Americans do not have access to broadband infrastructure that delivers even minimally sufficient speeds, and that 25 percent of adults ages 65 and older report never going online.⁴⁴ Accordingly, the EPA has determined that it is appropriate to improve the procedural public engagement requirements under CAA section 111(d) to ensure the statutory objectives are met.

Given the public health and welfare objectives of CAA section 111(d) in regulating specific existing sources, it is reasonable to include a meaningful engagement component as part of the state plan development public participation process in order to further these objectives. Additionally, CAA section 301(a)(1) provides that the EPA is authorized to prescribe such regulations "as are necessary to carry out [its] functions under [the CAA]." As

⁴³ Consistent with this principle of providing reasonable notice under the CAA, under programs other than CAA section 111(d), current regulations governing other CAA programs similarly require states to provide specific notice to an area affected by a particular proposed action. See e.g., 40 CFR 51.161(b)(1) (requiring specific notice for an area affected by a state or local agency's analysis of the effect on air quality in the context of the New Source Review program (40 CFR 51.102(d)(2), (4), and (5) (requiring specific notice for an area affected by a CAA section 110 SIP submission).

⁴⁴ FACT SHEET: Biden-Harris Administration Mobilizes Resources to Connect Tribal Nations to Reliable, High-Speed Internet (December 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/22/fact-sheet-biden-harris-administration-mobilizes-resources-to-connect-tribal-nations-to-reliable-high-speed-internet/>; 7 percent of Americans don't use the internet. Who are they? Pew Research Center (April 2, 2021), <https://www.pewresearch.org/fact-tank/2021/04/02/7-of-americans-dont-use-the-internet-who-are-they/>.

finalized, the meaningful engagement components of this rule would effectuate the EPA's function under CAA section 111(d) in prescribing a process under which states submit plans to implement the statutory directives of this section and promote the statutory objective that all pertinent stakeholders have reasonable notice of relevant information and the opportunity to participate in the state plan development throughout the process. Ongoing engagement between states and pertinent stakeholders will help ensure that plans achieve the appropriate level of emission reductions, that communities most affected by and vulnerable to the health and environmental impacts from the designated facilities share in the benefits of the state plan, and that these communities are protected from being adversely impacted by the plan.

To promote meaningful engagement, the EPA is finalizing as part of the completeness criteria in 40 CFR 60.27a(g) procedural requirements for states to describe in their plan submittals how they engaged with pertinent stakeholders. As proposed, the state will be required to describe, in its plan submittal, (1) a list of the pertinent stakeholders identified by the state; (2) a summary of engagement conducted; and (3) a summary of the stakeholder input received. The EPA is also finalizing a fourth component as part of the procedural completeness demonstration—that the state also includes (4) a description of how stakeholder input was considered in the development of the plan or plan revisions. The EPA will review the state plan to ensure it includes these required descriptions regarding meaningful public engagement as part of its completeness evaluation of a state plan submittal. If a state plan submission does not include the required elements for notice and opportunity for public participation, including the procedural requirements at 40 CFR 60.23a(i) and 60.27a(g)(2)(ix) for meaningful engagement, this may be grounds for the EPA to find the submission incomplete or (where a plan has become complete by operation of law) to disapprove the plan.

While the EPA is finalizing procedural requirements for meaningful engagement as completeness criteria and is not prescribing how states proceed with such engagement, we understand states would find it useful to consider guidance as to how such engagement could be meaningfully conducted. In light of this interest, the following paragraphs provide examples and guidance which the EPA

⁴¹ 42 U.S.C. 7410(a)(1).

⁴² See 40 CFR 51.102; 40 CFR part 51, appendix V, section 2.1.

encourages states to consider in designing their own meaningful engagement programs.

In considering approaches for meaningful engagement, states should consider the identification of pertinent stakeholders; developing a strategy for engagement with the identified pertinent stakeholders; making information available in a transparent manner; and providing adequate and accessible notice. First, it would be reasonable for states to identify pertinent stakeholders considering information specific to the applicable EG, including the nature of the designated pollutants at issue and the communities likely to be impacted by facilities in the source category. The EPA intends to specifically provide information on impacts of designated pollutant emissions to assist states in the identification of their pertinent stakeholders, in addition to any other guidance that EPA may find it reasonable to provide in the applicable EG. Moreover, in developing a strategy for engagement, it would be reasonable for states to share information and solicit input on plan development and on any accompanying assessments. Finally, in providing transparent and adequate notice of plan development, states should consider that internet notice alone may not be adequate for all stakeholders, given lack of access to broadband infrastructure in many communities. Thus, in addition to internet notice, examples of prominent advertisement for engagement and public hearing may include notice through newspapers, libraries, schools, hospitals, travel centers, community centers, places of worship, gas stations, convenience stores, casinos, smoke shops, Tribal Assistance for Needy Families offices, Indian Health Services, clinics, and/or other community health and social services as appropriate for the emission guideline addressed.

The EPA believes the following example, while not tailored to specific designated facilities but to a source category for recent EG development, provides states with ideas for how they can structure their own meaningful engagement activities.⁴⁵ Prior to the November 2021 proposal for the “Standards of Performance for New, Reconstructed, and Modified Sources

and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review” (86 FR 63110), the EPA conducted meaningful engagement with pertinent stakeholders. For the pre-proposal stakeholder outreach, the EPA engaged with stakeholders through information posted on the internet, meetings, training webinars, and public listening sessions to disseminate information regarding this action, communicate how to submit comments on the proposed rule, and receive stakeholder input about the industry and its impact. In addition to the pre-proposal stakeholder engagement, the EPA conducted additional post-proposal training during the comment period on the proposed rule and held a public hearing. The EPA conducted three half-day post-proposal trainings to provide background information, an overview of the proposed rule, stakeholder panel discussions, and information on how to effectively engage in the regulatory process. The trainings were open to the public, focusing on individuals from and representatives of communities with EJ concerns, Tribes, and small businesses. Further considerations, analyses, and outreach relevant to meaningful engagement are presented in sections VI.⁴⁶ and VII.⁴⁷ of the preamble for that action and could help states in designing, planning, and developing their own outreach and engagement plans associated with the development and implementation of their state plans. An additional resource is the memorandum on stakeholder outreach⁴⁸ for the “New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule” proposed rule (88 FR 33240, May 23, 2023). This memorandum provides states with another example of the types of activities and processes that the EPA has found appropriate for meaningfully engaging with stakeholders in the particular context of EG development.

The EPA recognizes that the state planning process is different than a national rulemaking and may benefit from different types of engagement. Nonetheless, the information and examples the EPA has provided on meaningful engagement can serve as an example of what types of engagement

states should consider for their meaningful engagement processes. In addition, to further assist states in the meaningful engagement efforts, the EPA expects to develop resources to aid states in establishing meaningful engagement best practices, while recognizing that states have differing situations and that best practices will not be “one size fits all.” One resource that states may find helpful in developing their own best practices is the “Public Involvement Policy of the US Environmental Protection Agency,”⁴⁹ which is currently under revision. Another helpful resource the EPA has developed is the “Capacity Building Through Effective Meaningful Engagement” booklet.⁵⁰ The booklet is also available in the docket for this rule. Additionally, most states have opted into the EPA Climate Pollution Reduction Grant Program (CPRG),⁵¹ developed under the Inflation Reduction Act.⁵² To assist states that are participating in the CPRG, the EPA is conducting training for states on meaningful engagement, sharing case studies, best practices, and lessons learned through ongoing EPA-led CPRG forums. The EPA expects that, with experience and shared access to information on best practices, approaches to address challenges and barriers, and other resources and collaborative opportunities, meaningful engagement practices at the state and Federal level will continue to improve.

D. Regulatory Mechanisms for State Plan Implementation

CAA section 111(d)(1) requires the EPA to promulgate regulations that establish a procedure “similar” to that provided by CAA section 110 for each state to “submit to [the EPA] a state plan which . . . establishes standards of performance . . . and . . . provides for the implementation and enforcement of such standards.” The EPA reasonably interprets this provision, particularly

⁴⁹ <https://archive.epa.gov/publicinvolvement/web/pdf/policy2003.pdf>.

⁵⁰ https://www.epa.gov/system/files/documents/2023-09/epa-capacity-building-through-effective-meaningful-engagement-booklet_0.pdf.

⁵¹ See U.S. EPA Office of Air and Radiation “Climate Pollution Reduction Grants Program: Formula Grants for Planning Program Guidance for States, Municipalities, and Air Pollution Control Agencies” (March 1, 2023), <https://www.epa.gov/system/files/documents/2023-02/EPA%20CPRG%20Planning%20Grants%20Program%20Guidance%20for%20States-Municipalities-Air%20Agencies%2003-01-2023.pdf> (overview of the CPRG). See also U.S. EPA, “Status of Notice of Intent to Participate (NOIP) Submittals by States (March 31, 2023), <https://www.epa.gov/system/files/documents/2023-04/NOIP%20Status%20Lists.pdf> (list of states who have opted in to the CPRG as of March 31, 2023).

⁵² Inflation Reduction Act section 60114.

⁴⁵ The EPA emphasizes that the appropriateness of any meaningful engagement strategy will depend on the specific context, including the sources and pollutants addressed by the EG, the scope and scale of the proposed regulation or plan, and the pertinent stakeholders. The activities and processes included in the examples of meaningful engagement in this preamble were tailored to the specific circumstances of EPA’s EG development.

⁴⁶ See 86 FR 63110, 63140.

⁴⁷ See 86 FR 63110, 63145.

⁴⁸ See Docket ID No. EPA–HQ–OAR–2023–0072–0002.

the “similar” clause, as referring to all the procedural provisions provided in CAA section 110 which serve the same purposes of providing useful flexibilities for states and EPA actions that help ensure emission reductions are appropriately and timely implemented.

The EPA proposed to incorporate 5 regulatory mechanisms as amendments to the implementing regulations under 40 CFR part 60, subpart Ba, governing the processes under which states submit plans and the EPA acts on those plans. 87 FR 79176, 79193–96 (Dec. 23, 2022). The proposed additional regulatory mechanisms include: (1) partial approval and disapproval of state plans by the EPA; (2) conditional approval of state plans by the EPA; (3) parallel processing of plans by the EPA and states; (4) a mechanism that allows the EPA to call for revision of a previously approved state plan; and (5) an error correction mechanism for the EPA to revise its prior action on a state plan.⁵³ These mechanisms were proposed to update the implementing regulations to better align with the flexible procedural tools that Congress added into section 110 of the CAA in the 1990 Amendments. The EPA is finalizing the adoption and incorporation of these mechanisms into subpart Ba as the EPA has interpreted and applied them in the context of CAA section 110.

As explained in the notice of proposed rulemaking, the interpretation that CAA section 111(d)(1) authorizes the EPA to adopt procedures “similar” to those under CAA section 110 for the entire state plan process, and not just the initial plan submission process, is strengthened by the provisions in CAA section 111(d)(2), which provide that the EPA has the “same” authority to promulgate a Federal plan for a state that has failed to submit a satisfactory plan as under CAA section 110(c), and to enforce state plan requirements as it does for SIPs under CAA sections 113 and 114. This is because, read together, CAA section 111(d)(1) and (2) call for the set of essential procedural requirements for state and Federal plan development and implementation that generally reflect the essential procedural requirements for SIPs and FIPs in section 110.⁵⁴ In that

context, it is reasonable to read CAA section 111(d)(1) as authorizing the EPA to promulgate procedures for section 111(d) that are comparable to CAA section 110 procedures for the overall state plan process. Moreover, the EPA believes that it is reasonable, in promulgating the regulations required under CAA section 111(d)(1), to look to the mechanisms and flexibilities that Congress has deemed appropriate for states and the EPA to use in the highly analogous context of state and Federal implementation plans.

The availability of these 5 regulatory mechanisms will streamline the state plan review and approval process, accommodate variable state processes, facilitate cooperative federalism, further protect public health and welfare, and generally enhance the implementation of the CAA section 111(d) program. Together, these mechanisms provide greater flexibility, may reduce processing time, and have proven to be very useful tools for the review and processing of CAA section 110 SIPs.

Overall, the comments received for incorporating the 5 regulatory mechanisms were favorable, in particular noting that the mechanisms would offer not only procedural improvements long sought by state agencies but also reflect the flexibility offered in section 111 of the CAA, consistent with the Act’s cooperative approach, and would expand state planning options while conserving state resources. However, one commenter noted generally that for 111(d) plans, the CAA directs the EPA to establish a procedure similar to CAA section 110 for SIP submittals but does not require those procedures to be identical. This commenter contended that while the CAA specifically authorized various flexible mechanisms in sections 110(k)(2)–(6), the plain language of CAA section 111 does not provide for these options for 111(d) plans.

The EPA agrees that procedures adopted under CAA section 111(d)(1) need not be identical to CAA section 110 procedures, but interprets section 111(d)(1) to authorize the EPA to adopt procedures under 111(d)(1) which are substantially the same as those outlined under section 110, including section

110 procedural mechanisms.⁵⁵ Additionally, as explained above, while CAA section 111(d)(1) directs EPA to establish “a procedure . . . under which each State shall submit to the Administrator a plan,” section 111(d)(2) further provides that EPA also has authority to prescribe a Federal plan where states fail to submit a satisfactory plan and to enforce the provisions of state plans in cases where states fail to do so. Congress saw fit to provide mechanisms such as conditional approval and SIP calls under CAA section 110 for the purpose of EPA evaluation and action on, and enforcement of, SIPs, and the Agency believes it is reasonable to look to section 110 as evidence of the types of mechanisms that are reasonable for EPA to provide for the same purposes under section 111(d).

These regulatory mechanisms will provide flexibility and support efficiency to the states and the EPA in the submission and processing of state plans. For the reasons discussed in the following sections, the EPA is finalizing these provisions.

1. Partial Approval and Disapproval

The EPA proposed a provision similar to that under CAA section 110(k)(3) for the EPA to partially approve and partially disapprove severable portions of a state plan submitted under CAA section 111(d). Under CAA section 110(k)(3), “[i]f a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.” Subpart Ba currently authorizes the EPA to “approve or disapprove [the state] plan or revision or each portion thereof” (40 CFR 60.27a(b)) but does not explicitly specify whether such actions may be partial.

One commenter stated that the partial approval and disapproval mechanisms the EPA proposed appear to be aimed at providing a way for the EPA to approve model rule provisions and disapprove RULOF provisions. The EPA disagrees with this comment. The EPA reviews each provision of a state plan, regardless of the type of provision, to determine whether it meets the applicable

⁵³ These regulatory mechanisms were also previously proposed to be added to subpart B in 2015 and largely received support from states, the public, and stakeholders, but were never finalized. 80 FR 64965 (October 23, 2015).

⁵⁴ Compare CAA section 111(d)(1) (requiring states to submit state plans that include specified types of measures that, in turn, meet minimum EPA requirements) and section 111(d)(2) (indicating that the EPA must review and approve or disapprove state plans, requiring the EPA to promulgate a Federal plan if the state does not submit a

satisfactory plan, authorizing the EPA to enforce state plan measures) with section 110(a)(1)–(2) (requiring states to submit SIPs that include specified types of measures that in turn meet minimum EPA requirements), section 110(k) (requiring the EPA to review and approve or disapprove SIPs), section 110(c) (requiring the EPA to promulgate a FIP if the state does not submit a plan or the EPA disapproves the state plan) and 113(a)(1) (authorizing the EPA to enforce SIP measures).

⁵⁵ See Merriam Webster’s Dictionary, defining “Similar” as “having characteristics in common” or “alike in substance and essentials.” <https://www.merriam-webster.com/dictionary/similar>.

statutory and regulatory requirements. If it meets the applicable requirements, the EPA must approve it. It is entirely possible, and in fact common, for some state plan provisions to comport with the applicable requirements and others not to. Pursuant to this mechanism, the EPA may partially approve or partially disapprove a state plan when portions of the plan are approvable, but other discrete and severable portions are not. In such cases, the purposes of a CAA section 111(d) EG, as well as section 111(d)'s framework of cooperative federalism, would be better served by allowing the state to move forward with implementing those portions of the plan that are approvable, rather than to disapproving the full plan and potentially delaying implementation of beneficial emission reductions. This mechanism is consistent with the *ALA* decision's emphasis on ensuring timely mitigation of harms to public health and welfare, as problematic parts of a state plan submission would not stall the implementation of emission reductions at designated facilities for which a portion of a plan could be approved, thus efficiently reducing the time from EG promulgation to implementation of emission reductions at those facilities.

The EPA is finalizing this provision so that it is similar to CAA section 110(k)(3), providing clarity on the EPA's authority to partially approve plans and the circumstances under which it may be used. As explained at proposal, the portion of a state plan that the EPA may partially approve must be "severable." A portion is severable when: (1) the approvable portion of the plan does not depend on or affect the portion of the plan that cannot be approved, and (2) approving a portion of the plan without approving the remainder does not alter the approved portion of a state plan in any way that renders it more stringent than the state's intent. See *Bethlehem Steel v. Gorsuch*, 742 F.2d 1028, 1034 (7th Cir. 1984). The EPA's decision to partially approve and partially disapprove a plan must go through notice and comment rulemaking. As a result, the public will have an opportunity to submit comment on the appropriateness and legal application of this mechanism on a particular state plan submission. A partial disapproval of a plan submission would have the same legal effect as a full disapproval for purposes of the EPA's authority under CAA section 111(d)(2)(A) to promulgate, for the partially disapproved portion of the plan, a Federal plan for the state to fill the gap. See section III.A.4 of this preamble for finalized timelines for promulgation of

a Federal plan. If the EPA does promulgate a Federal plan for a partially disapproved portion, the state may, at any time, submit a revised plan to replace that portion. If the state does so, and the EPA approves the revised plan, then the EPA would withdraw the Federal plan for that state.

This partial approval/disapproval mechanism also enables states to submit, and authorizes the EPA to approve or disapprove, state plans that are partial in nature and to address only certain elements of a broader program. For example, with this mechanism, states will be able to submit partial plans intended to replace discrete portions of a Federal plan, where appropriate. Partial submittals must meet all completeness criteria.

2. Conditional Approval

The EPA proposed a mechanism analogous to the authority under CAA section 110(k)(4) to grant the EPA the ability to conditionally approve a state plan under CAA section 111(d). Under CAA section 110(k)(4), "[t]he Administrator may approve a plan revision based on a commitment of the state to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the state fails to comply with such commitment." The proposed provision would authorize the EPA to conditionally approve a plan submission that substantially meets the requirements of an EG but that requires some additional, specified revisions to be fully approvable. For the EPA to conditionally approve a submission, the state Governor or their designee must commit to adopt and submit specific enforceable provisions to remedy the stipulated plan deficiency. The provisions required to be submitted by the state pursuant to a conditional approval would be treated as an obligation to submit a plan revision and be subject to the same processes and timeframes for the EPA action as other plan revisions (e.g., completeness determination, approval and/or disapproval).

Comments were generally supportive of including the mechanism in subpart Ba for use by the EPA in acting on CAA 111(d) state plans. One commenter submitted that the EPA should limit conditional approvals to plans either with only procedural deficiencies or with substantive deficiencies that (1) apply to few designated facilities (e.g., no more than 5); (2) do not lead to impacts on vulnerable communities; and (3) are likely to be remedied by the

state within one year. Comments were received both supporting and opposing the proposed 12-month time period for adopting and submitting the necessary revisions associated with a conditional approval. In particular, one commenter recommended allowing more than 12 months for submission of subsequent revisions that are required as part of conditional approvals that relate to RULOF provisions. After considering the comments received, the EPA is declining to explicitly limit the circumstances in which conditional approval may be used and is finalizing the 12-month period for submission of a plan revision pursuant to a conditional approval as proposed. First, the EPA views the conditional approval mechanism as a beneficial flexibility for states in instances in which partial disapproval may be appropriate because a discrete portion of a state plan does not meet the applicable requirements, but that deficiency is not so significant that it affects the substantial adequacy of the plan. CAA section 110(k)(4) supports this view, as Congress provided only 12 months for states correct the deficiency; 12 months is likely not sufficient for states to remedy significant substantive deficiencies in a plan. Thus, the EPA believes both that structure of the conditional approval mechanism already appropriately circumscribes its use and that extending the timeline for states to submit plan revisions pursuant to conditional approval would abrogate its utility as a way to address minor issues in a plan and encroach on circumstances in which partial disapproval is more appropriate. Second, under the provisions being finalized in this rulemaking, in the event that EPA did partially disapprove a state plan in lieu of conditionally approving it, the Agency would have 12 months to promulgate a Federal plan to fill the gap. See 40 CFR 60.27a(c)(2). It would be inappropriate to provide states a longer period of time in the same circumstances to remedy a deficiency.

As finalized, if the state fails to meet its commitment to submit the measures within 12 months, the conditional approval automatically converts to a disapproval. If a conditionally approved state plan converts to a disapproval due to either the failure of the state to timely submit the required measures or if the EPA finds the submitted measures to be unsatisfactory, such disapproval would be grounds for implementation of a Federal plan under CAA section 111(d)(2)(A). The EPA will publish a notice in the **Federal Register** and, if appropriate, on the public website

established for the EG notifying the public that the conditional approval is converted to a disapproval. As described in section III.A.4. of this preamble, the EPA would be required to promulgate a Federal plan within 12 months of state's failure to submit the required measures or the EPA's disapproval of measures submitted to address the conditional approval.

Commenters asserted that the EPA should take action to develop a Federal plan immediately upon issuing a conditional approval, and further asserted that the EPA should not allow the conditional approval mechanism to toll the Federal plan clock and thereby delay needed public health and welfare protections. A conditional approval is not a disapproval and therefore there has been no failure on the part of the state and thus will not trigger a corresponding Federal plan for the given state nor initiate a timeline for the EPA to provide a Federal plan. Conditional approvals will be evaluated and designed on a case-by-case basis, with consideration of public health and welfare, and are expected to result in approved state plans and therefore not require the development of a Federal plan. The commenters also noted the EPA proposed to allow 12 months in which to impose a Federal plan following disapproval of a previously conditionally approved plan and stated instead the EPA should start the clock for developing a Federal plan as soon as a state plan submission is conditionally approved if the EPA has determined that there is a significant possibility that the deficiencies will not be corrected. The EPA disagrees with this comment because the Agency would not conditionally approve a plan if the deficiencies were not expected to be corrected; in this instance, a partial disapproval of the plan would be appropriate.

Another commenter requested that the EPA clarify the applicable compliance deadline for a state plan that is conditionally approved by the Agency. The commenter contended that the proposed rule did not specify the "trigger" date for compliance deadlines when the EPA conditionally approves a state plan, and recommended that, in this scenario, compliance deadlines should begin to run when the state satisfies the condition(s) established by the EPA. However, the EPA notes that compliance timeframes for designated facilities are specified in the applicable EGs. To the extent that the Administrator conditionally approves a plan, the compliance timeframes must still meet the requirements in the EG. A conditional approval may not be an

appropriate action if the result would be a significant delay in compliance, as that is inconsistent with the intention of adding this flexibility for state plan processing.

Incorporating this mechanism under the subpart Ba will have the benefit of allowing a state with a substantially complete and approvable program to begin implementing it, while also promptly making specific changes that ensure it fully meets the requirements of CAA section 111(d) and of the applicable EGs. The EPA is therefore finalizing this provision as proposed at 40 CFR 60.27a(b)(2).

3. Parallel Processing

The EPA proposed to include a mechanism similar to that for SIPs under 40 CFR part 51 appendix V, section 2.3.1., for parallel processing a plan that does not yet meet all of the administrative completeness criteria under 40 CFR 60.27a(g)(2). This streamlined process allows the EPA to propose approval of such a plan in parallel with the state completing its process to fully adopt the plan in accordance with the required administrative completeness criteria, and then allows the EPA to finalize approval once those criteria have been fully satisfied and a final plan has been submitted.

At proposal, the EPA explained that parallel processing under subpart Ba would be subject to certain conditions. In lieu of the letter required under 40 CFR 60.27a(g)(2)(i), the state must submit the proposed plan with a letter requesting the EPA propose approval through parallel processing. Under the parallel processing procedures, a state will be temporarily exempt from the administrative completeness criteria as defined by 40 CFR 60.27a(g)(2) regarding legal adoption of the plan (40 CFR 60.27a(g)(2)(ii) and (v)) and from some of the public participation criteria (40 CFR 60.27a(g)(2)(vi), (vii), and (viii)). However, as with parallel processing for SIPs under 40 CFR part 51, appendix V, in lieu of these administrative criteria, the state must include a schedule for final adoption or issuance of the plan and a copy of the proposed/draft regulation or the document indicating the proposed changes to be made, where applicable. Note that a proposed plan submitted for parallel processing must still meet all the criteria for technical completeness as defined by 40 CFR 60.27a(g)(3) and meet all other administrative completeness criteria as defined by 40 CFR 60.27a(g)(2). If these conditions are met, the submitted plan may be considered for purposes of the EPA's

initial plan evaluation and proposed rulemaking action.

The exceptions to the administrative criteria described above only apply to the EPA proposing action on the state plan. If the EPA has proposed approval through parallel processing, the state must still submit a fully adopted and final plan that meets all of the completeness criteria under 40 CFR 60.27a(g), including the requirements for legal adoption and public engagement, before the EPA can finalize its approval. If the state finalizes and submits to the EPA a plan that includes changes relative to the plan that the EPA proposed to approve, the EPA will evaluate those changes for significance. If any such changes are found by the EPA to be significant (*e.g.*, changes to the stringency or applicability of a particular standard of performance), then the state submittal would be treated as an initial submission and the EPA would be required to re-propose its action on the final plan and to provide an opportunity for public comment.

Note further that once the state plan submission deadline passes, the EPA retains the authority to initiate development of a Federal plan at any time for a state that has not submitted a complete plan, even if a state has requested parallel processing and the EPA has proposed an action. The EPA intends to continue working collaboratively with states who are in the process of adopting and submitting state plans but notes that states must remain mindful of regulatory deadlines for CAA section 111(d) plan submissions even when seeking to use the parallel processing mechanism.

While comments were generally supportive of the EPA adopting parallel processing for CAA section 111(d) plans, some commenters expressed concern that the purpose and benefits of meaningful engagement would not be realized in the state plan development process if this mechanism were finalized as proposed. One commenter noted that the proposed parallel processing provision appeared to indicate that the state can submit its plan to the EPA prior to conducting meaningful engagement, and that the EPA is expecting an informational meeting rather than actual engagement from the public during the meaningful engagement process. Another commenter remarked that if a state does not include meaningful engagement before submitting its initial plan to the EPA, the proposed parallel processing mechanism creates an inherent disincentive for the state to modify a plan under this mechanism in response to any public engagement which occurs

subsequent to submittal, and further stated this would increase the disparity between the feedback received from the individuals the EPA designed the meaningful engagement provisions to protect and feedback from individuals or organizations with plentiful resources for proactive engagement. The commenters also asserted that members of the public, knowing that a version of the plan is already under Federal review, would be more likely to doubt that their feedback would have an impact on the final product.

The EPA agrees with these commenters that, as proposed, exempting meaningful engagement from completeness criteria requirements under parallel processing would be a disincentive to meeting to the goals of meaningful engagement. In fact, as defined in this action, meaningful engagement is the “*timely* engagement with pertinent stakeholders and/or their representatives in the plan development or plan revision . . .” (emphasis added). Thus, meaningful engagement should occur well in advance of a state being ready to submit a plan to the EPA for parallel processing. The EPA is therefore excluding the meaningful engagement completeness criteria defined at 40 CFR 60.27a(g)(2)(ix) from the completeness criteria exceptions provided under the finalized parallel processing provision at § 60.27a(h)(4). That is, states must include the information required under § 60.27a(g)(2)(ix) in any proposed state plans submitted to the EPA for parallel processing. Meaningful engagement is integral in early state plan development and should be included as part of the completeness criteria for parallel processing.

The EPA is finalizing as part of the completeness criteria in 40 CFR 60.27a(g) procedural requirements for states to describe in their plan submittals how they engaged with pertinent stakeholders. The state will be required to describe, in its plan submittal, (1) a list of pertinent stakeholders identified by the state; (2) a summary of engagement conducted; (3) a summary of the stakeholder input received; and (4) a description of how stakeholder input was considered in the development of the plan or plan revisions.

4. State Plan Call

Under CAA section 110(k)(5), the EPA may call for a revision of a state implementation plan “[w]henver the Administrator finds that the applicable implementation plan . . . is substantially inadequate to . . . comply with any requirement of [the Act].” The

EPA proposed to add a mechanism analogous to this “SIP call” provision to subpart Ba at 40 CFR 60.27a(i) under CAA section 111(d), which would authorize the EPA to find that a previously approved state plan does not meet the applicable requirements of the CAA or of the relevant EG and to call for a plan revision. This mechanism is a useful tool for ensuring that approved state plans continue to meet the requirements of the EGs and of the CAA over time. This may be particularly important because EGs that achieve emission reductions from specific source categories may be implemented over many years.

As proposed, the state plan call provision stated that, whenever the Administrator finds that the applicable plan is substantially inadequate to meet the requirements of the applicable EG, to provide for the implementation of such plan or to otherwise comply with any applicable requirement of subpart Ba or the CAA, the Administrator shall require the state to revise the plan as necessary to correct such inadequacies. The EPA explained that a plan call would be generally appropriate under two circumstances: when legal or technical conditions arise after the EPA approves a state plan that undermine the basis for the approval and when a state fails to adequately implement an approved state plan. In the first circumstance, a change in conditions or circumstances could render an approved plan inconsistent with the EG, subpart Ba, and/or the CAA, necessitating a plan revision to realign it with the applicable requirements. For example, a court decision subsequent to the approval of a plan may render that plan substantially inadequate to meet applicable CAA requirements resulting from the change in law.⁵⁶ Or, the EPA may determine that technical conditions, such as design assumptions, about control measures that were the basis for a state plan approval later prove to be inaccurate, meaning that the plan would be substantially inadequate to achieve the emission reductions required by the EG and therefore the plan should be revised.⁵⁷

⁵⁶ An example of this circumstance in the context of CAA section 110 is the 2015 “SSM SIP Call”, which required states to correct previously approved SIP provisions based on subsequent court decisions regarding startup, shutdown, and malfunctions (SSM) operations. 80 FR 33840, June 12, 2015.

⁵⁷ For example, the 1998 “NO_x SIP call” required states to submit SIP revisions addressing NO_x emissions found, after SIP approvals, to significantly impact the attainment of air quality standards in other states due to atmospheric transport. 63 FR 57356, October 27, 1998.

The second circumstance in which a state plan call may be appropriate is when a state fails to adequately implement an approved state plan. In this case, the approved state plan may facially meet all applicable requirements, but a failure in implementation (e.g., due to changes in available funding, resources, or legal authority at the state level) renders the plan substantially inadequate to meet the requirements of the EG and CAA section 111(d). In this circumstance, a state, in response to a plan call, would either be required to submit a plan revision that provides for implementation of the plan’s requirements given the state’s actual circumstances or to provide demonstration that the plan is being adequately implemented as approved.

Consistent with the SIP call process under CAA section 110(k)(5), the EPA proposed that, after it finds that a state’s approved plan is substantially inadequate to comply with applicable requirements, it would require the state to revise the plan as necessary to correct inadequacies. The EPA proposed that such finding and notice must be public. The plan call notice would identify the plan inadequacies leading to the plan call and establish a reasonable deadline (not to exceed 12 months after the date for such notice) for submission of a plan revision and/or demonstration of appropriate implementation of the approved plan.

A number of commenters asserted that the EPA is not authorized to issue a call for state plans under CAA section 111(d) because Congress did not provide this explicit authority in CAA section 111. Some commenters also expressed concern that this mechanism undermines the regulatory certainty approved plans provide to facilities. Additionally, some commenters contended that CAA sections 113 and 114 address the condition of states not properly implementing approved state plans such that a state plan call mechanism is unnecessary.

As explained at the start of this section of the preamble (section III.D.), the EPA interprets CAA section 111(d)(1)’s direction to prescribe regulations establishing a procedure similar to that provided by CAA section 110 for the submission of state plans to authorize the EPA to adopt the section 110 procedural mechanisms. Additionally, CAA section 111(d)(2) provides that EPA shall have the same authority as under CAA section 110(c) to prescribe a Federal plan where a state fails to submit a satisfactory plan, as well as the same authority as under CAA sections 113 and 114 to enforce the

provisions of a state plan where the state fails to enforce them. Congress did not specify how the EPA is to exercise its authority to approve or disapprove state plans, promulgate Federal plans, and oversee and enforce state plan implementation on an ongoing basis, and the EPA finds it reasonable to look to other mechanisms under the CAA that Congress has provided for substantially the same purpose. That is, the EPA believes CAA sections 111(d)(1) and 111(d)(2), taken together, provide the legal basis for incorporating mechanisms into subpart Ba that ensure the ongoing compliance of state plans with the applicable requirements, including the state plan call mechanism of CAA section 111(k)(5).

While CAA sections 113 and 114 provide the EPA authority to enforce the provisions of state plans through, *inter alia*, issuance of administrative orders and penalties, civil actions in the case of violations, and use of monitoring, reporting, recordkeeping, and compliance certifications, the EPA believes it is also reasonable and helpful to provide a mechanism for states to bring their state plans into compliance with the applicable requirements. A state's failure to implement its approved plan may result if that plan's implementation or enforcement measures, *e.g.*, monitoring, reporting, and verification requirements, prove inadequate to enable a state to ensure that a designated facility is meeting its standards of performance. A failure to implement may also arise, as described above, where an approved state plan contains the appropriate implementation and enforcement measures but changes in, *e.g.*, available funding, resources, or legal authority at the state level render the plan, as it is being implemented, substantially inadequate to meet the requirements of subpart Ba, the EG, or CAA section 111(d). In either instance, a reasonable alternative to EPA enforcement may be for the Agency to issue a state plan call in order to give the state an opportunity to remedy the deficiency or to provide demonstration that the plan is being or will be adequately implemented as approved. As with all of the regulatory mechanisms being incorporated into subpart Ba in this rulemaking, the EPA interprets CAA sections 111(d)(1) and (2) as collectively providing the authority to provide for procedures for ensuring that state plans remain "satisfactory" over the long time periods over which they are implemented, given that subsequent findings or conditions may affect the basis for a previous plan approval.

The EPA acknowledges that a call for revision of a state plan may result in a change in the requirements to which regulated entities are subject under than plan. However, as explained above, state plan calls are appropriate in two general circumstances: when legal or technical conditions arise that abrogate the basis of the initial state plan approval and when a state fails to adequately implement an approved state plan. In either of these two instances, the plan as it is currently being implemented fails to meet the applicable requirements. The EPA believes it would be neither consistent with the statute nor reasonable to fail to correct a state plan under these circumstances and that the state plan call mechanism, which provides for notice to the state and the public and a process for revising the state plan that is intended to cause as little disruption to the original plan as possible, is appropriate. The state plan call provisions state that "[a]ny finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this part to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate."⁵⁸

Several commenters noted that the proposed "not to exceed 12 months" timeline associated with the state call revision provision may be inadequate for states to respond to a state plan call and noted that this time is shorter than that provided for plan development. However, because a state plan call would represent that a plan is substantially inadequate to meet an EG after implementation of the plan was supposed to be underway, and compliance deadlines may have already passed, a more expeditious timeline to fix the problem than the deadline for initial plan development is imperative to the public health concerns. Additionally, the EPA anticipates that in many instances a state plan call would impact a discrete portion or element of a plan that will not require the same amount of time the EPA is allotting for initial state plan development and submission, *i.e.*, 18

⁵⁸ The regulations being finalized at § 60.27a(i)(1) further provided that if the Administrator makes the finding in § 60.27a(i) on the basis that a State is failing to implement an approved plan, or part of an approved plan, the State may submit a demonstration to the Administrator it is adequately implementing the requirements of the approved state plan in lieu of a plan revision. Such demonstration must be submitted by the deadline established under § 60.27a(i).

months, to correct. The EPA believes 12 months is a reasonable timeframe and allows for public outreach and state processes while ensuring the deficiency is expeditiously corrected to address any outstanding public health and welfare concerns associated with a deficient plan, consistent with the *ALA* decision. However, the Agency also acknowledges that this may not be true in every instance. The EPA is therefore finalizing the state plan call mechanism with a change relative to proposal to provide that plan revisions associated to a state plan call shall be submitted to the Administrator within 12 months or within a period as determined by the Administrator, instead of "not to exceed 12 months." Because the CAA contains numerous deadlines requiring states to submit various state implementation plans within 12 months of a triggering event,⁵⁹ the EPA believes it is reasonable to expect states to be able to submit state plan revisions pursuant to a state plan call within this timeframe as well. The final language provides more flexibility and allows that the EPA may supersede this 12-month timeframe in appropriate circumstances.

While this period is less than the time allotted for the submission of a full state plan (finalized in section III.A.1. of this preamble above as 18 months), it can provide a reasonable timeframe for public outreach and state processes while ensuring the deficiency is expeditiously corrected to address any outstanding public health and welfare concerns associated with a deficient plan, consistent with the *ALA* decision.

With the exception of this revision to the timeline for states to submit revised state plans, the EPA is finalizing the state plan call mechanism at 40 CFR 60.27a(i) as proposed. As explained at proposal, any failure of a state to submit necessary revisions by the date set in the call for state plan revisions constitutes a failure to submit a required plan submission. Therefore, pursuant to CAA section 111(d)(2)(A), the EPA would have the authority to promulgate a Federal plan for the state within 12 months after the necessary revisions are due. If the state fails to submit a plan revision, to make an adequate demonstration within the prescribed time pursuant to 40 CFR 60.27a(i)(1), or if the EPA disapproves a submission, then the EPA would be required to promulgate a Federal plan addressing the deficiency for sources within that state.

⁵⁹ See, *e.g.*, CAA sections 110(k)(4), 129(b)(2), and 179(d).

5. Error Correction

Under CAA section 110(k)(6), the EPA may, on its own accord, revise its prior action on a state implementation plan under certain circumstances:

“[w]henver the Administrator determines that the Administrator’s action approving, disapproving, or promulgating any plan or plan revision (or part thereof) . . . was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State.” The EPA proposed to add a mechanism analogous to this “error correction” provision to subpart Ba at 40 CFR 60.27a(j) under CAA section 111(d) and is finalizing that mechanism as proposed.

As explained in the notice of proposed rulemaking, this error correction provision would authorize the EPA to revise its prior action when the EPA determines its own action on the state plan was in error. Specifically, this provision allows the EPA to revise its prior action in the same manner as used for the original action (*e.g.*, through rulemaking) without requiring any further submissions from the state. In this manner, the error correction mechanism does away with unnecessary burdens on states based solely on an error made by the EPA, such as submitting a plan revision and the public participation related requirements under 40 CFR 60.23a (*e.g.*, providing notice and holding a public hearing).

CAA section 110(k)(6) is phrased broadly, and its legislative history makes clear that it “explicitly authorizes EPA on its own motion to make a determination to correct any errors it may make in taking any action, such as . . . approving or disapproving any plan.” See House Report No. 101–490 at 220. The circumstances that may give rise to an error that the EPA may correct with this mechanism depend on the specific facts and plan at issue, and the use of the mechanism is justified on a case-by-case basis. The EPA has previously used CAA section 110(k)(6) for correction of technical or clerical errors,⁶⁰ for removal of substantive provisions from an EPA-approved state plan that did not relate to implementation, enforcement, or maintenance of the NAAQS or is otherwise permissible under the CAA

for inclusion in the plan,⁶¹ and when the EPA in error approved a SIP that did not meet applicable requirements.⁶² These examples are not the only circumstances when the EPA has used CAA section 110(k)(6) in the past and do not limit the EPA for circumstances of error correction under section 111(d) in the future.

One commenter, while not objecting to the inclusion of this mechanism, suggested the EPA should make clear in the regulations that this provision cannot be used to effect a change in policy because of a change in perspective on implementation that may arise from an administration transition, citing the need for designated facilities to have regulatory certainty and to avoid unexpected changes in regulatory requirements. Other commenters also noted that the proposed regulatory text does not place any limitations on the EPA’s ability to use the error correction provision and that the EPA should impose meaningful limits on its ability to use this mechanism to effectuate significant changes to a prior action or to implement new policy perspectives. The EPA acknowledges the concern expressed by the commenters. The Agency intends the same intrinsic limits on its error correction authority that exist under CAA section 110(k)(6) to apply to its use under subpart Ba: the EPA must determine that its action on a state plan submission was “in error.” The EPA reviews state plan submissions against the applicable requirements of the statute, general implementing regulations, and specific EG. If the submission meets those requirements, it is “satisfactory” and the EPA must approve it. A subsequent change in Agency policy alone does not constitute an error that the EPA committed in acting on the state plan. The EPA’s history of using error correction mechanisms under CAA section 110(k)(6), including to correct clerical or typographic errors and remove provisions from SIPs that it was without authority to approve in the first instance (as described earlier), gives good indication of how the EPA intends to use this mechanism under subpart Ba. The EPA also notes that use of error correction is fact- and context-specific, and a determination that a previous action was in error is subject to scrutiny and review by the state and public. Additionally, due to the complex facts and circumstances that frequently

characterize state plans and state plan implementation, the EPA believes that any attempt to further define the circumstances in which use of error correction may or may not be permissible is likely to inadvertently limit its use where otherwise appropriate. Thus, the Agency does not find it necessary to prescribe further limits on its use of error correction under these CAA section 111 implementing regulations. The EPA is therefore finalizing use of error correction for state plan actions at 40 CFR 60.27a(j) as proposed. While the EPA maintains that this error correction mechanism would be available for acting on state plans when appropriate, it also expects that it will work with states, as it has done previously in the SIP context, to correct any deficiencies in their plans.

E. Remaining Useful Life and Other Factors (RULOF) Provisions

The EPA is finalizing revisions to certain provisions of 40 CFR 60.24a to clarify the framework for applying standards of performance based on RULOF in state plans⁶³ under CAA section 111(d). Consistent with Congress’s mandate in CAA section 111(d), the EPA’s implementing regulations have guided the implementation of RULOF for decades. See 40 CFR 60.24(d), (f). The existing subpart Ba regulations⁶⁴ contain provisions at 40 CFR 60.24a(e) governing the circumstances under which states may take RULOF into consideration when applying standards of performance to particular sources in state plans. The EPA proposed revisions to these existing provisions as well as additional RULOF-related requirements to ensure consistency with the statute and to enhance clarity and equitable treatment for states. The EPA is finalizing some of these provisions as proposed, is finalizing other provisions with changes relative to proposal in response to public comments, and is choosing not to finalize yet other provisions.

Section III.E.1. of this preamble describes the statutory and regulatory background of RULOF under CAA section 111 and section III.E.2. of this preamble explains the authority and rationale for the collective regulatory revisions. Section III.E.3. of this

⁶³ As explained in section III.E.1. of this preamble, any discussion and requirements that apply to states’ consideration of RULOF in state plans also apply to the EPA’s consideration of RULOF in the context of a Federal plan.

⁶⁴ The D.C. Circuit’s vacatur of certain provisions of subpart Ba in *ALA* did not impact the existing RULOF provision at 40 CFR 60.24a(e).

⁶⁰ For example, see 74 FR 57051, November 3, 2009, for correction of clerical and typographical errors in a portion of an Arizona SIP.

⁶¹ For example, see 86 FR 24505 (May 7, 2021) (removal of asbestos requirements from a Kentucky SIP).

⁶² For example, see 86 FR 23054, April 30, 2021, for error correction with respect to Kentucky’s “good neighbor obligations” and SIP disapproval.

preamble describes in detail the proposed RULOF provisions and the EPA's approach to each provision in this final rule.

1. Statutory and Regulatory Background

Under CAA section 111(d), the EPA is required to “establish a procedure . . . under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for” designated facilities and “(B) provides for the implementation and enforcement of such standards of performance.” As the Supreme Court explained in *West Virginia v. EPA* (in the context of an EG addressing existing power plants): “Although the States set the actual rules governing existing power plans, EPA itself still retains the primary regulatory role in Section 111(d).”⁶⁵ The Court elaborated that the “[t]he Agency, not the States, decides the amount of pollution reduction that must ultimately be achieved. It does so by again determining, as when setting the new source rules, ‘the best system of emission reduction . . . that has been adequately demonstrated for [existing covered] facilities.’ 40 CFR part 60.22(b)(5) (2021); see also 80 FR 64664, and n. 1. The States then submit plans containing the emissions restrictions that they intend to adopt and enforce in order not to exceed the permissible level of pollution established by EPA. See parts 60.23, 60.24; 42 U.S.C. part 7411(d)(1).”⁶⁶

Accordingly, while states establish the standards of performance for individual sources, EPA must ensure that such standards reflect the degree of emission limitation achievable through the application of the BSER. This obligation derives from the definition of “standard of performance” under CAA section 111(a)(1), which is “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which . . . the Administrator determines has been adequately demonstrated.” Consistent with this definition, the EPA identifies the degree of emission limitation achievable through application of the BSER for a category (or sub-category) of existing sources as part of its EG. 40 CFR 60.22a(b)(5). States must then

establish standards of performance for existing sources in their state plans that reflect the EPA's degree of emission limitation.

CAA section 111(d)(1) also requires that the “regulations which establish a procedure” for submission of state plans must “permit” states, “in applying a standard of performance to any particular source under a plan,” to consider, “among other factors, the remaining useful life of the existing source.” Thus, while standards of performance must generally reflect the degree of emission limitation achievable through application of the BSER determined by the EPA pursuant to CAA section 111(a)(1), see 40 CFR 60.24a(c), CAA section 111(d)(1) also contemplates circumstances in which states would be permitted to deviate from the degree of emission limitation in the applicable EG based on consideration of RULOF for particular sources.

The 1970 version of CAA section 111(d) made no reference to the consideration of RULOF in the context of standards for existing sources.⁶⁷ In the 1975 regulations promulgating subpart B to implement the 1970 CAA section 111(d), however, the EPA included a provision that would allow states to provide “variances” from the EPA's emission guideline on a case-by-case basis.⁶⁸ For health-based pollutants, the regulations provided that states could apply a standard of performance less stringent than the EPA's EGs based on cost, physical impossibility, and other factors specific to a designated facility that would make the application of a less stringent standard significantly more reasonable. 40 CFR 60.24(f). For welfare-based pollutants, the regulations provided that states could apply a less stringent standard by balancing the requirements of an EG “against other factors of public concern.” 40 CFR 60.24(d).

In proposing this variance provision, the EPA explained that the application of less stringent emission standards on a case-by-case basis is allowed, provided that sufficient economic justification is demonstrated in each case. Such justification must be presented for each case in the plan and may include, for example, unreasonable cost of control resulting from plant age, location, or basic process design or physical impossibility of installing specified control systems.⁶⁹ In response to a comment received on its proposal

arguing that the EPA did not have authority to promulgate a variance provision, the Agency explained that, although section 111(d) does not explicitly provide for variances, it does require consideration of the cost of applying standards to existing facilities. Such a consideration is inherently different than for new sources, because controls cannot be included in the design of an existing facility and because physical limitations may make installation of particular control systems impossible or unreasonably expensive in some cases. For these reasons, EPA believes the provision (§ 60.24(f)) allowing States to grant relief in cases of economic hardship (where health-related pollutants are involved) is permissible under section 111(d).⁷⁰

The Agency further explained in the 1975 rulemaking that the “EPA's emission guidelines will reflect its judgment of the degree of control that can be attained by various classes of existing sources without unreasonable costs.”⁷¹ States were required to establish emission standards for existing sources that are equivalent to the EPA's emission guidelines; states would also be free to apply more stringent standards for particular sources within a class of sources that can achieve greater control without unreasonable costs, or where they otherwise believe that additional control is necessary or desirable.⁷²

As part of the 1977 CAA amendments, Congress amended CAA section 111(d)(1) in a way that codified the provision of a variance as contained in the EPA's 1975 regulations. Specifically, Congress amended CAA section 111(d)(1) to require that the EPA's regulations under this section “shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.” The EPA considered the variance provision under subpart B to meet this requirement and did not revise the provision subsequent to the 1977 CAA amendments until the Agency promulgated new implementing regulations in 2019 under subpart Ba. As part of the 2019 revisions, the EPA removed the health- and welfare-based pollutants distinction and collapsed the associated requirements of the previous variance provision into a single, then-

⁶⁵ 142 S. Ct. 2587, 2601–02 (2022).

⁶⁶ Id. The part of the rule preamble cited by the Court states, in part: “Under CAA section 111(a)(1) and (d), the EPA is authorized to determine the BSER and to calculate the amount of emission reduction achievable through applying the BSER. The state is authorized to identify the emission standard or standards that reflect that amount of emission reduction.” 80 FR 64662, 64664 n. 1 (Oct. 23, 2015).

⁶⁷ See Public Law 91–604, section 111(d)(1) (Dec. 31, 1970), 84 Stat. 1684.

⁶⁸ 40 FR 53340, 53344 (Nov. 17, 1975).

⁶⁹ 39 FR 36102, 36102 (Oct. 7, 1974).

⁷⁰ 40 FR 53343.

⁷¹ Id.

⁷² See id.

new RULOF provision.⁷³ As did subpart B before it, this subsection provides that, in applying a standard of performance to a particular source, the state may take into consideration factors including the remaining useful life of such source, provided that the state demonstrates one or more of three circumstances: unreasonable cost of control resulting from plant age, location, or basic process design; physical impossibility of installing necessary control equipment; or other factors specific to the facility that make application of a less stringent standard or compliance time significantly more reasonable. The 2019 RULOF provision also allows, as did the 1975 version, for the variance to be provided for a particular facility or class of such facilities.

CAA section 111(d)(2) provides that “[t]he Administrator shall have the same authority . . . to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title [i.e., CAA section 110(c)] in the case of failure to submit an implementation plan.” When CAA section 111(d)(2) was enacted in 1970, CAA section 110(c) stated that the Administrator shall promptly propose a Federal implementation plan for a state if “(1) the State fails to submit an implementation plan . . . within the time prescribed, (2) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or (3) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan”⁷⁴

Thus, CAA section 111(d)(2), through its reference to CAA section 110(c), provides the EPA the authority and the obligation to review state plans for compliance with CAA requirements.^{75 76}

If a state has not submitted a state plan or if the EPA determines that a state plan is not “satisfactory,” i.e., not in accordance with the requirements of CAA section 111, the EPA must promulgate a Federal plan.

Congress further provided in CAA section 111(d)(2) that the EPA shall, in promulgating a standard of performance under a Federal plan, “take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.” Thus, the RULOF regulations the EPA has previously promulgated in subparts B and Ba, and the revisions to the RULOF regulations in subpart Ba being finalized in this action, apply not only to states when promulgating state plans, but also to the EPA when promulgating a Federal plan. Throughout this section III.E. of the preamble, discussion of provisions and requirements that apply to states’ consideration of RULOF in state plans also apply to the EPA’s consideration of RULOF in the context of a Federal plan.

2. Authority and Rationale for the Revisions

The primary authority for these revisions is in CAA section 111(d)(1). The rationale for the revisions finalized here is to more fully align the implementing regulations with the statute and to enhance clarity for states as well as the equitable treatment of states and sources.

CAA section 111(d)(1) directs the EPA to “prescribe regulations which establish a procedure” under which states submit state plans. These regulations must “permit” states, in applying a standard of performance to any particular source, to consider RULOF. That is, Congress gave the EPA the authority and the obligation to establish procedures that permit states to consider RULOF.

The EPA has been guiding consideration of RULOF for over fifty years, consistent with Congress’s direction. “Permit” means “to consent

to formally; to allow (something) to happen, esp[ecially] by an official ruling, decision, or law.”⁷⁷ It is well understood that there may be parameters or rules as a condition of someone consenting to or allowing something to be done. For example, a building permit generally does not allow a person to build in any way they like, but contains conditions and requirements such as compliance with safety codes and limitations on height. In general, “permit,” whether a verb or noun, carries with it an expectation of rules and parameters designed to ensure consistency with the applicable framework, as opposed to open-ended discretion.⁷⁸ CAA section 111(d)(1) provides that “regulations of the Administrator . . . shall permit the State” to consider RULOF (emphasis added). The natural reading of this provision is that Congress intended the EPA to set out parameters and conditions that govern states’ consideration of RULOF.⁷⁹

The EPA’s role in implementing RULOF finds further support in the Supreme Court’s understanding of this provision as laid out in *American Electric Power v. Connecticut*.⁸⁰ In describing the statutory framework of CAA section 111, the Court explained that the EPA sets standards of performance based on CAA section 111(a)(1). It further recognized that, pursuant to the EPA’s subpart B general implementing regulations for state plans, 40 CFR 60.24(f), “EPA may permit state plans to deviate from generally applicable emissions standards upon demonstration that costs are ‘[u]nreasonable.’”⁸¹

At the same time that Congress clearly directed the EPA to prescribe rules governing states’ consideration of RULOF, it also provided that those rules establish a *procedure* under which

⁷⁷ Black’s Law Dictionary (11th ed. 2019); see also The American College Dictionary (1970) (“to let (something) be done or occur”); Oxford English Dictionary Online (“to allow or give consent to (a person or thing) to do or undergo something”), <https://www.oed.com/search/dictionary/?scope=Entries&q=permit>, page accessed Sept. 1, 2023.

⁷⁸ See, e.g., *U.S. v. Chau*, 293 F.3d 96, 101 (3d Cir., 2002) (a provision requiring an entity to provide notice to the EPA prior to acting is not a “permit” because “[a] requirement that someone provide written notice of an intention to perform an act is not the same as the EPA’s granting of a license, or other permission, to the person to perform the act in question . . .”).

⁷⁹ This contrasts with other provisions of the Clean Air Act where Congress granted states unbounded discretion. See, e.g., CAA section 116 (“nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce” more stringent requirements).

⁸⁰ 564 U.S. 410 (2011).

⁸¹ Id. at 427.

⁷³ 84 FR 32520, 32577 (July 8, 2019).

⁷⁴ Public Law 91–604, section 110(c) (Dec. 31, 1970), 84 Stat. 1681–82.

⁷⁵ See also 40 CFR 60.27(c) (“The Administrator will, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth a plan, or portion thereof, for a State if: (1) The State fails to submit a plan within the time prescribed; . . . (3) The Administrator disapproves the State plan or plan revision or any portion thereof, as unsatisfactory because the requirements of this subpart have not been met.”); 60.27(d) (providing for promulgation of a proposed Federal plan).

⁷⁶ Congress subsequently updated CAA section 110(c) in 1977 and again in 1990. The current version of CAA section 110 splits the EPA’s Federal implementation plan authority and the criteria for disapproval of State implementation plans across

subsections 110(c) and 110(k)(3). CAA section 110(c)(1) provides that “[t]he Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—” (A) finds that a State has failed to make a complete plan submission, or “(B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal plan.” CAA section 110(k)(3), which addresses “[f]ull and partial approval and disapproval,” states that the Administrator shall approve all or certain portions of the plan that “meet[] the applicable requirements of this chapter.” Thus, a plan, or any portion thereof, that fails to meet the applicable CAA requirements must be disapproved.

states submit state plans, including any standards of performance pursuant to consideration of RULOF. CAA section 111(d)(1) states, “The Administrator shall prescribe regulations which shall establish a procedure . . . Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source . . . to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.” Consistent with this statutory direction, the EPA’s RULOF provisions, both the existing provisions and those being finalized in this action, are fundamentally procedural in nature. They prescribe the series of steps and considerations states must undertake to apply a less stringent standard of performance that is consistent with CAA section 111(d).

As discussed in section III.E.1. of this preamble, Congress also granted the EPA a role in ensuring that states applying standards of performance based on RULOF do so in an appropriate manner. CAA section 111(d)(2) requires the EPA to evaluate standards of performance in state plans and approve them only if they are “satisfactory,” *i.e.*, if they meet the applicable requirements.⁸² Thus, while states have responsibility for establishing, implementing, and enforcing standards of performance for designated facilities, the EPA has an obligation to ensure that those standards of performance—including any standards of performance based on consideration of RULOF—are consistent with the statute. The regulations the EPA is promulgating in this final rule provide greater clarity and thus enable states to apply less stringent standards of performance that are consistent with CAA section 111(d). Having clear, detailed regulations also aids the EPA in evaluating less stringent standards of performance included in state plans, which maximizes the Agency’s ability to provide for fair and equitable treatment across the states and sources that use the RULOF provision.

In addition, the parameters for considering RULOF set out in this final rule are consistent with the role of RULOF as an important tool for states in the unusual circumstance in which the EPA’s BSER determination is

unreasonable for a particular source. As explained in detail in section III.E.3.b. of this preamble, the EPA’s longstanding interpretation is that RULOF provision in CAA section 111(d)(1) allows the Agency to permit states to provide variances for existing facilities in certain circumstances. These circumstances are limited to when a state can demonstrate that it is unreasonable for a particular facility to achieve the degree of emission limitation determined by the EPA in the applicable EG.

Under CAA section 111, EPA must provide BSER and degree of emission limitation determinations that are, to the extent reasonably practicable, applicable to all designated facilities in the source category. In many cases, this requires the EPA to create subcategories of designated facilities, each of which has a BSER and degree of emission limitation⁸³ tailored to its circumstances.⁸⁴ Thus, the EPA endeavors, to the extent practicable, to promulgate BSER and degree of emission limitation determinations that are achievable for all designated facilities covered by an EG. However, as Congress recognized, this may not be possible in every instance because, *e.g.*, it is not be feasible for the Agency to know and consider the idiosyncrasies of every designated facility in a source category or because the circumstances of individual facilities change after the EPA determined the BSER. The EPA believes Congress intended RULOF to allow the EPA to permit the use of variances for states to adjust a standard of performance in unusual circumstances in which the EPA’s determination regarding the degree of emission limitation achievable through the BSER is not reasonable for a particular designated facility.

This view of the RULOF provision as a limited variance from the EPA’s determinations in an EG has a long history. The EPA’s description of how it develops EGs in the preamble to the 1975 subpart B implementing regulations stated that “emission guidelines will reflect subcategorization within source categories where

appropriate, taking into account differences in sizes and types of facilities and similar considerations [*sic*], including differences in control costs that may be involved for sources located in different parts of the country.”⁸⁵ As a result, emission guidelines “will in effect be tailored to what is reasonably achievable by particular classes of existing sources, and States will be free to vary from the levels of control represented by the emission guidelines in the ways mentioned above.”⁸⁶ The “ways mentioned above” included establishing more stringent standards under CAA section 116 where states believe additional control is necessary or desirable, as well as setting more lenient standards, subject to EPA review, in cases of economic hardship.⁸⁷ The EPA subsequently explained that such cases could arise because controls were not included in the design of existing sources or because physical limitations may make installation of particular control systems impossible or unreasonably expensive in some cases.⁸⁸

Thus, the EPA’s long-standing interpretation is that the standards of performance established by states must generally reflect the degree of emission limitation determined by the Agency, except where, based on RULOF, states provide “sufficient justification” that the EPA’s determination is “unreasonable” for a particular source.⁸⁹ Although the EPA endeavors to address the circumstances of all designated facilities in its EG, there may remain instances in which the circumstances of a particular facility justify application of a less stringent standard of performance.

⁸⁵ 40 FR 53343.

⁸⁶ *Id.*

⁸⁷ See *id.*

⁸⁸ *Id.* at 53344. Similarly, in the 1974 notice of proposed rulemaking for the subpart B regulations, the EPA explained that “it is the Administrator’s judgment that section 111(d) permits him to approve State emission standards only if they reflect application of the best systems of emission reduction (considering the cost of such reduction) that are available.” The EPA further stated: “It is recognized, however, that application of such standards may be unreasonable in some situations. For example, to require that existing controls be upgraded by a small margin at a relatively high cost may be unreasonable in some cases. The proposed regulations, therefore, provide that States may establish less stringent emission standards on a case-by-case basis provided that sufficient justification is demonstrated in each case.” 39 FR 36102, 36102 (Oct. 7, 1974).

⁸⁹ 39 FR 36102; see also 40 CFR 60.24(c), (f) (EPA’s longstanding regulations in subpart B require standards of performance in state plans to be no less stringent than the corresponding EG except where a state has satisfied the regulatory requirements for invoking RULOF).

⁸² CAA section 111(d)(2)(A) authorizes the EPA to promulgate a Federal plan for any state that “fails to submit a satisfactory plan” under section 111(d)(1). Accordingly, the EPA interprets “satisfactory” as the standard by which the EPA reviews state plan submissions. The EPA discusses the “satisfactory” standard of review in greater detail in section III.E.3.b of this preamble.

⁸³ The EPA, in different contexts, uses the phrase “degree of emission limitation” to refer to both the degree of emission limitation achievable through application of the BSER at the level of an individual source, *e.g.*, the best system can achieve an 85% reduction in end-of-stack emissions when applied to a designated facility, and to the overall level of stringency that results from applying the BSER to the source category as a whole. In this section of the preamble, this phrase refers to the emission reductions that are achievable at an individual source.

⁸⁴ See 40 CFR 60.22a(b)(5) (EPA may specify different degrees of emission limitation and compliance times for different subcategories of designated facilities).

Finally, and relatedly, to be consistent with the statutory purpose of reducing dangerous air pollution under CAA section 111; the statutory framework under which to achieve that purpose the EPA is directed to set the degree of emission limitation achievable through application of the best system of emission reduction; and the history of the statutory RULOF provision as a limited variance from that degree of emission limitation to address unusual circumstances at particular facilities, the EPA's regulations must ensure that application of less stringent standards of performance pursuant to consideration of RULOF does not undermine the degree of emission limitation achievable through application of the BSER.

Thus, for the reasons explained above, the EPA has the authority to promulgate the regulatory updates included in this final rule, which flow from the statute's direction for the Agency to "establish procedures" that, among other things, "permit" states to consider RULOF. The EPA believes these updates are warranted to provide additional clarity to the states (when developing state plans) and the EPA (when issuing Federal plans and reviewing state plans) regarding the appropriate procedures for considering RULOF and to ensure the predictable and equitable treatment of states and sources in implementing EGs under CAA section 111(d). Furthermore, the updates to the framework are needed to ensure that consideration of RULOF adheres to statutory purpose, structure, and historical context discussed above.

Critically, the regulatory revisions also provide a framework for how states and the EPA calculate and apply less-stringent standards of performance. Neither the RULOF provision in subpart B nor the 2019 update to that provision in subpart Ba clearly delineate the process for states or the EPA after they have determined that a source cannot reasonably achieve the degree of emission limitation in the applicable emission guideline. As such, the existing regulations are not adequate to ensure that standards of performance pursuant to RULOF are no less stringent than required to address the basis for providing a variance from the EPA's degree of emission limitation in the first instance.

Consistent with the long-held interpretation of the RULOF provision as a limited variance, the EPA is aware of only a small handful of instances in which a state has used this provision to apply a less-stringent standard of performance to a designated facility in a state plan. In three of these instances, the Agency approved less stringent

standards of performance for welfare-related designated pollutants for which, under subpart B (40 CFR 60.24(d)), there was a lower bar for doing so.⁹⁰ In the fourth instance, the state invoked RULOF to apply a less-stringent standard for a health-related designated pollutant and the EPA disapproved the less-stringent standard for failing to satisfy the requirements of 40 CFR 60.24(f).⁹¹ At the time of this rulemaking, however, there are two new EGs for which rulemaking is ongoing; each of these EGs would address large, complex, and highly diverse source categories.⁹² Commenters on these proposed EGs have suggested that there may be more of a role for RULOF than in past EGs.⁹³ The revisions to the

⁹⁰ 49 FR 35771 (Sept. 12, 1984), 47 FR 50868 (Nov. 10, 1982), 47 FR 28099 (June 29, 1982). See, e.g., Emission Guideline Document for Kraft Pulp: Control of TRS Emissions from Existing Mills, EPA-450/2-78-003b (March 1979) at 1-3 ("For Welfare-related pollutants, states may balance the emission guidelines, times for compliance, and other information in a guideline document against other factors of public concern in establishing emission standards, compliance schedules, and variances provided that appropriate consideration is given to the information presented in the guideline document and at public hearing(s) required by Subpart B and that all other requirements of Subpart B are met. . . . Thus, states will have substantial flexibility to consider factors other than technology and costs in establishing plans for the control of welfare-related pollutants if they wish.").

⁹¹ See 40 CFR 62.8860(a) ("The requirements of § 60.24(f) of this chapter are not met because the State failed to justify the application of emission standards less stringent than the Federal emission standards."); see also 55 FR 19883, 19884 (May 14, 1990) (explaining the proposed less-stringent limits were not approvable because the state had not demonstrated sufficient justification). The RULOF provision that governed that action in subpart B was substantively identical to the version promulgated in 2019 in subpart Ba.

⁹² Proposed Rule: "Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review," 86 FR 63110 (Nov. 15, 2021); Supplemental Proposal: Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review," 87 FR 74702 (Dec. 6, 2022); Proposed Rule: New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule," 88 FR 33240 (May 23, 2023).

⁹³ See, e.g., Comment Letter of Pioneer Natural Resources USA, Inc. on Supplemental Notice of Proposed Rulemaking for Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector ("Oil and Gas Proposed Rule"), EPA-HQ-OAR-2021-0317-2298 at 20-21; Comment Letter of American Petroleum Institute on Oil and Gas Proposed Rule, EPA-HQ-OAR-2021-0317-2428 at 93-95, 102-104; Comment Letter of Power Generators Air Coalition on New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed

RULOF provisions are thus timely to give states greater clarity on and predictability for applying less stringent standards of performance consistent with CAA section 111.

Note that the RULOF provisions are distinct from the flexible compliance mechanisms such as trading and averaging, discussed in section III.G.1. of this preamble. The RULOF provisions apply where a state intends to *depart* from the degree of emission limitation in the EG and propose a less stringent standard for a designated facility (or class of facilities). That is, the RULOF provisions are relevant to a state's process of applying a standard of performance to a designated facility in the first instance. In contrast, trading and averaging are mechanisms that, when permitted in an EG, states may use to demonstrate compliance with the standards of performance that are contained within their state plans.

3. Proposed and Finalized RULOF Provisions

The EPA proposed revisions to the existing RULOF provision at 40 CFR 60.24a(e), which details the circumstances under which states or the EPA may apply a less stringent standard of performance. The EPA also proposed to add new provisions: a procedure for determining less stringent standards when a state has properly invoked RULOF (proposed and finalized at 40 CFR 60.24a(f)); a clarification that state plans may not apply less stringent standards if a designated facility can reasonably achieve the presumptive standard of performance using a technology other than the BSER (proposed at 40 CFR 60.24a(g)); a clarification that any less stringent standards must meet all other applicable requirements (proposed at 40 CFR 60.24a(l), finalized at 60.24a(h)); requirements related to when operating conditions that are relied on for a less stringent standard must be included as enforceable requirements in state plans (proposed at 40 CFR 60.24a(h), finalized at 40 CFR 60.24a(g)); requirements related to the consideration of remaining useful life (proposed 40 CFR 60.24a(i)); a clarification regarding the burden of proof and information on which RULOF demonstrations are based (proposed 40 CFR 60.24a(j));

Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule ("EGU Proposed Rule"), EPA-HQ-OAR-2023-0072-0710 at 75-78; Comment Letter of Wisconsin Department of Natural Resources and Public Service Commission of Wisconsin on EGU Proposed Rule, EPA-HQ-OAR-2023-0072-0538 at 1-2, 10-11.

requirements to consider potential impacts and benefits of control to communities most affected by and vulnerable to emissions from a designated facility for which a state is proposed a less stringent standard (proposed 40 CFR 60.24a(k)); and a clarification that states may account for other factors in applying a more stringent standard of performance (proposed 40 CFR 60.24a(m)). In addition, the EPA proposed changes to the existing 40 CFR 60.24a(f) (proposed at 40 CFR 60.24a(n), finalized at § 60.24(i)) reflecting the Agency's revised interpretation that CAA sections 111(d) and 116 authorize states to include standards of performance more stringent than the EPA's presumptive standards in their state plans as enforceable requirements.

The EPA received a wide range of comments on its proposed RULOF provisions. Some commenters expressed support for the proposed revisions, noting that the EPA has the authority to specify how RULOF is implemented and the obligation to ensure that its use does not undermine the emission reductions that are achievable through application of the BSER. Supportive commenters also noted that providing a regulatory structure is important to ensure that RULOF is applied in a reliable, consistent, and appropriate manner. Commenters opposed to the proposed RULOF revisions stated that there is no basis in the statute for the EPA to restrict states' authority to consider RULOF and apply less-stringent standards of performance. Some commenters also argued that the EPA's proposed regulations were too prescriptive and burdensome. Other commenters generally supported the EPA's proposed revisions but had questions or concerns regarding specific provisions, including the requirements around source-specific standards of performance and consideration of impacted communities. One commenter requested that the EPA clarify that the revised RULOF provisions would apply to design, equipment, work practice, or operational standards issued under CAA sections 111(d) and 111(h)(1).

After consideration of these comments, the EPA is finalizing a subset of the requirements that it proposed. As a general matter, the EPA is finalizing as requirements the provisions that must apply under any EG to provide necessary clarity to both the states and the EPA in applying or approving less stringent standards of performance. This clarity and predictability with regard to what constitutes a satisfactory, and therefore approvable, less stringent standard is crucial to ensuring the

equitable treatment of states and sources that are considering RULOF in state plans. The requirements the EPA is finalizing are additionally necessary to ensure that use of RULOF is consistent with the statutory purpose of reducing emissions of dangerous air pollutants, the framework under which the EPA is directed to achieve that purpose through determining the degree of emission limitation, and history of RULOF as a limited variance to address unusual circumstances when it is not possible for a particular facility to achieve the EPA's degree of emission limitation. The proposed RULOF provisions that are not being included as regulatory requirements remain important considerations when applying RULOF; however, the EPA is not finalizing them in these general implementing regulations.

The EPA recognizes that in finalizing these updates it is imposing certain requirements on states' use of RULOF. Consistent with the framework of cooperative federalism under which CAA section 111(d) operates, states apply standards of performance pursuant to consideration of RULOF, as well as provide the compliance measures for implementing such standards, subject to the applicable statutory requirements. The Agency again notes that it has placed requirements on states' ability to apply less stringent standards of performance since it first created a variance provision in subpart B in 1975. See 40 CFR 60.24(c) through (e). When Congress later adopted the RULOF provision into the statute, it directed the EPA in CAA section 111(d)(1) to establish a procedure *permitting* states to consider RULOF. Moreover, as discussed further in section III.E.3.b, these updates are consistent with the historical interpretation of RULOF as a variance from the EPA's degree of emission limitation. The EPA also notes that the requirements being finalized in this action establish a process for states in applying less stringent standards of performance. These final regulations ensure, consistent with the statutory purpose, that any less stringent standards are no less stringent than necessary to address the reason that the variance is needed in the first place.

Finally, the EPA confirms that the RULOF provisions, including those being finalized in this action, apply to standards of performance promulgated pursuant to CAA sections 111(d) and 111(h)(1). The existing definition of "standard of performance" in 40 CFR 60.21a(f) includes "a legally enforceable regulation . . . prescribing a design, equipment, work practice, or

operational standard, or combination thereof." Therefore, the RULOF provisions in 40 CFR 60.24a, which may be invoked to apply a "standard of performance" to a particular designated facility, also apply to standards of performance applied under CAA section 111(h)(1).⁹⁴

a. Threshold Requirements for Considering Remaining Useful Life and Other Factors

The existing RULOF provision at 40 CFR 60.24a(e) addresses the circumstances in which states may invoke RULOF to deviate from the BSER and degree of emission limitation determinations the EPA has made pursuant to CAA section 111(a)(1). It allows states to consider RULOF to apply a less stringent standard of performance for a designated facility or class of facilities if they demonstrate one of the three following circumstances: (1) unreasonable cost of control resulting from plant age, location, or basic process design; (2) physical impossibility of installing necessary control equipment; or (3) other factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time significantly more reasonable.

As discussed in the notice of proposed rulemaking, the proposed amendments largely retained this provision, including the three circumstances under which a less stringent standard of performance may be applied, and provided further clarification of what a state must demonstrate in order to invoke RULOF in a state plan. Specifically, the proposed amendments required the state to demonstrate that a particular facility cannot reasonably apply the BSER to achieve the degree of emission limitation determined by the EPA, based on one or more of the three circumstances. The EPA's proposal retained the first circumstance in whole and revised the second circumstance to add the "technical infeasibility" of installing a control as another situation in which application of RULOF may be appropriate. The proposal further clarified the third circumstance for invoking RULOF, the existing version of which provides that states may invoke RULOF when other factors specific to the facility make a less stringent standard of performance "significantly more reasonable." The EPA proposed to revise this circumstance, under which the first two circumstances also fall, to specify that states may consider RULOF

⁹⁴ See also 40 CFR 60.24a(b).

to apply a less stringent standard if circumstances specific to a facility are fundamentally different from the information the EPA considered in determining the BSER. This proposed clarification was intended to provide clear parameters for developing and assessing state plans, as the existing third circumstance is vague and potentially open-ended.

The EPA explained at proposal that the revisions clarified the RULOF provision by tethering a state's RULOF demonstration to the statutory factors the EPA considered in the BSER determination. As discussed in section III.E.1. of this preamble, CAA section 111(a)(1) gives the EPA the responsibility of determining the BSER and degree of emission limitation that is required of designated facilities in the source category; the EPA endeavors, to the extent reasonably practicable based on the information before it, to promulgate determinations that are achievable for every designated facility covered by an EG. Per the statutory requirements, the EPA determines the BSER by first identifying control methods that it considers to be adequately demonstrated and then determining which is the best system of emission reduction by evaluating the statutory factors: (1) the cost of achieving such reduction, (2) nonair quality health and environmental impacts, (3) energy requirements, and (4) the amount of emission reductions.⁹⁵ The EPA's BSER determination thus represents a system that is "adequately demonstrated" and reasonable for sources broadly within the source category; CAA section 111(a)(1) requires that standards of performance must reflect the degree of emission limitation that is achievable through application of the BSER.

In considering the BSER, the D.C. Circuit has stated that to be "adequately demonstrated," the system must be "reasonably reliable, reasonably efficient, and . . . reasonably expected to serve the interests of pollution control without becoming exorbitantly costly in an economic or environmental way." *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C.

Cir. 1973). Thus, in making the BSER determination, the EPA must evaluate whether a system of emission reduction is "adequately demonstrated" for the source category or sub-category based on the physical possibility and technical feasibility of control. Similarly, the court has interpreted CAA section 111(a)(1) as using reasonableness in light of the statutory factors as the standard in evaluating cost, so that a control technology may be considered the "best system of emission reduction . . . adequately demonstrated" if its costs are reasonable (*i.e.*, not exorbitant, excessive, or greater than the industry can bear), but cannot be considered the BSER if its costs are unreasonable.⁹⁶ In light of the statutory factors the EPA is required to consider, it follows that most designated facilities within the source category or subcategory should be able to implement the BSER at a reasonable cost to achieve the degree of emission limitation determined by the EPA. Consideration of RULOF is appropriate only for particular sources for which implementing the BSER to achieve that degree of emission limitation would impose unreasonable costs or would otherwise not be feasible due to facility-specific circumstances that are not applicable to the broader source category (or subcategories) and that the EPA did not consider in determining the BSER.

For example, if the EPA applied a specific cost threshold in determining the BSER, application of RULOF based on cost would only be appropriate where the cost of achieving the associated degree of emission limitation at a particular designated facility is unreasonably high relative to the costs the EPA considered for the BSER. Or, by way of further example, if the EPA were to determine that a specific back-end control technology is adequately demonstrated and the BSER for a source category, a state may need to evaluate whether it would be physically possible to install that control technology at a designated facility given the particular size and physical constraints of that facility. Application of RULOF to deviate from the EPA's determinations pursuant to CAA section 111(a)(1) may be appropriate, *e.g.*, where the state could show that the cost of achieving the degree of emission limitation would be significantly higher at a specific designated facility than the cost-per-ton EPA considered in setting the BSER, or that a specific designated facility does

not have adequate space to reasonably accommodate the installation of the BSER and the facility cannot reasonably achieve the degree of emission limitation using a different control technology. The EPA proposed to require states to hew to the same types of factors and analyses the EPA's considered in its BSER determination when demonstrating that the EPA's determinations are not reasonable for a particular designated facility; the Agency explained that this would be consistent with the statutory framework under which RULOF is a limited exception to the level of stringency otherwise required by the BSER.⁹⁷

Related to the proposed revisions at 40 CFR 60.24a(e), the EPA also proposed to add new § 60.24a(g) to the regulations, which would explicitly provide that a state plan may not apply a less stringent standard of performance in cases where a designated facility cannot reasonably apply the BSER to achieve the degree of emission limitation determined by the EPA, but *can* reasonably implement a different technology or other system to achieve that same degree of emission limitation. This is consistent with the statutory framework, which does not require sources to implement the EPA's BSER but rather permits states to allow their sources to comply with their standards of performance using systems of their choosing.

The EPA received a range of comments on the proposed revisions to the threshold circumstances for invoking RULOF to apply a less-stringent standard of performance. Some commenters agreed with the EPA that the existing criteria are not specific or clear enough to ensure that RULOF is invoked only when a designated facility cannot achieve the degree of emission limitation that the EPA has determined pursuant to section 111(a)(1). Several commenters supported the EPA's proposal that application of RULOF is only appropriate where a facility cannot reasonably apply the BSER to achieve the degree of emission limitation determined by the EPA based on fundamental differences between that facility and the factors the EPA considered in the BSER determination. Some commenters also urged the EPA to explicitly apply the "fundamentally different" standard to all three circumstances under 40 CFR 60.24a(e).

However, other commenters argued that the EPA cannot preclude states from considering factors specific to particular facilities on the basis that the EPA did not consider those factors in

⁹⁵ Although CAA section 111(a)(1) may be read to state that the factors enumerated in the parenthetical are part of the "adequately demonstrated" determination, the D.C. Circuit's case law may be read to treat them as part of the "best" determination. See *Sierra Club v. Costle*, 657 F.2d 298, 330 (D.C. Cir. 1981). Under either approach, the EPA's analysis and ultimate determination as to the BSER would be the same. In determining the "best" system of emission reduction, the EPA also considers the advancement of technology, consistent with D.C. Circuit caselaw. See *id.* at 347.

⁹⁶ See *Lignite Energy Council v. EPA*, 198 F.3d 930, 933 (D.C. Cir. 1999), *Sierra Club v. Costle*, 657 F.2d 298, 343 (D.C. Cir. 1981), *Portland Cement Ass'n v. EPA*, 513 F.2d 506, 508 (D.C. Cir. 1975).

⁹⁷ 87 FR 79199.

determining the BSER, and that the “fundamentally different” standard unlawfully narrows states’ consideration of site-specific factors under the third RULOF criterion. Some commenters further contended that states should have wide latitude and flexibility to consider RULOF and that the EPA lacks authority to restrict states’ abilities to apply RULOF in circumstances they deem appropriate. The EPA also received a request from one commenter asking the Agency to clarify how the proposed provisions at 40 CFR 60.24a(e) and (g) interact with each other.

The EPA is finalizing the provisions for invoking RULOF at 40 CFR 60.24a(e) with clarifying revisions relative to proposal. Based on these changes, the proposed addition of 40 CFR 60.24a(g) is redundant; the EPA is therefore not finalizing this provision.

These revisions to 40 CFR 60.24a(e) are necessary to ensure that state plans comply with CAA section 111(d). As explained above, the EPA’s determination of the degree of emission limitation achievable through application of the BSER is the level of stringency required by CAA section 111(d), unless it can be demonstrated that something about the EPA’s determination does not hold true for a particular designated facility. The enumerated circumstances for invoking RULOF in 40 CFR 60.24a(e) mirror the information the EPA considers in making its BSER and degree of emission limitation determination pursuant to CAA section 111(a)(1): information related to determining that a system is adequately demonstrated (including physical possibility and technical feasibility), the cost of achieving emission reductions, and other factors, which include nonair quality health and environmental impacts and energy requirements. Thus, the long-standing RULOF provision⁹⁸ is formulated for states to examine, at a minimum, the same factors the EPA considered in determining the BSER in order to determine the reasonableness of the EPA’s BSER and degree of emission limitation as it applies to a particular designated facility. In this action, the EPA is clarifying the circumstances in 40 CFR 60.24a(e) for invoking RULOF in order to provide more objective and consistent criteria that will aid both states and the EPA in developing and reviewing standards of performance consistent with CAA section 111(d), as

well as ensure the equitable treatment of states and sources that avail themselves of the RULOF provision.

The EPA disagrees with commenters who argued that the proposed revisions to the third circumstance unlawfully constrain states’ authority to invoke RULOF. On the contrary, the EPA believes these revisions provide necessary clarity to ensure that states invoke RULOF in appropriate circumstances. First, as discussed more fully in section III.E.2. of this preamble, Congress directed the EPA to promulgate regulations for the submission of state plans that “permit” states to consider RULOF. Rather than granting states unfettered discretion to consider RULOF in applying standards of performance, the statute directs the EPA to establish regulations describing the “permissible” use of such consideration. Thus, the EPA has the authority and obligation to guide states’ consideration of RULOF.

Second, the revisions to 40 CFR 60.24a(e) provide a clear and easily replicable standard for when it is appropriate to apply a less stringent standard of performance: when there are fundamental differences between the information the EPA considered in determining the degree of emission limitation and the information specific to a facility that make the EPA’s degree of emission limitation unreasonable for the facility. In addition to clarifying the circumstances under which consideration of RULOF is appropriate, this standard also provides greater specificity that will aid both states and the EPA in implementing the provision. This standard is further consistent with statutory purpose, structure, and history of CAA section 111(d), under which the generally applicable requirement is the degree of emission limitation determined by the EPA and RULOF serves as a variance to that requirement.⁹⁹ Moreover, the revisions to 40 CFR 60.24a(e) will provide a framework for the EPA to use when considering any requests for less stringent standards of performance when the Agency is promulgating a Federal plan, which is again critical to ensuring both the equitable treatment of states and sources and the integrity of an EG’s emission reduction purpose.

This revision will additionally provide the EPA with clear criteria to use when evaluating any invocation of RULOF in state plans to determine whether providing a less-stringent standard of performance is consistent with the statutory framework and

therefore approvable as “satisfactory.” As noted above, it provides an objective, replicable benchmark against which to assess states’ plans, which can be further elaborated on in individual EGs.

The “fundamentally different” standard ensures that RULOF is invoked for circumstances where application of the statutory factors would lead to a result that is outside the realm of what the EPA considered reasonable in determining the BSER. The EPA makes BSER determinations on a source category, or sub-category, basis. Necessarily, therefore, the Agency considers information relevant to potential BSERs for representative, average units or as average values for the set of designated facilities. Implicit in an EPA determination that a system is the BSER based on average, representative information is a determination that values around those average representative values are also reasonable, including some portion of unit-specific values that will deviate from but are not significantly different than the average representative values. Therefore, in order to justify deviating from the EPA-determined degree of emission limitation, the circumstances of a particular source must be not just different but fundamentally different from those the Agency considered in determining the BSER.

Furthermore, as explained at proposal, the “fundamentally different” standard is also consistent with other variance provisions that courts have upheld for environmental statutes. For example, in *Weyerhaeuser Co. v. Costle*,¹⁰⁰ the court considered a regulatory provision promulgated under the Clean Water Act (CWA) that permitted owners to seek a variance from the EPA’s national effluent limitation guidelines under CWA sections 301(b)(1)(A) and 304(b)(1). The EPA’s regulation permitted a variance where an individual operator demonstrates a “fundamental difference” between a CWA section 304(b)(1)(B) factor at its facility and the EPA’s regulatory findings about the factor “on a national basis.”¹⁰¹ The court upheld this standard as ensuring a meaningful opportunity for an operator to seek dispensation from a limitation that would demand more of the individual facility than of the industry generally, but also noted that such a provision is not a license for avoidance of the Act’s strict pollution control requirements.¹⁰²

⁹⁸ The circumstances for invoking RULOF in the existing subpart Ba provision at 40 CFR 60.24a(e) are identical to those in the original variance provision of subpart B at 40 CFR 60.24(f).

⁹⁹ See the discussion in section III.E.3.b. of this preamble.

¹⁰⁰ 590 F.2d 1011 (D.C. Cir. 1978).

¹⁰¹ Id. at 1039.

¹⁰² Id. at 1035.

The EPA is revising the regulatory text of 40 CFR 60.24a(e) relative to proposal to explicitly provide that the “fundamentally different” standard applies to all three categories of circumstances for invoking RULOF. This change is consistent with the stated intent at proposal; for example, the EPA proposed “to require that, in order to demonstrate that a designated facility cannot reasonably meet the presumptive level of stringency based on one of these three criteria, the state must show that implementing the BSER is not reasonable for the designated facility due to fundamental differences between the factors the EPA considered in determining the BSER, such as cost and technical feasibility of control and circumstances at the designated facility.”¹⁰³ As explained above, in order to be consistent with the statutory framework, the fundamentally different standard necessarily applies to any consideration that may be cause to invoke RULOF to provide a less-stringent standard of performance.

There may be instances in which the EPA has not considered, in making its BSER determination, a circumstance that makes the BSER unreasonable for a particular facility because that circumstance is not applicable to the average or typical designated facility in the source category. Where the EPA did not consider a circumstance that is relevant to a particular designated facility and that circumstance causes the BSER to be unreasonable for that facility due to one or more of the reasons enumerated in 40 CFR 60.24a(e), a state may find there is a fundamental difference from the information the EPA considered in determining the degree of emission limitation achievable through application of the BSER. That is, if the EPA did not consider any information pertaining to a certain circumstance in making its determination, facility-specific information relevant to that circumstance that demonstrates that achieving the degree of emission limitation is unreasonable pursuant to 40 CFR 60.24a(e) may be “fundamentally different” from the information the EPA considered. The EPA notes that, in many cases, facility-specific circumstances can be considered in terms of differences in cost. For example, an issue of the technical feasibility of implementing a control to achieve a certain degree of emission limitation may, at its root, be an issue of being able to achieve that degree of emission limitation *at a reasonable cost*. Because cost is generally a more quantifiable and

replicable metric, where possible the EPA expects states to include the impacts of any facility-specific circumstances in the cost calculation, rather than evaluating those circumstances under a different factor or consideration.

The EPA is also finalizing its proposed clarifying revisions to 40 CFR 60.24a(e) with further updates. The existing provision in subpart Ba was not clear, unless it was read directly in conjunction with 40 CFR 60.24a(c), that its specific purpose is application of less stringent standards of performance pursuant to consideration of RULOF; it did not mention less stringent standards until 40 CFR 60.24a(e)(3).¹⁰⁴ The EPA therefore proposed and is finalizing revisions so that the provision’s purpose is now clearly stated at the outset. The EPA is also making two further revisions relative to the proposed 40 CFR 60.24a(e). First, it is adding back in language allowing the RULOF provision to be used to provide a compliance schedule longer than otherwise required by an applicable emission guideline. In proposing to revise 40 CFR 60.24a(e), the EPA inadvertently deleted the phrase “that make application of a less stringent . . . final compliance time significantly more reasonable” in the document containing redline/strikeout of the subpart Ba regulations.¹⁰⁵ It was not the EPA’s intent to preclude the use of RULOF to provide a longer compliance schedule; this has been part of the provision since the original variance in 1975.¹⁰⁶ However, as the language pertinent to providing a longer compliance time no longer fits in its original sub-paragraph, the EPA is adding this allowance back elsewhere in 40 CFR 60.24a(e).

Second, the EPA is revising this provision relative to proposal to change the circumstances under which invoking RULOF is appropriate from the state demonstrating that “the facility cannot reasonably apply the best system of emission reduction to achieve the degree of emission limitation determined by the EPA . . .” to the state demonstrating that “the facility cannot reasonably achieve the degree of emission limitation determined by the EPA. . . .” At proposal, the EPA explained that “the state must show that implementing the BSER is not reasonable for the designated facility due to fundamental differences between

the factors the EPA considered in determining the BSER, such as cost and technical feasibility of control and circumstances at the designated facility.”¹⁰⁷ However, it is not sufficient that a facility not be able to implement the BSER; the state must demonstrate that the facility cannot otherwise reasonably achieve the EPA’s degree of emission limitation (for example, through a different system of emission reduction) in order for a facility to be eligible for a less stringent standard of performance. This is consistent with the definition of “standard of performance” in CAA section 111(a)(1), which is a “standard for emissions of air pollutants” that “reflects the degree of emission limitation achievable through application of the [BSER],” as opposed to a standard requiring the application of the BSER. That is, the statute requires a certain degree of emission limitation, not the use of a particular technology. Therefore, the fact that a facility cannot apply the BSER on its own is not sufficient to invoke RULOF.

The EPA believes that simplifying the language in 40 CFR 60.24a(e) will reduce confusion about the ultimate circumstances under which invoking RULOF is appropriate: where a particular facility cannot meet the degree of emission limitation determined by the EPA. Because the degree of emission limitation is based on the EPA’s BSER determination, the information the EPA considered in determining the BSER remains the touchstone for determining when a particular facility cannot reasonably achieve the degree of emission limitation in the applicable emission guideline. Furthermore, given that the BSER presumptively reflects a system that is adequately demonstrated and reasonable for all designated facilities within a source category or subcategory, the EPA anticipates that in many if not most instances a state considering RULOF will in fact be evaluating the reasonableness of applying the BSER to achieve the degree of emission limitation. However, even if the state is evaluating the use of a different system to achieve the degree of emission limitation determined by the EPA, the factors and information the EPA considered in the EG, *e.g.*, cost effectiveness, will remain relevant to this inquiry.

As a corollary to this change, the EPA is not finalizing the provision proposed at 40 CFR 60.24a(g), which would have provided that a state could not apply a less stringent standard of performance where a facility could reasonably

¹⁰⁴ 84 FR 32520, 32577 (July 8, 2019).

¹⁰⁵ Memorandum, “Redline/Strikeout for proposed amendments to 40 CFR 60 Subpart Ba: Adoption and Submittal of State Plans for Designated Facilities,” Docket ID No. EPA-HQ-OAR-2021-0527-0035.

¹⁰⁶ See 40 CFR 60.24(f).

¹⁰⁷ 87 FR 79199.

¹⁰³ 87 FR 79199.

implement a system of emission reduction other than the BSER to achieve the degree of emission reduction determined by the EPA. This provision is redundant now that the EPA is clarifying in 40 CFR 60.24a(e) that states may apply less stringent standards of performance only when they demonstrate that a facility cannot reasonably achieve the degree of emission limitation determined by the EPA.

Both subpart B at 40 CFR 60.24(f) and the existing regulations of subpart Ba at 40 CFR 60.24a(e) provide that use of RULOF is appropriate if a state demonstrates that one of the three circumstances is met “with respect to each facility (or class of such facilities).” In the notice of proposed rulemaking for this action, the EPA stated that, “[t]o the extent that a state seeks to apply RULOF to a class of facilities that the state can demonstrate are similarly situated in all meaningful ways, the EPA proposes to permit the state to conduct an aggregate analysis of [the five BSER factors] for the entire class.”¹⁰⁸ The EPA is reiterating in this final rule that invoking RULOF and providing a less-stringent standard or performance or longer compliance schedule for a class of facilities is only appropriate where all the facilities in that class are similarly situated in all meaningful ways. That is, they must not only share the circumstance that is the basis for invoking RULOF, they must also share all other characteristics that are relevant to determining whether they can reasonably achieve the degree of emission limitation determined by the EPA in the applicable EG. For example, it would not be reasonable to create a class of facilities for the purpose of RULOF on the basis that the facilities do not have space to install the EPA’s BSER control technology if some of them are able to install a different control technology to achieve the degree of emission limitation in the EG. Similarly, it would not be appropriate for a state to conduct a single evaluation pursuant to 40 CFR 60.24a(f) to apply the same less stringent standard of performance to a class of facilities if individual facilities within that class have different characteristics that could result in different standards of performance. The evaluation of when it is appropriate to create a class of facilities is extremely source-sector and EG-specific; the EPA will address circumstances in which it may or may not be permissible to group facilities for purposes of RULOF in individual EGs.

In summary, the EPA is finalizing its proposed revisions to 40 CFR 60.24a(e) with additional clarifications. The first is to reflect that the “fundamentally different” standard applies to all three circumstances for invoking RULOF. This clarification reinforces that invocation of RULOF is appropriate when the circumstances of a particular designated facility are fundamentally different from those the EPA considered such that the facility cannot reasonably achieve the degree of emission limitation the EPA determined pursuant to CAA section 111(a)(1). Second, the EPA is revising the circumstances under which invoking RULOF is appropriate from a demonstration that a facility cannot reasonably apply the BSER to achieve the degree of emission limitation determined by the EPA to a demonstration that the facility cannot reasonably achieve the degree of emission limitation determined by the EPA. This change is intended to simplify and clarify the provision as it is the degree of emission limitation determined by the EPA, not the system used to achieve it, that has always been the relevant consideration under CAA sections 111(d) and 111(a)(1). Third, the EPA is clarifying the provision that states may use RULOF to provide for a longer compliance timeline as well as less-stringent standards of performance, which was inadvertently omitted from the proposed regulatory text. In general, the EPA is revising 40 CFR 60.24a(e) to provide more objective and consistent criteria for when it is appropriate to invoke RULOF in order to guide states in applying standards of performance to particular designated facilities and the EPA in evaluating state plans. The EPA is not finalizing proposed 40 CFR 60.24a(g), as this provision is now superfluous given the updates to 40 CFR 60.24a(e).

The EPA acknowledges that what is considered reasonable in light of the statutory factors is a fact-specific inquiry based on the source category and pollutant that is being regulated pursuant to a particular EG, and that the EPA cannot anticipate and address all circumstances that may arise in these general implementing regulations. Thus, the EPA may consider additional factors and establish additional parameters governing the consideration of RULOF, including what deviations from the EPA’s determinations may be within the range of reasonable versus deviations that constitute fundamental differences between facility-specific circumstances and the EPA’s degree of emission limitation determination, in a particular EG.

b. Calculation of a Standard Which Accounts for Remaining Useful Life and Other Factors

If a state has demonstrated, pursuant to 40 CFR 60.24a(e), that there is a fundamental difference between the information the EPA considered in the applicable EG and the information specific to a particular source that makes it unreasonable for that source to achieve the degree of emission limitation, the state may then apply a less stringent standard of performance.¹⁰⁹ The current RULOF provision, 40 CFR 60.24a(e), does not specify how a less stringent standard is to be calculated and applied. While this provision stands on its own and permits states to consider RULOF to apply a less stringent standard of performance, the lack of a process for determining any such standards makes it difficult for states to know whether the result will be approvable and additionally makes it difficult for the EPA to review less stringent standards in a consistent and equitable manner. In order to provide clarity and ensure the integrity of the emission reduction purpose of CAA section 111(d), as well as to ensure the equitable treatment of designated facilities across states, the EPA is promulgating a framework in 40 CFR 60.24a(f) for the calculation of a standard of performance that accounts for RULOF. As explained in this section of the preamble, the process the EPA is finalizing differs from the proposed framework, but the material components of calculating and applying a less stringent standard of performance, and the underlying purpose and direction of the EPA’s framework, remain the same.

The EPA proposed to require that states determine a source-specific BSER for each designated facility for which RULOF has been invoked pursuant to 40 CFR 60.24a(e) and include a standard of performance that reflects the degree of emission limitation achievable through application of that BSER in their state plans. The notice of proposed rulemaking explained that the statute requires the EPA to determine the BSER by considering emission control methods that it finds to be adequately demonstrated, and then determining which is the best system of emission

¹⁰⁹ States intending to apply a less-stringent standard of performance pursuant to RULOF would include all information, demonstrations, etc. necessary to satisfy 40 CFR 60.24a(e) through (h) in their state plan submissions. The EPA will first review a state’s demonstration that invocation of RULOF pursuant to 40 CFR 60.24a(e) is appropriate for a particular designated facility against the applicable requirements. If the EPA finds that demonstration satisfactory, it will proceed to evaluate the standard of performance for that facility applied pursuant to 40 CFR 60.24a(f).

¹⁰⁸ 87 FR 79200 n.46.

reduction by evaluating (1) the cost of achieving such reduction, (2) nonair quality health and environmental impacts, (3) energy requirements, and (4) the amount of reductions.¹¹⁰ To be consistent with this statutory construct, the EPA proposed to require that in determining a source specific BSER for a designated facility (or class of such facilities¹¹¹), a state must also consider all these factors in applying RULOF for that source.

Specifically, the EPA proposed that a state in its plan submission would identify all control technologies available for the source and evaluate the BSER factors for each technology, using the same factors and evaluation metrics as the EPA did in developing the EG. For example, if the EPA evaluated the cost factor using the evaluation metric of capital costs in determining the BSER, the EPA proposed that the state must do the same in evaluating a control technology for an individual designated facility, rather than selecting a different evaluation metric for cost. The state would then calculate the emission reductions that applying the source-specific BSER would achieve and select the standard of performance which reflects this degree of emission limitation. This standard would be in the form or forms (e.g., numerical rate-based emission standard) as required by the specific EG.

While the EPA proposed to require that states identify all control technologies or other systems of emission reduction available for the source and evaluate each system using the same factors and evaluation metrics as the EPA did in determining the BSER, it also solicited comment on whether there are additional factors, not already accounted for in the BSER analysis, that the EPA should permit states to consider in determining a less stringent standard of performance. The EPA further solicited comment on whether it should provide that the manner in which the EPA conducted the BSER analysis would be a presumptively approvable framework for applying a less-stringent standard rather than requirements and, if so, what different approaches states might use to evaluate and identify less stringent standards of performance.

The EPA also noted at proposal that CAA section 111(d) requires that state plans include measures that provide for the implementation and enforcement of a standard of performance. This requirement applies to any standard of performance established by a state, including one that accounts for RULOF. Such measures include monitoring, reporting, and recordkeeping requirements, as required by 40 CFR 60.25a, as well as any additional measures specified under an applicable EG. In particular, any standard of performance that accounts for RULOF is also subject to the requirement under subpart Ba that the state plan submission include a demonstration that each standard is quantifiable, non-duplicative, permanent, verifiable, and enforceable. 40 CFR 60.27a(g)(3)(vi). The EPA did not reopen these existing requirements of subpart Ba in this rulemaking.

The EPA received both comments in support of and comments opposed to the proposed requirements for calculating facility-specific standards of performance under RULOF. Some commenters supported the addition of a regulatory framework for facility-specific BSER analysis and stated that the BSER factors encompass all relevant information to a state's determination of an appropriate standard for a facility. Other commenters opposed the proposed framework. Comments in opposition largely fell into two categories: Some commenters asserted there is no basis in the statute for requiring states to conduct facility-specific BSER analyses pursuant to RULOF and, relatedly, that the EPA should not put restrictions on what states may consider in applying a less stringent standard of performance for a particular source but should rather maintain the wide latitude afforded to states under CAA section 111. Others stated that the EPA's proposed requirements would constitute a heavy lift for state agencies and would require substantial work for states to implement. In this vein, one commenter requested that the EPA not require states to evaluate, as part of their facility-specific BSER analyses, control technologies that the Agency has previously excluded from the BSER on the basis of technological or economic feasibility. Rather, the only control technologies that states should be required to evaluate are technologies that result in less emission reduction than the technology the EPA determined to be the BSER.

As explained below, the EPA disagrees with comments that there is no basis for putting a framework in

place for states and the Agency to use in applying and evaluating less stringent standards of performance. The EPA believes that such a framework is well supported by the statutory purpose, text, and context of the RULOF provision. In particular, after considering the comments, the EPA believes that the purpose, text, and context support a requirement that states (or the EPA in the case of a Federal plan) calculate and apply a standard of performance that varies from the EPA's degree of emission limitation in the applicable emission guideline only to the extent necessary to address the fundamental difference that is the basis for invoking RULOF.

First, providing a framework for calculating less stringent standards of performance is consistent with the text of CAA section 111(d) and is responsive to Congress's directive in that provision that the Agency prescribe regulations establishing a procedure for state plans, including regulations that "permit" states "in applying" a standard of performance to a particular source to "take into consideration" RULOF. The provisions the EPA is promulgating in this action set out a procedure—the series of steps and considerations states must undertake to apply a less stringent standard of performance. As described in section III.E.2. of this preamble, to "permit" something means to allow or give consent for that thing to occur. In this case, the EPA is prescribing the procedures that allow for states to apply less stringent standards of performance. To "apply" means "to put to a special use or purpose" or "put into practical operation,"¹¹² and "consideration" means "the action of taking into account."¹¹³ Thus, the state's authorization to "apply[]" a standard of performance to any particular source, "tak[ing] into consideration" RULOF, means the state may particularize a standard of performance for a given source by accounting for remaining useful life and other factors where there are fundamental differences between the information specific to a facility and the information the EPA considered in determining the degree of emission limitation achievable through application of the BSER. In doing so, the state must remain as consistent as possible with that degree of emission limitation in light of what the Supreme

¹¹⁰ The D.C. Circuit has stated that in determining the "best" system, the EPA must take into account "the amount of air pollution" reduced, see *Sierra Club v. Costle*, 657 F.2d 298, 326 (D.C. Cir. 1981), and the role of "technological innovation." *Id.* at 347.

¹¹¹ See section III.E.3.a. of this preamble. The EPA expects to address the appropriateness of invoking RULOF and applying less-stringent standards to a class of facilities in individual EGs.

¹¹² Oxford English Dictionary, <https://www.oed.com/search/advanced/Meanings?textTermText0=apply&textTermOpt0=WordPhrase>, last accessed Nov. 1, 2023.

¹¹³ *Id.*, <https://www.oed.com/search/advanced/Meanings?textTermText0=consideration&textTermOpt0=WordPhrase>, last accessed Nov. 1, 2023.

Court has recognized as the EPA's "primary regulatory role in section 111(d)" ¹¹⁴ and the emission reduction purpose of CAA section 111.

Second, the history and context of CAA section 111(d) supports the EPA's authority to provide a framework for states' consideration of RULOF. As explained in section III.E.2. of this preamble, the standards of performance that states establish in state plans must generally be no less stringent than the degree of emission limitation that Congress required, which is the degree of emission limitation that EPA determines in the applicable EG. ¹¹⁵ However, in the original 1975 subpart B implementing regulations, the EPA allowed states to grant variances from this degree of emission limitation in cases of economic hardship based on the age of the plant and other factors, as long as the states could justify the variances. ¹¹⁶ Congress then, in the 1977 CAA Amendments, included the RULOF provision in CAA section 111(d)(1), which similarly allows states to deviate from the EPA's degree of emission limitation based on consideration of an existing source's age (*i.e.*, remaining useful life) and other factors.

Congress's inclusion of the RULOF provision in CAA section 111(d)(1) should be interpreted as expressing its intent to confirm that the EPA has authority to promulgate a regulatory variance provision, including the provision the EPA had, at that time, recently promulgated. The EPA, following its 1974 proposal of the subpart B implementing regulations, had received a comment arguing that it did not have authority to promulgate such a variance provision, to which it responded by asserting that it did have the authority and explaining that such a provision is consistent with CAA section 111(d). ¹¹⁷ The Courts have held that Congress is presumed to be aware of an administrative interpretation under certain circumstances. ¹¹⁸ Accordingly, Congress's adoption of the RULOF provision in the 1977 CAA Amendments should be interpreted as expressing its intent to make explicit under CAA section 111(d) the EPA's

authority to promulgate regulations that include a variance provision. ¹¹⁹

It is also clear that the EPA understood the RULOF provision in CAA section 111(d)(1) to be a variance in the same way it had provided a variance in subpart B. This is evidenced by the fact that following the 1977 CAA Amendments the EPA did not revise its 1975 regulations, which were premised on this understanding, for over forty more years. ¹²⁰ This indicates that the EPA viewed its 1975 regulations granting a variance as authorized under the RULOF provision enacted in 1977.

The regulations the EPA is promulgating at 40 CFR 60.24a(f) are consistent with the long-held view that the Agency's implementing regulations provide a variance. While 40 CFR 60.24a(e) provides the process for invoking this variance, to date the regulations have not included the second part: how to address a source that has qualified for the variance. ¹²¹ Although variances may operate in different ways in the context of different statutory and regulatory schemes, it is

¹¹⁹ In the notice of proposed rulemaking for this rule, the EPA stated that "[t]here are noticeable differences between the subpart B variance provision and the CAA section 111(d) RULOF provision that indicate Congress did not intend to incorporate and ratify all aspects of the EPA's regulatory approach when amending CAA section 111(d) in 1977." The EPA thus proposed to conclude that it could not "clearly ascertain whether the statutory RULOF provision ratified the variance provision under subpart B" 87 FR 79176, 79205 (Dec. 23, 2022). Upon further consideration, however, the EPA believes the most reasonable interpretation of the statutory RULOF provision, given its history and context, is that Congress intended it to authorize the EPA to provide variances from the required degree of emission limitation on a case-by-case basis. However, the EPA agrees with its assessment at proposal that Congress did not necessarily incorporate or ratify specific aspects of the Agency's 1975 variance provision; it is reasonable that Congress would not have codified the precise regulations that the EPA promulgated in 1975 and instead leave the Agency space to revise those regulations as needed, as it is did in 2019 and is doing in the present rule.

¹²⁰ The ACE rule, in which the EPA promulgated subpart Ba in 2019, declined to refer to the RULOF provision as a "variance," apparently because the term conflicted with that rule's view that RULOF would be used to establish standards of performance as a general matter. 84 FR 32520, 32570 n. 291 (July 8, 2019). The ACE rule misunderstood the RULOF provision. As explained throughout section III.E. of this preamble, this provision authorizes a state to depart from the degree of emission limitation the EPA determines under CAA section 111(a)(1) when applying a standard of performance to a particular source pursuant to consideration of RULOF. As the 1975 regulations indicated, 40 FR 53332, 53344 (Nov. 17, 1975), it is appropriate to call this type of departure or exception a "variance."

¹²¹ The EPA explains the reasons it believes it is now necessary to provide the second part of the process for this variance—how to calculate a less stringent standard of performance—in section III.E.2. of this preamble.

clear from both the language and the context of the RULOF provision that Congress intended it to provide for alternative compliance with CAA section 111(d), *i.e.*, a less stringent standard of performance, to the extent necessary to address the fundamental differences between the EPA's EG and the circumstances of a particular facility. Such variances are common throughout environmental statutes and, for the environmental protection aim to be achieved, must be crafted so that the alternative is as close as possible to the statutory standard, even as it departs from the generally applicable requirement.

For example, Clean Water Act (CWA) section 301(b)(2) requires, in part, certain sources to achieve effluent limitations consistent with application of the best available technology economically achievable, which will result in reasonable further progress toward eliminating the discharge of all pollutants. These limitations must be determined in accordance with factors specified in the statute and are provided by either effluent limitation guidelines issued by the EPA or the permitting authority on a best professional judgment basis where no such national effluent limitation guidelines exist. CWA section 301(n) authorizes the EPA to grant variances for existing sources from the best available technology requirements of its effluent limitation guidelines where a facility can demonstrate that it is fundamentally different with respect to the factors (other than cost) specified in the statute and considered by the EPA in establishing those requirements. CWA section 301(n) further requires that, where a variance is warranted, the EPA must provide an alternative requirement that (1) is no less stringent than justified by the fundamental difference, and (2) will not result in a non-water quality environmental impact which is markedly more adverse than the impact considered in establishing the rule. ¹²²

Similarly, section 3004(m)(1) of the Resource Conservation and Recovery Act (RCRA) requires the EPA to promulgate regulations specifying the levels or methods of treatment of hazardous waste, if any, that "substantially diminish the toxicity of the waste or substantially reduce the

¹²² As another example, CWA section 301(c) provides that the EPA may modify the best available technology requirements for particular sources if a facility can demonstrate that a modified standard will (1) represent the maximum use of technology within the economic capability of the owner or operator and (2) will result in reasonable further progress toward the elimination of the discharge pollutants.

¹¹⁴ *West Virginia v. EPA*, 142 S. Ct. at 2601.

¹¹⁵ 40 CFR 60.24(c); 40 CFR 60.24a(c); see 39 FR 36102.

¹¹⁶ 40 CFR 60.24(f); 40 FR 53344.

¹¹⁷ 40 FR 53344.

¹¹⁸ See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when in re-enacts a statute without change.").

likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized.” The EPA has set generally applicable regulatory standards for the treatment of hazardous waste under RCRA section 3004(m)(1). The Agency has also provided regulatorily for waste-specific variances in instances in which it is not physically possible, or it is inappropriate, to treat waste to the level specified in the Agency’s treatment standard or to treat waste using the method the Agency specified as the treatment standard.¹²³ In order for the EPA to grant a variance, the party requesting it must provide an alternative waste treatment requirement that is sufficient to minimize threats to human health and the environment posed by disposal of the waste, *i.e.*, that is sufficient to satisfy the underlying statutory requirement, even though it differs from the generally applicable treatment standard prescribed by the EPA.

The discussion above highlights examples of environmental statutes that require adherence to a generally applicable standard, but under which either Congress or the EPA has authorized variances when it is impossible or unreasonable for a particular regulated entity to achieve that standard. For a general statutory standard requiring the “best” technology or “substantial” progress, the variances are an alternative way of achieving the statutory standard, as opposed to an exemption from that standard. In the case of the CWA variances, in particular, this means that the alternative requirement pursuant to the variance constitutes a degree of pollutant limitation that deviates as little as possible from the EPA’s regulation pursuant to that statutory standard. That is, the alternative requirement constitutes a particular regulated entity’s best effort to achieve the generally applicable standard.

The EPA has crafted 40 CFR 60.24a(e) and (f) to be a variance in the same vein as the CWA and RCRA statutory and regulatory provisions discussed above. It is clear from both the history and plain language of CAA section 111(d)(1) that Congress did not provide an exemption from regulation, but rather a method for providing alternative compliance with the general statutory requirement of that section.¹²⁴ CAA

section 111(d) provides that states must submit plans that include “standards of performance,” and CAA section 111(a)(1) defines “standard of performance” as “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which . . . the Administrator determines has been adequately demonstrated.” Thus, the underlying statutory standard is the degree of emission limitation determined by the EPA in the applicable EG. A variance from this statutory standard is not available if a source can reasonably achieve the EPA’s degree of emission limitation. If a variance is warranted, the alternative requirement, *i.e.*, a standard of performance pursuant to consideration of RULOF, must be a standard for emissions of air pollutants that is no less stringent than necessary to address the fundamental differences identified under 40 CFR 60.24a(e). That is, the degree of emission limitation of a standard of performance pursuant to RULOF must deviate as little as possible from the degree of emission limitation in the applicable EG.¹²⁵ Consistent with the structure of CAA section 111(d) generally, the RULOF provision does not prescribe the use of any particular system of emission reduction in conjunction with a less stringent standard of performance but instead focuses on ensuring that the degree of emission limitation deviates no more than necessary; anything less would be inconsistent with the general statutory framework.

Thus, 40 CFR 60.24a(f)(1) requires that a less stringent standard of performance be no less stringent (or have a compliance schedule no longer) than necessary to address the fundamental differences identified under 40 CFR 60.24a(e). It also contains a framework that states must use, to the extent necessary to satisfy that criterion, to determine the less stringent standard of performance. In some instances, determining the standard of performance that is no less stringent

than necessary to address the fundamental differences will be straightforward and the state will not need to undertake the analysis of additional systems of emission reduction that is laid out in the second and third sentences of 40 CFR 60.24a(f)(1). For example, where the BSER the EPA has identified in the applicable EG may be implemented at the source at either a lower stringency or with a longer compliance schedule and it is clear that no other system of emission reduction will result in greater stringency or a shorter schedule, it is unnecessary for a state to evaluate other systems in order to satisfy the first sentence of paragraph (f)(1). In this case, the state would simply justify the degree of emission limitation or compliance schedule as the most stringent or shortest reasonably possible.

However, where a particular source cannot implement the types of controls that comprise the BSER or where it is not apparent that implementation of the BSER at lower stringency or with a longer compliance schedule will result in a standard of performance that is no less stringent than necessary, evaluation of additional systems of emission reduction will be necessary under 40 CFR 60.24a(f)(1). In this situation, the EPA does not believe it is reasonably possible to determine a standard of performance that satisfies the criterion of § 60.24a(f)(1) without considering the systems of emission reduction that the EPA determined, in the applicable EG, have been adequately demonstrated.¹²⁶ As discussed below, however, it may not be necessary for a state to evaluate every system of emission reduction that the EPA considered. Thus, the EPA is requiring that, to the extent necessary to determine a standard of performance that is no less stringent than necessary, states must evaluate the systems of emission reduction in the applicable EG. As further discussed below, the EPA expects states will leverage the information and analysis the Agency has provided in that EG for their evaluations, particularizing that information to the circumstances of the particular facility as needed.

Similarly, it is not reasonably possible to craft a standard of performance that is no less stringent than necessary to address a fundamental difference between a particular facility’s circumstances and the information the EPA considered in determining the degree of emission limitation without engaging with that information.¹²⁷ In

(proposed regulations “provide that States may establish less stringent emission standards on a case-by-case basis provided that sufficient justification is demonstrated in each case”).

¹²⁵ Cf. *Weyerhaeuser Co. v. Costle*, F.2d 1011, 1035 (D.C. Cir. 1978) (Clean Water Act variance provision “authorizes the Agency to relieve a particular point source operator from any demands that the Act does not allow the Agency to make of the industry generally.” However, the point source operator must still, consistent with the general statutory requirement for the industry, use the best available technology economically available and “the variance may not halt progress toward eliminating pollution.”).

¹²³ 40 CFR 268.44.

¹²⁴ See CAA section 111(d)(1) (requiring that states considering RULOF for a particular source nonetheless apply a standard of performance to that source); 39 FR 36102, 36102 (Oct. 7, 1974)

¹²⁶ See 40 CFR 60.22a(b)(2).

¹²⁷ Cf. *Weyerhaeuser Co. v. Costle*, F.2d 1011, 1035 (D.C. Cir. 1978) (CWA section 304(b)(2)(B) lays out

determining the degree of emission limitation in an EG, the EPA considers whether available systems of emission reduction have been adequately demonstrated, the amount of emissions they reduce, the cost of achieving such reduction, any nonair quality health and environmental impacts, and energy requirements.¹²⁸ To evaluate whether a state's less stringent standard of performance is no less stringent than necessary, both states and the EPA need to be able to compare the information relevant to the source category (or subcategory) with the facility-specific information. Additionally, to ensure equitable consideration and treatment of sources in different states that have invoked RULOF to apply less stringent standards of performance, it is necessary that each state is using a common set of factors and metrics as the bases for their decisions. Using the factors¹²⁹ and evaluation metrics¹³⁰ that the EPA considered in determining the degree of emission limitation ensures "apples-to-apples" comparisons, both between the EPA's degree of emission limitation and a state's less stringent standard of performance and between different sources in different states. Thus, to the extent that states are evaluating systems of emission reduction to determine a less stringent standard of performance under 40 CFR 60.24a(f)(1), they must

the minimum factors the EPA must consider in determining the best available technology economically achievable on a source-category basis. In deciding whether a variance sought by a particular point source owner represents the "maximum use of technology within the economic capability of (that) owner, the permit-granting agency, and the EPA in supervising that agency, must consider the factors laid out in section 304(b)(2)(B).")

¹²⁸ The D.C. Circuit has stated that in determining the "best" system of emission reduction, the EPA must also take into account the role of "technological innovation." See *Sierra Club v. Costle*, 657 F.2d 298, 347 (D.C. Cir. 1981). However, because technological innovation is less likely to be relevant at the scale of a single facility than it is on a source-category basis, the EPA is not explicitly requiring states to consider it under 40 CFR 60.24a(f)(1).

¹²⁹ Under 40 CFR 60.24a(f)(1), as finalized in this action, states must evaluate the systems of emission reduction identified in the applicable EG. The EPA's EGs include systems of emission reduction that have been "adequately demonstrated." There is therefore no need for states to revisit the "adequately demonstrated" consideration. However, "adequately demonstrated" includes "technical feasibility" and the EPA acknowledges that systems of emission reduction that are adequately demonstrated for the source category may not be technically feasible for a particular source. The EPA is thus adding "technical feasibility" to the list of factors states must consider in determining a less stringent standard of performance.

¹³⁰ An "evaluation metric" includes both the form of the EPA's consideration of a factor and any threshold or level of reasonableness the EPA considered in the applicable EG.

use the same factors the EPA considered, and the evaluation metrics the EPA used to consider the factors, in doing so.

For example, assume the EPA considered cost using the evaluation metric dollars per ton of pollutant reduced and concluded that costs of up to \$500/ton of pollutant reduced are reasonable. A state has invoked RULOF for a particular source under 40 CFR 60.24a(e) because, based on that source's shortened remaining useful life, the cost, in dollars per ton of pollutant reduced, of achieving the degree of emission limitation in the applicable EG is fundamentally different from \$500/ton. The state, in determining a less stringent standard of performance pursuant to 40 CFR 60.24a(f), must evaluate the systems of emission reduction in the EG using the cost evaluation metric dollars per ton of pollutant reduced. In doing so, the state would consider the reasonableness of the costs of those systems against the benchmark of \$500/ton.

The regulations at 40 CFR 60.24a(e) also allow states to invoke RULOF based on a fundamental difference unrelated to cost, e.g., physical impossibility of implementing control equipment necessary to achieve the EPA's degree of emission limitation. In this instance, a state may find that a particular facility's footprint is such that there are no systems of emission reduction that could be installed at the facility to achieve the degree of emission limitation in the applicable EG. Under 40 CFR 60.24a(f)(1), the state would evaluate the systems of emission reduction in the EG using the factors—technical feasibility, amount of emission reductions, cost of achieving such reductions, nonair quality health and environmental impacts, and energy requirements—and evaluation metrics the EPA considered in order to determine the standard of performance that is both physically possible for the source to achieve and that is no less stringent than necessary.

As explained in section III.E.3.a., there may be facility-specific circumstances and factors that the EPA did not anticipate and consider in the applicable EG that make achieving the EPA's degree of emission limitation unreasonable for that facility. Such facility-specific information may constitute an "other factor specific to the facility" under 40 CFR 60.24a(e) and could potentially represent a fundamental difference between the information the EPA considered in determining the degree of emission limitation and the information specific to a facility. Such facility-specific "other

factors" may also be relevant in determining and applying a less stringent standard of performance. Thus, pursuant to the process the EPA is finalizing in 40 CFR 60.24a(f)(1), states may consider "other factors specific to the facility" that were the basis of the demonstration under paragraph (e) in determining and applying a less stringent standard of performance.

In some instances, the fundamental difference between the information the EPA considered in the applicable EG and the information specific to a facility will manifest as a difference in whether or how an enumerated factor applies to a particular facility. For example, parasitic load may be an appropriate evaluation metric for considering energy requirements for some systems of emission reduction but not for others, or water availability may not have been important to the EPA's consideration of nonair quality environmental impacts but may be relevant for a source located in a particularly water-scarce region. If such information represents a fundamental difference that make the EPA's degree of emission limitation determination unreasonable for a particular facility pursuant to 40 CFR 60.24a(e), it would be reasonable and permissible for a state to consider such information in applying a less stringent standard of performance under 40 CFR 60.24a(f)(1).

In addition to "other factors" that the EPA did not necessarily consider, there may be circumstances in which a system of emission reduction that the EPA did not consider in the applicable EG or that the EPA concluded was not adequately demonstrated because, e.g., it is not available on a source-category wide basis, is available, technically feasible, and potentially reasonable for a particular facility.

The EPA is therefore providing in 40 CFR 60.24a(f)(1) that states may consider, in determining a less stringent standard of performance, "other factors specific to a facility" that were the basis for the fundamental difference and invoking RULOF under 40 CFR 60.24a(e), as well as systems of emission reduction in addition to those the EPA considered in the applicable EG. At the same time, however, the EPA in a particular EG makes certain judgments about which systems are available and adequately demonstrated, as well as how the factors are reasonably considered when evaluating those systems for designated facilities within the source category. To ensure that any additional considerations do not result in a standard of performance that deviates more than necessary from the

EPA's degree of emission limitation, the state must justify how any additional consideration results in a standard of performance that is no less stringent than necessary to address the fundamental differences identified under paragraph (e).

In addition to being consistent with statutory and regulatory precedent on variances, the procedure the EPA is promulgating in 40 CFR 60.24a(f)(1) for determining standards of performance that are no less stringent than necessary is also consistent with CAA section 111. As explained throughout this section of the preamble, CAA section 111(a)(1) defines a standard of performance as a standard for emissions of air pollutants that reflects a certain degree of emission limitation and gives the EPA the "primary regulatory role"¹³¹ of determining that degree of emission limitation. Congress required that, in doing so, the EPA evaluate systems of emission reduction that have been adequately demonstrated and determine which is best based on the amount of emission reductions, cost of achieving such reduction, nonair quality health and environmental impacts, and energy requirements. As also explained in this section of the preamble, CAA section 111(d) directs the EPA to prescribe regulations that "permit" states "in applying" a standard of performance to a particular source to "take into consideration" RULOF. The requirements the EPA is promulgating in 40 CFR 60.24a(f)(1) "permit" a state to particularize a standard of performance for any given source by accounting for RULOF where there are fundamental differences between the information specific to a facility and the information the EPA considered in determining the degree of emission limitation in the applicable EG. In doing so, the state must remain as consistent as possible with that degree of emission limitation in light of what the Supreme Court has recognized as the EPA's primary regulatory role in CAA section 111(d) and the emission reduction purpose of CAA section 111. Because Congress has identified the factors noted above as relevant considerations for the EPA in determining a standard of performance, the Agency believes it is also reasonable to require states to consider these systems, factors, and evaluation metrics in the manner that the EPA did in applying standards of performance pursuant to 40 CFR 60.24a(f).

Furthermore, the EPA's authority to promulgate 40 CFR 60.24a(f) is buttressed by CAA section 111(d)(2). As

discussed in sections III.E.1. and 2. of this preamble, CAA section 111(d)(2) provides that the EPA shall have the same authority as under CAA section 110(c) to prescribe a Federal plan where a state fails to submit a satisfactory plan. The EPA's long-standing interpretation of this subsection is that it provides the Agency authority to substantively review states' standards of performance.¹³² The existing regulations of subpart Ba and the EPA's emission guidelines provide the substantive criteria for the Agency's evaluation of standards of performance generally;¹³³ the regulations the EPA is promulgating at 40 CFR 60.24a(f) constitute the substantive criteria for evaluating standards of performance states have applied pursuant to RULOF.

Some commenters on proposed 40 CFR 60.24a(f) dislike the EPA's approach to determining what constitutes a "satisfactory" less stringent standard of performance but offer no alternatives, other than states should have complete discretion to apply standards pursuant to RULOF. This cannot be correct. If this was the case, the EPA would have no choice but to approve plans in which states have applied business-as-usual standards, or standards that allows designated facilities' emissions to *increase*, even if more stringent standards of performance are reasonable for that facility. Such an outcome would be inconsistent with the text, context, and purpose of CAA section 111. The EPA believes the criteria it is providing for the Agency's substantive review of less stringent standards of performance are a reasonable approach to fulfilling its statutory obligation under CAA section 111(d)(2) to substantively review standards of performance in state plans.

Moreover, it is not uncommon for the EPA to promulgate regulatory frameworks to guide states in areas in which Congress has granted them discretion. For example, under the visibility protection provisions of CAA section 169A, Congress directed the EPA to promulgate regulations to assure that reasonable progress towards meeting the national goal for visibility improvement in mandatory class I Federal areas, as well as to assure compliance with the requirements of CAA section 169A. Section 169A further provides that states implement the visibility protection requirements through state implementation plans, in

which they must include emission limitations for sources of visibility impairing pollutants. The statute provides two types of control analyses for states to use in determining the applicable emission limitations: reasonable progress and best available retrofit technology.¹³⁴ Although Congress directed states to determine the best available retrofit technology for their existing sources, the EPA, in promulgating its implementing regulations, provided a detailed methodology and requirements for doing so in 40 CFR 51.308(e) and 40 CFR part 51, appendix Y. The EPA has similarly prescribed requirements for states to determine the emission reduction measures that are necessary to make reasonable progress in 40 CFR 51.308(f).¹³⁵ These requirements create procedural and substantive frameworks within which states exercise their discretion in order to ensure the outcomes of their control analyses are consistent with the statutory requirements and purpose. The regulatory framework and associated guidance also provide states useful clarity as to how the EPA will fulfill its statutory obligation to review and approve or disapprove state plans, and how the EPA will promulgate Federal plans.

The EPA is not providing that states can forgo analyzing control technologies or other systems of emission reduction that the EPA has excluded from being the BSER on the basis of technological or economic feasibility, as suggested by commenters. The EPA conducts BSER analyses on a source-category basis. It may be that a system of emission

¹³⁴ CAA section 169A(g)(1) and (2). The statutory factors that states must use to determine reasonable progress are "costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements." The statutory factors for best available retrofit technology analysis are: "costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology."

¹³⁵ The EPA has also issued extensive and detailed guidance for states in conducting reasonable progress analyses for sources of visibility impairing pollutants. See Guidance on Regional Haze State Implementation Plans for the Second Implementation Period (2019), available at <https://www.epa.gov/visibility/guidance-regional-haze-state-implementation-plans-second-implementation-period>; Clarifications Regarding Regional Haze State Implementation Plans for the Second Implementation Period (2021), available at <https://www.epa.gov/visibility/clarifications-regarding-regional-haze-state-implementation-plans-second-implementation>.

¹³² See 40 FR 53342 (CAA section 111(d)'s references to CAA section 110 suggest that Congress intended the Administrator to apply some substantive criterion to his review of State plans).

¹³³ See 40 CFR 60.24a(c).

¹³¹ *West Virginia v. EPA*, 142 S. Ct. at 2601.

reduction is generally adequately demonstrated but is not the BSER because it cannot be applied to designated facilities across the category at a reasonable cost or because it is technically infeasible for a certain portion of the category. However, designated facilities that are eligible to receive a less-stringent standard of performance are in demonstrably different circumstances than facilities in the source category generally. Therefore, control technologies or other systems that may not be the BSER for the source category may be reasonable for a source that has invoked RULOF. Similarly, to avoid inadvertently precluding consideration of a system that could allow a state to apply a standard of performance that is no less stringent than necessary, the EPA is not providing that states must consider only control technologies or systems that result in less emission reductions than the EPA's BSER. While it is true that states should only be in the position of applying less stringent standards of performance if they have demonstrated that a designated facility cannot achieve the degree of emission limitation, there may be situations in which it is not practical or feasible to ascertain *a priori* what degree of emission limitation a technology or system could achieve when applied to a particular source. Thus, the EPA does not believe it is reasonable to narrow the scope of control technologies or other systems of emission reduction that states must consider under these general implementing regulations. The Agency may find it appropriate to do so in the context of an individual EG.

Some commenters noted the resources and potential burden associated with conducting the proposed source-specific BSER analyses. While the EPA is not finalizing a requirement for states to conduct source-specific BSER analyses, it acknowledges that stakeholders could have similar concerns in the context of the provision being promulgated at 40 CFR 60.24a(f). However, the EPA does not believe the RULOF provisions will significantly add to states' planning processes. First, as explained in section III.E.2. of this preamble, consistent with the statutory framework the EPA believes that use of RULOF should be an exception to the general rule that the EPA's degree of emission limitation is reasonable for designated facilities within the applicable source category. Given the EPA's ability to subcategorize source categories and to tailor its EG to the circumstances of each subcategory, using RULOF to apply a less stringent standard of performance should be

appropriate in only very limited circumstances.

Second, as explained above, the EPA is providing in 40 CFR 60.24a(f)(1) that states must evaluate the systems of emission reduction in the applicable EG using the factors and evaluation metrics the EPA considered "[t]o the extent necessary to determine a standard of performance" that is no less stringent than necessary to address the fundamental differences identified under paragraph (e). As noted above, the EPA anticipates that in some if not many cases, states will be able to demonstrate that the less stringent standard of performance they are applying is no less stringent than necessary without evaluating all of the systems of emission reduction in the applicable EG. For example, if the EPA's degree of emission limitation is 95% reduction in emissions and a state applies a less stringent standard of performance that results in 90% reduction, the state may reasonably forgo evaluating additional systems of emission reduction if, based on the information in the EG, it is clear that none is able to achieve comparable reductions. Similarly, a state may not need to consider every system of emission reduction in an applicable EG if it starts by evaluating the system or systems that achieve the greatest emission reductions and applies a standard of performance corresponding to one of those systems.

Third, the EPA anticipates states applying less stringent standards of performance would leverage the information and analyses the Agency has provided in the applicable EG. In promulgating an EG, the EPA is required to provide the elements listed in 40 CFR 60.22a(b), which include "[a] description of systems of emission reduction which, in the judgment of the Administrator, have been adequately demonstrated," and "[i]nformation on the degree of emission limitation which is achievable with each system, together with information on the costs, nonair quality health environmental [sic] effects, and energy requirements of applying each system to designated facilities," as well as "[s]uch other available information as the Administrator determines may contribute to the formulation of State plans." In many cases, the EPA provides extensive technical support documents including feasibility and cost analyses. The Agency also typically discusses the types of nonair quality health and environmental effects and energy requirements that might be expected in conjunction with various systems of emission reduction applicable to the

source category. Although designated facilities for which RULOF has been invoked are in fundamentally different circumstances that the average or typical facilities that EPA considers in the context of its own analysis, the information provided in an EG will provide a starting point and, in at least some cases, much of the analytical basis for states' evaluations.

Fourth, in the event the state needs to analyze different systems of emission reduction to determine a less stringent standard of performance, the EPA believes it would be in this position regardless of any requirements the Agency does or does not provide. That is, because CAA section 111(d)(1) requires a standard of performance for each existing source, the EPA does not believe the framework being provided in 40 CFR 60.24a(f) will significantly alter states' workload if and when invoking RULOF. Rather, it is intended to provide clarity for states in developing standards of performance consistent with the statutory requirements. The EPA intends for these requirements to in fact reduce planning burdens overall, as they provide a framework for states to submit approvable standards of performance for sources invoking RULOF, thereby obviating the need for subsequent plan revisions to address any disapproved standards.

As noted above, the EPA requested comment on whether to provide consideration of the five BSER factors as part of a source-specific BSER analysis as a presumptively approvable framework for applying a less stringent standard of performance, as opposed to requirements. The framework the EPA is finalizing in this action differs from the proposed approach under which states would conduct source-specific BSER analyses; the process the EPA is finalizing at 40 CFR 60.24a(f) is premised on determining the appropriate variance from the EPA's degree of emission limitation. The EPA is providing this framework as requirements for states applying a less stringent standard of performance. As explained elsewhere in this section of the preamble, the EPA does not believe it is possible, as a practical matter, to determine a standard of performance that is no less stringent than necessary without evaluating the systems of emission reduction that the EPA determined are adequately demonstrated and engaging with the factors and evaluation metrics that the EPA used to evaluate those systems in the applicable EG. Therefore, the EPA believes that states must use the framework laid out in 40 CFR 60.24a(f) in order for the resulting variance to be

consistent with CAA section 111(d). As laid out in the § 60.24a(f)(1), states may also consider additional systems and other factors specific to the facility that were the basis of the fundamental difference identified under 40 CFR 60.24a(e), so long as they justify that any such consideration is consistent with applying a standard of performance that is no less stringent than necessary.

In sum, the EPA is not finalizing its proposed requirement under 40 CFR 60.24a(f)(1) that states that have invoked RULOF for a particular facility determine a source-specific BSER. As a result, it is also not finalizing the provision proposed at 40 CFR 60.24a(f)(2) that would have required states to calculate the emission reductions a source-specific BSER would achieve and apply the standard of performance that reflects this degree of emission reduction. However, consistent with its proposal, the EPA continues to believe it is necessary for the Agency to provide a process for states that have invoked RULOF for a particular facility to follow in applying a less stringent standard of performance. The EPA is therefore promulgating requirements at 40 CFR 60.24a(f) to ensure that states that have invoked RULOF for a particular designated facility apply a standard of performance that is no less stringent than necessary to address the fundamental differences identified under 40 CFR 60.24a(e). These provisions are necessary to ensure consistency with the purpose, text, and context of CAA section 111(d), including an understanding of RULOF as a limited variance from the degree of emission limitation in the applicable EG. The provisions at 40 CFR 60.24a(f)(1) as finalized will require states to determine a less stringent standard of performance that is no less stringent than necessary. In doing so, states must, to the extent necessary, evaluate the systems of emission reduction in that EPA using the factors and evaluation metrics that the EPA considered. States may also consider, as justified, other factors specific to the facility that were the basis for invoking RULOF under 40 CFR 60.24a(e), as well as additional systems of emission reduction. The EPA is finalizing the provision proposed at 40 CFR 60.24a(f)(3), requiring that a less stringent standard of performance pursuant to RULOF be in the form ¹³⁶

required by the applicable EG, at paragraph (f)(2).

c. Contingency Requirements

The EPA recognizes that a source's operations may change over time in ways that cannot always be anticipated or foreseen by the EPA, state, or designated facility. This is particularly true where the basis of the application of RULOF is a designated facility's operational conditions, such as the source's remaining useful life or restricted capacity. If the designated facility subsequently changes its operating conditions after the state or EPA applies a less stringent standard of performance, the basis for the variance may be abrogated and the standard of performance may no longer be no less stringent than necessary. For example, a state may seek to invoke RULOF for an EGU on the basis that it is running at lower utilization than the EPA considered in determining the degree of emission limitation and intends to do so for the duration of the compliance period required by an EG. Under this scenario, the state may be able to demonstrate that it is not reasonably cost-effective for the designated facility to achieve the degree of emission limitation and the state could set a less stringent standard of performance for this EGU. However, because reduced utilization is not a physical constraint on the designated facility's operations, it is possible that the source's utilization could increase in the future without any other legal constraint.

The EPA proposed to address this potential scenario by adding a contingency requirement to the RULOF provision at 40 CFR 60.24a(h) that would require a state to include in its state plan an instrument making a source's operating condition, such as remaining useful life or restricted capacity, enforceable whenever the state seeks to rely on that operating condition as the basis for a less stringent standard. This requirement would not extend to instances where a state applies a less stringent standard on the basis of an unalterable condition that is not within the designated source's control, such as technical infeasibility, space limitations, water access, or geologic sequestration access. Rather, this requirement addresses operating conditions such as operation times, operational frequency, process temperature and/or pressure, fuel parameters, and other conditions that are subject to the discretion and control of the designated facility.

Many commenters on this subject supported the EPA's proposed approach to operating conditions that are within a designated facility's control. They

noted that, in the absence of an enforceable requirement, a designated facility could change its operations with the result being foregone emission reductions and undermining of the level of stringency in the EG. One commenter stated that the EPA should not permit a source that has legally committed to a retirement date as a condition of invoking RULOF to receive a less-stringent standard to postpone that date because, even if it committed to meet the emission limitation in the EG from that point forward, it could not make up for its excess emissions before that time. Other commenters opposed the EPA's proposed requirement and asserted that the EPA had cited no legal authority or record basis for a need to require states to make operational conditions that are the basis of less stringent standards into enforceable requirements in state plans. One commenter noted that states should have latitude in their regulatory and permit processes to determine what additional restrictions or contingencies are necessary to ensure that the less stringent standard remains appropriate over time.

The EPA continues to believe the requirement proposed at 40 CFR 60.24a(h) is a necessary and reasonable safeguard to ensure that designated facilities' standards of performance are consistent with the level of stringency Congress required. Where are particular facility's operating conditions are the basis for a variance from the EPA's degree of emission limitation, that variance is warranted only so long as the operating condition remains a fundamental difference between that facility's circumstances and the information the EPA considered in the applicable EG. Therefore, in order for a state plan to include satisfactory standards of performance as well as measures for the implementation and enforcement of those standards pursuant to CAA section 111(d)(1), the contingency must be an enforceable requirement in that plan; upon EPA approval of the plan the contingency becomes a federally enforceable requirement (in addition to being enforceable through the state-law instrument that was included in the plan). Inclusion in a state permit, rule, or other instrument alone is not sufficient to satisfy CAA section 111(d)(1). A state-only instrument can additionally be changed outside the state plan revision process, which could result in the lifting of the operational condition without a corresponding adjustment to the designated facility's less stringent standard of performance.

The EPA notes that it has a practice of requiring operational conditions that

¹³⁶ "Form" of the less stringent standard of performance refers to a numerical emissions standard versus a work practice standard, the units in which a standard is expressed, or both.

are the basis of less stringent emission limitations to be included in state plans or state implementation plans under CAA section 111 or 110, respectively, including in the Affordable Clean Energy Rule¹³⁷ and under the CAA's regional haze program.¹³⁸

States may revise their state plans to allow a designated facility that has committed to retiring as the basis for invoking RULOF to postpone its retirement date. There could be many reasons a designated facility that previously agreed to a federally enforceable commitment to cease operations by a certain date might need to extend that date. The EPA is unable to assess, in the context of these general implementing regulations, an appropriate approach for all possible circumstances to ensure that the level of stringency of the EG is not undermined. The EPA anticipates addressing this consideration in individual EGs.

As previously discussed, the state plan submission must also include measures for the implementation and enforcement of a standard that accounts for RULOF. For standards that are based on operating conditions that a facility has discretion over and can control, the operating condition and any other measure that provides for the implementation and enforcement of the less stringent standard must be included in the plan submission and as a component of the standard of performance. For example, if a state applies a less stringent standard for a designated facility on the basis of a lower capacity factor, the plan submission must include an enforceable requirement for the source to operate at or below that capacity factor, and include monitoring, reporting, and recordkeeping requirements that will allow the state, the EPA, and the public to ensure that the source is in fact operating at that lower capacity. A specific EG may detail supplemental or different requirements on implementing the proposed general requirement that a state plan submission include both the operating condition that is the basis for a less stringent standard, and measures

to provide for the implementation and enforcement of such standard.

The EPA notes there may be circumstances under which a designated facility's operating conditions change permanently so that there may be a potential violation of the contingency requirements approved as federally enforceable components of the state plan. For example, a designated facility that was previously running at lower capacity now plans to run at a higher capacity full time, which conflicts with the federally enforceable state plan requirement that the facility operate at the lower capacity. To address this concern, a state may submit a plan revision to reflect the change in operating conditions. Such a plan revision must include a new standard of performance that accounts for the change in operating conditions. The plan revision would need to include a standard of performance that reflects the degree of emission limitation required by the EG and meet all applicable requirements, or if a less stringent standard is still warranted for other reasons, the plan revision would need to meet all of the applicable requirements for considering RULOF. The new standard of performance would only become effective upon the EPA's determination that the plan revision is satisfactory.

The EPA is finalizing as proposed the requirement that, where a plan applies a less stringent standard of performance on the basis of an operating condition within the designated facility's control, such as remaining useful life or restricted capacity, the plan must also include such operation condition or conditions as an enforceable requirement (this requirement was proposed at 40 CFR 60.24a(h) and is being finalized at 40 CFR 60.24a(g)). The plan must also include requirements to provide for the implementation and enforcement of the operating condition, such as monitoring, reporting, and recordkeeping requirements.

d. Requirements Specific to Remaining Useful Life

CAA section 111(d) explicitly requires that the EPA permit states to consider remaining useful life in applying a standard of performance. While the EPA may consider the age of designated facilities within a source category as a general matter in determining the BSER, it is a factor that can have considerable variability from facility to facility. The annualized costs can change considerably based on the applied technology at any particular designated facility given the amortization period. When the EPA determines a BSER, it

considers cost and, in many instances, specifically considers annualized costs associated with payment of the technology associated with the BSER. The shorter that payback period is (*i.e.*, shorter remaining useful life), the less cost-effective that BSER may become. The current RULOF provision in subpart Ba generally allows for a state to account for remaining useful life to set a less stringent standard. However, the provision does not provide guidance or parameters on when and how a state may do so.

Consistent with the principles described previously in section III.E., the EPA proposed requirements for when a state seeks to apply a less stringent standard on grounds that a designated facility will retire in the near future. Specifically, the EPA proposed that the Agency would be required to identify in an EG the outermost retirement date for designated facilities that could qualify for consideration of remaining useful life, or a methodology and considerations for states to use in determining such an outermost date. The proposed regulations would have also allowed states to apply a routine maintenance standard of performance to designated facilities with "imminent" retirement dates and additionally provided that the EPA may define the timeframe for imminent retirements in an EG. Finally, consistent with the proposed provisions regarding contingency requirements, the EPA proposed that any state plan that applies a standard of performance that is based on a particular designated facility's remaining useful life must include the retirement date as an enforceable commitment and provide measures for its implementation and enforcement.

Several commenters supported the EPA's proposal to identify in an EG an outermost and imminent retirement date to guide states' consideration of remaining useful life in setting less stringent standards. Some supportive commenters also urged the EPA to prescribe further requirements for designated facilities that rely on a shorter remaining useful life, including prohibiting them from extending their retirement dates and defining an imminent retirement as one that occurs within two years of state plan submission. Other commenters opposed the EPA's proposed requirements around the consideration of remaining useful life. Some argued that the requirements would foreclose states from considering remaining useful life when a designated facility's retirement date falls outside the prescribed range and that, although states must reasonably exercise their discretion, the

¹³⁷ 84 FR 32520, 32558 (July 8, 2019). The EPA has proposed to repeal the ACE Rule on other grounds. See 88 FR 33240 (May 23, 2023).

¹³⁸ See, *e.g.*, 76 FR 12651, 12660–63 (March 8, 2011) (best available retrofit technology requirements for Oregon source based on enforceable retirement that were to be made federally enforceable in state implementation plan); Guidance on Regional Haze State Implementation Plans for the Second Implementation Period at 34, EPA–457/B–19–003, August 2019 (to the extent a state relies on an enforceable shutdown date for a reasonable progress determination, that measure would need to be included in the SIP and/or be federally enforceable).

CAA puts no limits on their consideration of this factor. Adverse commenters also noted that the remaining useful life consideration is very source-specific and that there may be relevant factors that the EPA would not necessarily take into account when determining the outermost and imminent dates in an EG.

After consideration of the comments received, the EPA has decided not to finalize the provisions proposed at 40 CFR 60.24a(i) regarding remaining useful life. As a general matter, the proposed requirement for the EPA to identify an outermost and imminent retirement date for the consideration of remaining useful life was intended to assist states in developing their state plans and to provide transparency and consistency in states' application of, and the EPA's review of, standards of performance based on this factor. As explained in the preamble to the proposed rule, a designated facility's remaining useful life generally impacts a cost analysis by changing the amortization period, or the period of time over which a facility pays the capital costs for a system of emission reduction. The shorter the period, the higher the annualized costs. The EPA generally assumes a certain amortization period in its BSER determination based on, *e.g.*, the lifespan of the system under consideration and the characteristics of facilities within the source category. A designated facility that has a shorter remaining useful life than the amortization period the EPA assumed in its BSER determination will likely find that achieving the degree of emission based on application of the BSER has higher annualized costs; the larger the difference between a particular facility's remaining useful life and the EPA's assumed amortization period, the larger the difference in annualized costs. However, as a factual matter, there is a point at which a designated facility's remaining useful life is long enough so that the difference in annualized costs for that facility and the costs the EPA considered reasonable in the applicable EG are not fundamentally different. At this point, it would be unreasonable for a state to use remaining useful life as the basis for a less-stringent standard for that facility because it could achieve the EPA's degree of emission limitation at a reasonable cost.

Similarly, an imminent retirement date could serve to streamline states' planning for sources with remaining useful lives that are so short that, as a factual matter, no available system of emission reduction could have reasonable costs. What constitutes a reasonable cost in the context of a

specific EG could depend on, *inter alia*, the source category, the emission reductions available, and the designated pollutant.

However, the EPA agrees with commenters that states' consideration of remaining useful life and what constitutes reasonable consideration of this factor will necessarily depend on the source category, the variability of the individual designated facilities within the source category, and the structure of the applicable EG. In some instances, the nature of the designated facilities and structure of the EG may render a designated facility's remaining useful life of little relevance. For example, where a BSER is based on operational changes or activities that entail little to no capital cost, the remaining useful life of a designated facility should not change the reasonableness of the system and there would be no need for the EPA to prescribe imminent and outermost retirement dates in an EG. Alternatively, designated facilities within the source category may, by virtue of how an industry developed, fall into discrete age classes based on their remaining useful lives such that the EPA considers this characteristic in creating subcategories and determining appropriate BSERs for each subcategory. In this case, too, there might be little utility in the EPA defining imminent and outermost dates for consideration of remaining useful life in an EG.

The EPA is therefore choosing not to finalize the provisions proposed at 40 CFR 60.24a(i), although it may be appropriate to include outermost and imminent retirement dates for the consideration of remaining useful life in individual EGs. The proposed provisions included a requirement that any plan that applies a less-stringent standard based on remaining useful life must include the retirement date for the designated facility as an enforceable commitment, including any measures that provide for the implementation and enforcement of such a commitment. The EPA notes that although it is not finalizing the proposed 40 CFR 60.24a(i)(3), as discussed in section III.E.3.c. of this preamble plans that include less-stringent standards based on remaining useful life will still be required to include the relevant designated facilities' retirement dates as enforceable commitments and include any measures necessary to provide for the implementation and enforcement of those commitments pursuant to the requirement being finalized at 40 CFR 60.24a(g).

The EPA also reiterates that the obligation to include a standard of

performance in a state plan applies to any designated facility that meets the applicability requirements of an EG as of that EG's compliance date. That is, a state plan must include a standard of performance for a designated facility that is retiring after the compliance date, even if the facility has an enforceable commitment to retire imminently following that date. In the case of an imminently retiring designated facility, it may be reasonable for a state to apply a standard reflecting that facility's business as usual; the EPA will address this and other potential considerations, including how such a standard would be calculated, in individual EGs.

e. Reasoned Decision Making and the EPA's Review of State Plans Invoking RULOF

As discussed previously in section III.E. of this preamble, under CAA section 111(d)(2), the EPA has the obligation to determine whether a state plan submission is "satisfactory." This obligation extends to all aspects of a state plan, including the application of a less stringent standard of performance that accounts for RULOF. States carry the primary responsibility to develop plans that meet the requirements of CAA section 111(d) and therefore have the obligation to justify any consideration of RULOF in applying standards less stringent than the degree of emission limitation provided by the EG. That states must provide a reasoned basis including, where applicable, technical analyses and other documentation to support the decisions they make in their plans is fundamental to the structure of CAA section 111(d).¹³⁹ As explained in section III.E.3.a. of this preamble, consistent with the statutory framework of CAA section 111(d), state plans must ensure that designated facilities achieve the degree of emission limitation achievable through application of the BSER as determined by the EPA unless doing so would be unreasonable for a particular facility. The fundamental tenet has been reflected in the EPA's regulations since 1975.¹⁴⁰ Thus, a "satisfactory" plan is one that, *inter alia*, applies less-stringent standards only where the state has demonstrated that achieving the EPA's degree of emission limitation would be unreasonable pursuant to 40 CFR 60.24a(e). A demonstration that a particular designated facility cannot

¹³⁹ See, *e.g.*, 84 FR 32558 (ACE Rule explained that state plans must adequately document and demonstrate the process and underlying data used to establish standards of performance so that EPA can adequately and appropriately review the plan to determine whether it is satisfactory).

¹⁴⁰ See 40 CFR 60.24(c), 60.24a(c).

reasonably achieve the degree of emission limitation determined by the EPA will, in most cases, necessarily be supported by technical analysis that assesses a particular designated facility and compares its circumstances to those the EPA considered in its EG.

While it is within states' discretion to apply a less stringent standard of performance where the state has identified fundamental differences for a particular facility (or class of facilities), the state must support its decision making and demonstrate that it results in a standard of performance that is no less stringent than necessary to address the fundamental differences and that meet the applicable requirements. When a state invokes RULOF and applies a less-stringent standard, it must demonstrate that the standard is no less stringent than necessary to address the fundamental difference identified by the state. Absent such a demonstration, the EPA cannot ascertain that a less-stringent standard meets the requirements of CAA section 111; that is, it cannot determine that a less-stringent standard is "satisfactory."

The requirements proposed at 40 CFR 60.24a(j) were intended to explicitly clarify states' responsibilities when invoking RULOF and to assist them in developing standards in a manner that enables the Agency to determine whether such standards are "satisfactory." The proposed requirements provided that states would carry the burden of making any demonstrations in support of less-stringent standards pursuant to the RULOF provisions. States would carry the primary responsibility to develop plans that meet the requirements of CAA section 111(d) and therefore have the obligation to justify any accounting for RULOF in support of standards less stringent than those provided by the EG. While the EPA has discretion to supplement a state's demonstration, the Agency may also find that a state plan's failure to include a sufficient RULOF demonstration is a basis for concluding the plan is not "satisfactory" and therefore disapprove the plan. The EPA further proposed that for the required demonstrations, states must use information that is applicable to and appropriate for the specific designated facility, and must show how information is applicable and appropriate. As RULOF is a source-specific determination, it is appropriate to require that the information used to justify a less stringent standard for a particular designated facility be applicable to and appropriate for that source. Finally, the EPA proposed to require that the information used for

states' demonstrations under the new RULOF provisions must come from reliable and adequately documented sources, such as EPA sources and publications, permits, environmental consultants, control technology vendors, and inspection reports.

Comments received on the proposed requirements regarding states' burden of demonstration and the use of site-specific information were generally supportive while also requesting further clarification of and flexibility in the types of information that the EPA would consider acceptable. One commenter suggested that the EPA allow states to use historical data even if not published or documented by third parties, as this constitutes site-specific information, while another suggested allowing verified industry information, even if it is not site-specific.

Despite the generally supportive commenters received, the EPA is not finalizing the requirements proposed at 40 CFR 60.24a(j). While the EPA continues to find that states carry the burden of making any demonstrations in support of less-stringent standards pursuant to RULOF in developing their plans, we have determined that it is not necessary to promulgate this expectation as a standalone regulatory requirement. States always bear the responsibility of reasonably documenting and justifying the standards of performance in their plans.¹⁴¹ If the EPA cannot ascertain, based on the information and analysis included in a state plan submission, whether a standard of performance meets the statutory requirements, it cannot find that standard satisfactory. Additionally, it is *de facto* necessary to use information that is applicable to and appropriate for the designated facility when analyzing systems of emission reduction for that particular facility. For example, for a designated facility invoking RULOF based on its unique design features, the state plan must provide information corroborating the uniqueness of those features and analysis demonstrating how they result in the facility being unable to reasonably achieve the degree of emission limitation determined by the EPA. It would not be reasonable in this instance for a state to use generic industry data, whether verified or not, as the basis of demonstrations pursuant to 40 CFR 60.24a(e) and (f).

¹⁴¹ Where a state has relied on information or analyses the EPA provided in an applicable EG as part of its source specific BSER determination, a state would explain why such reliance is reasonable and cite or otherwise incorporate that information or analyses in its state plan submission.

While the proposed requirements would have simply codified generally applicable tenets of reasoned decision making, the EPA recognizes that the specific types and provenances of information needed to justify a less-stringent standard can vary significantly between not only source categories, but between individual designated facilities within a source category. As a result, the proposed provisions had the potential to be both over- and underinclusive. While we are not finalizing these provisions as generally applicable requirements for state plans, they and the accompanying discussion in the notice of proposed rulemaking¹⁴² remain important guidance for plan development. The EPA may also choose to promulgate requirements for RULOF demonstrations in individual EGs.

f. Consideration of Impacted Communities

While the consideration of RULOF can be warranted to apply a less stringent standard of performance to a particular facility, such standards have the potential to result in disparate health and environmental impacts to communities most affected by and vulnerable to those impacts from the designated facilities being addressed by the state plan. These communities could be put in the position of bearing the brunt of the greater health or environmental impacts resulting from that source implementing less stringent emission controls than would otherwise have been required pursuant to the EG. The EPA considers that a lack of attention to such potential outcomes would be antithetical to the public health and welfare goals of CAA section 111(d) and the CAA generally. Because of CAA section 111(d)(2)'s requirement that the EPA determine whether a state plan is "satisfactory" applies to such plan's consideration of RULOF in applying a standard of performance to a particular facility, the EPA must determine whether a plan's consideration of RULOF is consistent with CAA section 111(d)'s overall health and welfare objectives.

In order to address the potential exacerbation of health and environmental impacts to these communities as a result of applying a less stringent standard, the EPA proposed to require states to consider such impacts when applying the RULOF provision to establish those standards. Under the proposed provisions at 40 CFR 60.24a(k), to the extent a designated facility would qualify for a less stringent standard through

¹⁴² See 87 FR 79176, 79202–03 (Dec. 23, 2022).

consideration of RULOF, the state, in calculating such standard, would have been required to demonstrate consideration of the potential health and environmental impacts and potential benefits of control to communities most affected by and vulnerable to the impacts from the designated facility considered in a state plan for RULOF provisions. These communities will be identified by the state as pertinent stakeholders under the finalized meaningful engagement completeness requirements described in section III.C. of this preamble.

The notice of proposed rulemaking further explained that state plan submissions seeking to invoke RULOF for a source would be required to identify where and how a less stringent standard impacts these communities. In evaluating a RULOF option for a facility, states should describe the health and environmental impacts anticipated from the application of RULOF for such communities, along with any feedback the state received during meaningful engagement regarding its draft state plan submission, including on any standards of performance that consider RULOF. Additionally, to the extent there is a range of options for reasonably controlling a source based on RULOF, the EPA proposed that in determining the appropriate standard of performance, states should consider the health and environmental impacts to the communities most affected by and vulnerable to the impacts from the designated facility considered in a state plan for RULOF provisions and provide in the state plan submission a summary of the results that depicts potential impacts for those communities for that range of reasonable control options.

The EPA received a wide range of comments on the proposed requirements for state plans to consider the potential pollution impacts and benefits of control to communities most affected by and vulnerable to emissions from a designated facility that is invoking RULOF. Several commenters supported the proposal and agreed that, given that the purpose of regulating stationary source pollution under CAA section 111 is to address emissions that endanger public health and welfare, requiring states that are applying less-stringent standards to take into account how air pollution above the level reflected by application of the BSER may impact the health and welfare of local communities furthers the statutory design. Other commenters agreed that the EPA has authority to require states to consider the impacts of less-stringent standards of performance on vulnerable communities but expressed concern that

the lack of specificity of and guidance for implementing the proposed requirements would cause uncertainty among state regulators and impacted communities and lead to unequal application across states. Similarly, one commenter noted the differences between community impacts when considering localized pollutants versus regional or global pollutants and that impacts of the latter are more diffuse and difficult to assess. Some commenters, however, disagreed that the EPA has authority to require states to consider potential health and environmental impacts of less-stringent standards on vulnerable communities. These commenters generally asserted that the state-focused language of the RULOF provision in CAA section 111(d)(1) does not mandate an analysis of vulnerable communities and does not give the EPA power to force states to consider “other factors” that it deems relevant.

The EPA is not finalizing the proposed provisions at 40 CFR 60.24a(k) as requirements under the general implementing regulations. We agree with commenters that additional specificity and guidance with regard to how states should consider the potential pollution impacts and benefits of control to communities most affected by and vulnerable to emissions from a designated facility invoking RULOF would be key to ensuring meaningful implementation of this provision. However, given the diversity of source categories, designated facilities, and designated pollutants that are regulated and could be regulated in CAA section 111(d), as well as the wide range of potential impacts on vulnerable communities that may result from less-stringent standards of performance under any given EG,¹⁴³ the EPA does not believe it is either feasible or appropriate to prescribe a universally applicable approach or standard for approvability for this consideration. Instead, to protect all communities, including the most vulnerable ones, the EPA is finalizing a provision that will ensure that any less stringent standards of performance applied by states are no less stringent than necessary. Moreover, because consideration of health and environmental impacts is inherent in consideration of both the nonair quality health and environmental impacts and amount of emission reduction factors

the EPA considers under CAA section 111(a)(1), when a state considers the systems of emission reduction identified in the applicable emission guideline using the factors and evaluation metrics the EPA considered in assessing those systems pursuant to RULOF, the state will necessarily consider the potential impacts and benefits of control to communities affected by a designated facility that is receiving a less-stringent standard of performance.

Thus, while the EPA is not promulgating a regulatory requirement in subpart Ba for states to consider the impacts of applying a less-stringent standard of performance on the communities most affected by and vulnerable to emissions from a designated facility invoking RULOF, the EPA anticipates that states will consider these impacts. To this end, states may look to the EPA’s emission guideline and its consideration of nonair quality health and environmental impacts and the amount of emission reductions available in determining the degree of emission limitation for guidance on considering the health and environmental impacts on communities affected by a designated facility for which RULOF has been invoked. Additionally, the procedural requirements under subpart Ba for meaningful engagement with pertinent stakeholders on state plan development that the EPA is finalizing will play an important role in RULOF. Meaningful engagement, which the EPA is defining as “timely engagement with pertinent stakeholder representation in the plan development or plan revision process,”¹⁴⁴ and providing that “[s]uch engagement should not be disproportionate in favor of certain stakeholders and should be informed by available best practices,” should address, *inter alia*, the application of any less-stringent standards of performance pursuant to RULOF. Thus, the EPA intends for communities most affected by and vulnerable to the health and environmental impacts of pollution from a designated facility invoking RULOF to have an opportunity to participate in the process of determining how that facility is addressed in the relevant state plan. The EPA may also consider whether to promulgate requirements pertaining to consideration of impacts on vulnerable communities as part of an individual EG in the future, at which point it would

¹⁴³ In the notice of proposed rulemaking, the EPA “recognize[d] that the consideration of communities in the standard setting process, such as what constitutes a benefit to a vulnerable community and what is a reasonable level of control, is highly dependent on the designated pollutant and source category subject to an EG.” 87 FR 79203.

¹⁴⁴ The EPA is also finalizing the proposed definition of “pertinent stakeholders” to include those who are most affected by and vulnerable to the health or environmental impacts of pollution from the designated facilities addressed by the plan or plan revision.

provide guidance on how to do so specific to the designated facilities and designated pollutant at issue.

g. Authority To Apply More Stringent Standards as Part of the State Plan

The EPA, in the notice of proposed rulemaking, addressed two different sources of authority that would allow the Agency to approve state plans that include standards of performance that are more stringent than the degree of emission limitation determined by the EPA in the applicable EG. First, the EPA explained that allowing states to apply a more stringent standard of performance as part of their CAA section 111(d) plans is consistent with CAA section 116, which generally authorizes states to include more stringent standards of performance or requirements regarding control or abatement of air pollution in their plans. Second, the EPA proposed to interpret the RULOF provision in CAA section 111(d)(1), and specifically the “other factors” consideration, as allowing states to adopt more stringent standards of performance.¹⁴⁵ As explained below, the EPA is not finalizing its proposed interpretation that states can use the RULOF provision in CAA section 111(d)(1) to adopt, and have the EPA approve, more stringent standards of performance in their state plans because, inter alia, states already have the authority and ability to do so under CAA section 116.

As explained in the notice of proposed rulemaking, the anti-preemption requirements of CAA section 116 provide that nothing in the statute shall preclude or deny the right of states to adopt or enforce “any standard or limitation respecting emissions of air pollutants.” While CAA section 116 clearly extends to a state adopting or enforcing a standard of performance more stringent than required under CAA section 111(d), the subpart Ba implementing regulations did not explicitly speak to whether the EPA can approve a state plan that includes such standard of performance. However, the EPA proposed to find that CAA section 116, as interpreted through the Supreme Court in *Union Electric Co. v. EPA*,¹⁴⁶ requires the EPA to approve a state plan that includes more stringent standards of performance under CAA section 111(d). The EPA therefore proposed to modify the existing 40 CFR 60.24a(f),¹⁴⁷ clarifying that to the extent

a state chooses to submit a plan that includes standards of performance that are more stringent or compliance schedules that are more rapid than the requirements of an EG, states have the authority to do so under this provision and CAA section 116. Further, the EPA proposed to clarify that it has the obligation, and therefore the authority, to review and approve such plans and render the more stringent requirements federally enforceable if all applicable requirements are met.

The EPA is finalizing the proposed changes to the provision currently at 40 CFR 60.24a(f) which, as renumbered pursuant to this final rule, is now 40 CFR 60.24a(i). The Agency acknowledges that it previously took the position in the ACE Rule that *Union Electric* does not control the question of whether CAA section 111(d) state plans may be more stringent than Federal requirements. The EPA took this position in the ACE Rule on the basis that *Union Electric* on its face applies only to CAA section 110, and that it is “potentially salient” that CAA section 111(d) is predicated on specific technologies whereas CAA section 110 gives states broad latitude in the measures used for attaining the NAAQS.¹⁴⁸ The EPA no longer takes this position. Upon further evaluation, the EPA finds that, because of the structural similarities between CAA sections 110 and 111(d), CAA section 116 as interpreted by *Union Electric* requires the EPA to approve CAA section 111(d) state plans that are more stringent than required by the EG.

The Court in *Union Electric* rejected a construction of CAA sections 110 and 116 that measures more stringent than those required to attain the NAAQS cannot be approved into a federally enforceable SIP but can be adopted and enforced only as a matter of state law. The Court found that such an interpretation of CAA section 116 “would not only require the Administrator to expend considerable time and energy determining whether a state plan was precisely tailored to meet the Federal standards but would simultaneously require States desiring stricter standards to enact and enforce

two sets of emission standards, one federally approved plan and one stricter state plan.” 427 U.S. at 263–64. The Court concluded there was no basis “for visiting such wasteful burdens upon the States and the Administrator.” *Id.* CAA sections 111(d) and 110 are structurally similar in that both require the EPA to establish targets to meet the objectives of the respective sections (*i.e.*, the degree of emission limitation set by an EG under CAA section 111(d), and attainment and maintenance of the NAAQS under CAA section 110), and states must adopt and submit to the EPA plans which include requirements to meet these targets. Specifically, the EPA establishes a presumptive standard of performance corresponding to the degree of emission limitation it has determined in an EG, and state plans under CAA section 111(d) must establish standards of performance that generally reflect this degree of emission limitation. Because CAA section 116 applies to “any standard or limitation,” this provision clearly applies to standards of performance adopted under CAA section 111(d). Therefore, the Court’s rationale in *Union Electric* as it pertains to the application of CAA section 116 in the context of the cooperative federalism structure of CAA section 110 also applies to CAA section 111(d). That is, the assessment of CAA section 116 in the context of requirements that states develop and submit to the EPA for evaluation against nationally applicable standards or criteria applies equally to CAA sections 110 and 111(d). On that basis, the EPA is finding that the Court’s holding applies and controls the outcome here, as well. Requiring states to enact and enforce two sets of standards of performance, one that is exactly equal to the EPA’s presumptive standard of performance that is federally approved as part of the CAA section 111(d) plan and one that is stricter and is only adopted and enforced as a matter of state requirements, runs directly afoul of *Union Electric*’s holding that there is no basis for interpreting CAA section 116 in such manner.

Moreover, there is nothing in CAA section 111(d) that precludes states from adopting, and EPA from approving, more stringent standards of performance.¹⁴⁹ In fact, permitting

subdivision thereof from adopting or enforcing,” (1) standards of performance more stringent than an EG, or (2) compliance schedules requiring final compliance at earlier times than specified in an EG. In the proposed rulemaking, the EPA added several proposed provisions to 40 CFR 60.24a, which resulted in § 60.24a(f), in addition to being amended, being renumbered as § 60.24a(n). However, the EPA is not finalizing all the new provisions it proposed; as a result, erstwhile § 60.24a(f) is now being finalized, with amendments, at § 60.24a(i).

¹⁴⁸ 84 FR 32559–61.

¹⁴⁵ 87 FR 79204–06.

¹⁴⁶ 427 U.S. 246, 263–64 (1976).

¹⁴⁷ The existing provision at 40 CFR 60.24a(f) provides that “[n]othing in this subpart shall be construed to preclude any State or political

¹⁴⁹ In the 1975 CAA section 111(d) implementing regulations the Agency explained that EPA’s emission guidelines will reflect its judgment of the degree of control that can be attained by various classes of existing source without unreasonable costs. Particular sources within a class may be able to achieve greater control without unreasonable costs. Moreover, States that believe additional

states to adopt more stringent standards of performance and include such standards in their state plans is entirely consistent with the purpose and structure of CAA section 111(d). States bear the obligation pursuant to CAA section 111(d)(1) to establish standards of performance. Nothing in CAA section 111(d) suggests that Congress intended to preclude states from determining that it is appropriate to regulate certain sources within their jurisdiction more strictly than otherwise required by Federal requirements. For the EPA to do so would be arbitrary and capricious in light of the overarching purpose of CAA section 111(d), which is to require emission reductions from existing sources for certain pollutants that endanger public health or welfare. It is inconsistent with the purpose of CAA section 111(d) and the role it confers upon states for the EPA to constrain them from further reducing emissions that harm their citizens, and the EPA does not see a reasonable basis for doing so.

The EPA also included a second rationale for permitting more stringent standards of performance in the notice of proposed rulemaking. The Agency explained that CAA section 111(d)(1) provides that states are permitted to consider remaining useful life and other factors “in applying a standard of performance to any particular source under a plan,” but does not specify that the source-specific standard must be a *less stringent* standard of performance. Aside from the explicit reference to remaining useful life, the statute is silent as to what the “other factors” are that states may consider in applying a standard of performance and whether such factors can be used only to weaken the stringency of a standard of performance for a particular designated facility. Therefore, in addition to proposing that states may include, and the EPA must approve, more stringent standards of performance in state plans pursuant to CAA sections 111(d) and 116, the EPA also proposed to interpret CAA section 111(d)(1) as allowing states to consider “other factors” in exercising their discretion to apply a more stringent standard to a particular source. The Agency acknowledged that it had previously, in promulgating subpart Ba in 2019, taken the position that the

statutory RULOF provision authorizes only standards of performance that are less stringent than the presumptive level of stringency required by a particular EG,¹⁵⁰ and explained why it was proposing to change course. To codify its revised interpretation of the RULOF provision, the EPA proposed explicit regulatory text that would have allowed states to use RULOF, and specifically, “other factors,” to apply a more stringent standard of performance. The new provision at 40 CFR 60.24a(m) would have also required that state plans include an adequate demonstration that the standard of performance is more stringent than required by an application EG and meet all other applicable requirements.

The EPA received comments both in support of and opposed to its proposed interpretation that states may apply more stringent standards of performance and that EPA has an obligation to approve such standards in state plans. Several commenters stated the Agency has appropriately interpreted CAA section 116 and 111(d), as well as *Union Electric Co. v. EPA*, as allowing states to submit, and the EPA to approve, more stringent standards. One commenter also agreed that the statutory phrase “remaining useful life and other factors” does not foreclose a state plan from applying a more stringent standard of performance to a particular source; while “remaining useful life” implies a less stringent standard, “other factors” does not. Another commenter asserted that the EPA need not rely on “other factors” to permit states to apply more stringent standards because states already have the ability to do so in light of the Supreme Court’s ruling in *Union Electric*. Commenters that disagreed with the EPA’s proposed interpretation generally recognized that states can adopt more stringent rules than those required by the EPA but asserted that the CAA does not authorize the EPA to approve them into state plans and thus make them federally enforceable. One commenter argued that the EPA’s BSER determination defines the extent of both EPA and state authority under CAA section 111 and that the RULOF provision does not authorize states to select a different, more stringent BSER under the guise of RULOF. Another commenter stated that the EPA’s position that RULOF is a variance provision for sources that cannot meet the BSER due to limited remaining

useful life or other factors is in tension with its interpretation that the same provision provides a broad grant of authority for states to impose more stringent standards on sources. The same commenter pointed out the difference in proposed requirements for states invoking RULOF to apply a less stringent standard and those for applying a more stringent standard.

The EPA agrees with commenters that it need not rely on “other factors” for authority to permit states to submit, and the EPA to approve, more stringent standards of performance in state plans. As explained above, CAA sections 116 and 111(d), and the Court’s interpretation in *Union Electric* of section 116 as it relates to CAA section 110’s analogous statutory framework, provide a sufficient basis this position. Moreover, upon further consideration of the history of the RULOF provision and the EPA’s interpretation of that provision as a variance for states to use when a source cannot reasonably achieve the degree of emission limitation determined by the EPA, the Agency is not finalizing its proposed interpretation that the RULOF provision allows states to adopt more stringent standards of performance in their plans. The EPA is therefore not finalizing the provision it proposed at 40 CFR 60.24a(m) that would have explicitly allowed a state to “account for other factors in applying a standard of performance that is more stringent than required by an applicable emission guideline, or the proposed provision that “[t]he plan must include an adequate demonstration that the standard of performance is more stringent than required by an applicable emission guideline, and must meet all other applicable requirements, such as those that provide for the implementation and enforceable of the more stringent standard of performance.” As a general matter, states already bear the burden of demonstrating that their standards of performance are no less stringent than the corresponding EG. See 40 CFR 60.24a(c).

The EPA disagrees with comments suggesting that the EPA’s BSER determination is the ceiling—that the EPA is constrained from approving more stringent standards of performance into state plans. As explained above, there is no support for this position in the statutory language or structure of CAA section 111(d). It is also inconsistent with CAA section 116 and would run counter to the purpose of section 111—reducing emissions of dangerous air pollutants from designated facilities.

control is necessary or desirable will be free under section 116 of the Act to require more expensive controls, which might have the effect of closing otherwise marginal facilities, or to ban particular categories of sources outright. 40 FR 53343. Congress did nothing to disturb the understanding that states can use CAA section 116 to adopt more stringent standards of performance when it enacted the 1977 CAA Amendments shortly thereafter.

¹⁵⁰ See EPA’s Responses to Public Comments on the EPA’s Proposed Revisions to Emission Guideline Implementing Regulations at 56 (Docket ID No. EPA-HQ-OAR-2017-0355-26740) (July 8, 2019).

The EPA anticipates that, in many cases, more stringent standards of performance would entail marginal differences in stringency between the degree of emission limitation in the applicable EG and the state plan requirement. For example, the EPA may determine that, for the source category in general, a control technology can reasonably achieve an 80% reduction in emissions, while a state finds that at a particular designated facility, that same control technology can reasonably achieve a 90% reduction. Or a state may decide that a particular designated facility can install a control technology that has already been demonstrated to reasonably achieve greater emission reductions than the BSER the EPA determined for the source category generally. The EPA also notes that approving more stringent standards of performance in state plans is not a new practice under subpart Ba; for example, in 2020 the EPA approved more stringent standards of performance that California submitted as part of its CAA section 111(d) state plan to implement the emission guidelines for landfill gas emissions from municipal solid waste landfills. These more stringent standards of performance were incorporated into the Code of Federal Regulations and thus became federally enforceable.¹⁵¹

In summary, the EPA is finalizing, at 40 CFR 60.24a(i), the proposed revisions to the existing provision (currently at 40 CFR 60.24a(f)) stating that nothing in subpart Ba shall be construed to preclude any state from adopting or enforcing, as part of a state plan, (1) standards of performance more stringent than the applicable EG, or (2) compliance schedules requiring final compliance at earlier times than specified in the applicable EG. The EPA is not finalizing the regulatory text provision proposed at 40 CFR 60.24a(m) stating that a state may account for other factors in applying a more stringent standard of performance.

F. Provision for Electronic Submission of State Plans

The EPA proposed to revise subpart Ba to require electronic submission of state plans instead of paper copies.¹⁵² As explained in the notice of proposed rulemaking, the regulations

promulgated in 2019 require state plan submissions to be made in accordance with 40 CFR 60.4. Pursuant to 40 CFR 60.4(a), all requests, reports, applications, submittals, and other communications to the Administrator pursuant to 40 CFR part 60 shall be submitted in duplicate to the appropriate regional office of the EPA. The provision in 40 CFR 60.4(a) then proceeds to list the corresponding addresses for each regional office. The EPA proposed that, rather than requiring paper copies of state plan submissions to be sent to the appropriate regional office, states would submit their state plans electronically via the use of its State Planning Electronic Collaboration System (SPeCS).

As previously described, CAA section 111(d) requires the EPA to promulgate a “procedure” similar to that of CAA section 110 under which states submit plans. The statute does not prescribe a specific platform for plan submissions, and the EPA reasonably interprets the procedure it must promulgate under the statute as allowing it to require electronic submission. Requiring electronic submission is reasonable for the following reasons. Providing for electronic submittal of CAA section 111(d) state plans in subpart Ba in place of paper submittals aligns with current trends in electronic data management and as implemented in the individual EGs will result in less burden on the states. It is the EPA’s experience that the electronic submittal of information increases the ease and efficiency of data submittal and data accessibility. The EPA’s experience with the electronic submittal process for SIPs under CAA section 110 has been successful as all the states are now using the SPeCS, which is a user-friendly, web-based system that enables state air agencies to officially submit SIPs and associated information electronically for review and approval to meet their CAA obligations related to attaining and maintaining the NAAQS. SPeCS for SIPs is the EPA’s preferred method for receiving such SIPs submissions. The EPA has worked extensively with state air agency representatives and partnered with E-Enterprise for the Environment and the Environmental Council of the States to develop this integrated electronic submission, review, and tracking system for SIPs. SPeCS can be accessed by the states through the EPA’s Central Data Exchange (CDX) (<https://cdx.epa.gov/>). The CDX is the Agency’s electronic reporting site and performs functions for receiving acceptable data in various formats. The CDX registration

site supports the requirements and procedures set forth under the EPA’s Cross-Media Electronic Reporting Regulation, 40 CFR part 3.

Most of the commenters were supportive of the proposed amendments for electronically submitting state plans. However, a few commenters expressed that EPA should provide an option to submit state plans in paper format. The EPA has determined that submitting state plans electronically is more efficient and less burdensome than paper submittals. States already submit state implementation plans electronically via SPeCS so there should be little to no additional burden associated with using it for state plans. Additionally, having some states submit state plans via SPeCS and other states mail hard-copy plans to regional offices would undermine many of the efficiencies provided to the EPA through the use of electronic submission and could result in confusion. One commenter recommended adding language to clarify that a Negative Declaration letter submitted in accordance with 40 CFR 60.23a(b) can also be submitted via SPeCS. The EPA agrees with the need to add the electronic submittal language to 40 CFR 60.23a(b) identified by the commenter and has added the language in the final rule so that the states submit the Negative Declaration letter using the SPeCS, or through an analogous electronic reporting tool provided by the EPA for the submission of any plan required by this subpart.

The EPA is therefore finalizing the requirements for electronic submittal of state plans in 40 CFR 60.23a(a)(1) and (3). As finalized, 40 CFR 60.23a(a)(1) provides: “The submission of such plan shall be made in electronic format according with § 60.23a(a)(3) or as specified in an applicable emission guideline.” The regulation at 40 CFR 60.23a(a)(3) in turn contains the general requirements associated with the electronic submittal of a state plan in subpart Ba via the use of SPeCS or through an analogous electronic reporting tool provided by the EPA for the submission of any plan required by subpart Ba. The EPA is also including at 40 CFR 60.23a(a)(3) language to specify that states are not to transmit confidential business information (CBI) through SPeCS. Even though state plans submitted to the EPA for review and approval pursuant to CAA section 111(d) through SPeCS are not to contain CBI, the language at 40 CFR 60.23a(a)(3) also addresses the submittal of CBI in the event there is a need for such information to be submitted to the EPA.

¹⁵¹ 40 CFR 62.1100(b)(7); 85 FR 1121 (Jan. 9, 2020); see also “Appendix E: Comparison of the Major Provisions of the Emission Guidelines and California’s Landfill Methane Regulation,” EPA–R09–OAR–2019–0393–0008 (technical support document for EPA action on California’s CAA section 111(d) state plan to implement the EG for landfill gas from municipal solid waste landfills).

¹⁵² 87 FR 79206.

Any other specific requirements associated with the electronic submittal of a particular state plan will be provided within the corresponding EG. The requirements for electronic submission of CAA section 111(d) state plans in EGs will ensure that these Federal records are created, retained, and maintained in electronic format. Electronic submittal will also improve the Agency's efficiency and effectiveness in the receipt and review of state plans. The electronic submittal of state plans may also provide continuity in the event of a disaster like the one our nation experienced with COVID-19.

G. Other Proposed Modifications and Clarifications

1. Standard of Performance and Compliance Flexibility

a. Definition of Standard of Performance

The EPA proposed amendments to 40 CFR 60.21a(f) and 60.24a(b) to clarify that the definition of "standard of performance" allows for state plans to include standards in the form of an allowable mass limit of emissions. As explained in the notice of proposed rulemaking,¹⁵³ the amendments were intended to harmonize these regulatory definitions with the definitions of "emission limitation" and "emission standard" in CAA section 302(k), which is "a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice, or operational standard promulgated under this chapter." While the EPA had intended the phrase "allowable rate or limit of emissions" in the existing regulatory definitions to encompass the full range of forms included in the statute, to eliminate any potential confusion the Agency proposed to make this explicit.

Most comments received on the proposed revision to the definition of "standard of performance" were in support of these amendments. Some commenters pointed out that the revision would be consistent with the statutory definition in CAA section 302(k) and many expressed approval that the revised definition would clearly allow for standards of performance to take the form of mass-based emission limits. Several commenters stressed that, while they supported the proposed

definition of standard of performance for subpart Ba, the appropriate form of the standard of performance in any particular EG must be determined in the context of that EG. Some commenters expressed concern that the proposed revision would allow the EPA to define the BSER as a trading program for any source sector, or for states and the EPA to impose emissions averaging and trading programs in CAA section 111(d) plans.

The EPA is finalizing amendments to 40 CFR 60.21a(f) and 60.24a(b) as proposed. The Agency's interpretation of CAA section 111 with regard to emissions trading or averaging is a separate matter that is discussed in section III.G.1.b. of this preamble; it is reiterated that the revisions to the definition of standard of performance are being made to align it with the statutory definition of emission limitation and emission standard in CAA section 302(k) for the purpose of these general implementing regulations. The EPA agrees with commenters that the appropriate form of the standard of performance in any particular EG must be determined in the context of that EG, and the EPA may choose to prescribe the acceptable form or forms of the standard of performance in an individual EG. In addition to finalizing the proposed amendments to 40 CFR 60.21a(f) to clarify that the term "an allowable rate or limit of emissions" means "an allowable rate, quantity, or concentration of emissions" of air pollutants, the EPA is also finalizing its proposed removal of the phrase "but not limited to" from 40 CFR 60.21a(f) as unnecessary and potentially confusing verbiage that is redundant of the word "including," particularly where the definition already identifies a wide breadth of potential standards that may be included in a state plan. Moreover, the EPA is finalizing amendments to the definition of standard of performance under 40 CFR 60.24a(b) to read ". . . in the form of an allowable rate, quantity, or concentration of emissions" rather than ". . . either be based on allowable rate or limit of emission."

b. Compliance Flexibilities, Including Trading or Averaging

The EPA is finalizing its proposal that CAA section 111(a) and (d) cannot be interpreted, by their terms, to limit the types of controls that states, in their state plans, may authorize their sources to adopt to at-the-source, and thereby preclude states from authorizing their sources flexibilities such as trading or averaging. Under the provisions of CAA section 111(a) and (d), and consistent with the federalism principles that

underlie the CAA, states have broad authority to determine the types of control measures for their sources, including trading or averaging, although the EPA may establish constraints to protect the integrity of particular EGs. The EPA is also finalizing its proposal that CAA section 111 cannot be interpreted, by its terms, to limit the "best system of emission reduction . . . adequately demonstrated" (BSER) to at-the-source measures. As the EPA explains, many control measures that the EPA has determined to be the BSER in prior rules have outside-the-source components. The EPA is finalizing its repeal of the ACE Rule's contrary interpretations of CAA section 111.

In the proposal, the EPA provided a brief summary of the applicable CAA provisions, the ACE Rule, the D.C. Circuit's decision reversing the ACE Rule, and the U.S. Supreme Court's decision vacating the D.C. Circuit's vacatur of the ACE Rule.¹⁵⁴ For convenience, parts of that summary are reproduced here.

i. *CAA section 111.* Under CAA section 111(d)(1), each state is required to submit to the EPA "a plan which . . . establishes standards of performance for any existing source" that emits certain types of air pollutants, and which "provides for the implementation and enforcement of such standards of performance." Under CAA section 111(a)(1), a "standard of performance" is defined as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction . . . adequately demonstrated."

ii. *Rulemaking and caselaw.* In the Clean Power Plan (CPP), the EPA interpreted the term "system" in CAA section 111(a)(1) to be broad and therefore to authorize the EPA to consider a wide range of measures from which to select the BSER.¹⁵⁵ Similarly, the CPP took the position that states had broad flexibility in choosing compliance measures for their state plans.¹⁵⁶ The CPP went on to determine that generation shifting qualified as the BSER,¹⁵⁷ and that states could include trading or averaging programs in their state plans for compliance.¹⁵⁸

The ACE Rule included the repeal of the CPP. It interpreted CAA section 111 so that the type of "system" that the EPA may select as the BSER is limited to a control measure that could be

¹⁵⁴ 87 FR 79176, 79207–08 (Dec. 23, 2022).

¹⁵⁵ 80 FR 64662, 64720 (October 23, 2015).

¹⁵⁶ See, e.g., id. at 64887.

¹⁵⁷ Id. at 64707.

¹⁵⁸ Id. at 64840.

¹⁵³ 87 FR 79176, 79206–07 (Dec. 23, 2022).

applied at each source (that is, inside the fenceline of each source) to reduce emissions at each source.¹⁵⁹ The ACE Rule also concluded that the compliance measures the states include in their plans must “correspond with the approach used to set the standard in the first place,”¹⁶⁰ and therefore must also be limited to inside-the-fenceline measures that reduce the emissions of each source. For these reasons, the ACE Rule invalidated the CPP’s generation-shifting system as the BSER, on grounds that it was an outside the source measure, and precluded states from allowing their sources to trade or average to demonstrate compliance with their emission standards.¹⁶¹

In 2021, the D.C. Circuit vacated the ACE Rule.¹⁶² The court held, among other things, that CAA section 111(d) does not limit the EPA, in determining the BSER, to at-the-source measures.¹⁶³ The court further held that the ACE Rule’s premise for viewing compliance measures as limited to at the source measures, which is that BSER measures are so limited, was invalid for the same reason. The court indicated that while requiring symmetry between the nature of the BSER and compliance measures “would be reasonable” where necessary to preserve the environmental outcomes a particular BSER was designed to achieve, a universal restriction on compliance measures could not be sustained by policy concerns that were not similarly universal.¹⁶⁴

In 2022, the U.S. Supreme Court reversed the D.C. Circuit’s vacatur of the ACE Rule’s embedded repeal of the Clean Power Plan.¹⁶⁵ The Supreme Court made clear that CAA section 111 authorizes the EPA to determine the BSER and the amount of emission limitation that state plans must achieve.¹⁶⁶ However, the Supreme Court invalidated the CPP’s generation-shifting BSER under the major question doctrine, explaining that the term “system” does not provide the “clear congressional authorization” needed to support a BSER “of such magnitude and consequence.”¹⁶⁷ The Court declined to address the D.C. Circuit’s decision that the text of CAA section 111 did not limit the type of “system” the EPA could consider as the BSER to at-the-

source measures.¹⁶⁸ Nor did the Court rule on the scope of the states’ compliance flexibilities.

iii. *Proposal.* In the proposal, the EPA stated that it has reconsidered the ACE Rule’s interpretation of the compliance flexibilities available to states under CAA section 111 and that it was proposing to disagree with the rule’s view that trading or averaging are universally precluded¹⁶⁹ and that state plan compliance measures must always correspond with the approach the EPA uses to set the BSER. The EPA added, however, that the flexibility that CAA section 111(d) grants to states in adopting measures for their state plans is not unfettered; rather, CAA section 111(d)(2) requires the EPA to review state plans to ensure that they are “satisfactory,” and the EPA may conclude in particular emission guidelines that limiting the types of control measures states may authorize their sources to adopt, including precluding trading or averaging, are necessary to protect the environmental outcomes of the emission guidelines.¹⁷⁰

In addition, the EPA also proposed to reject the ACE Rule’s interpretation that various provisions in CAA section 111 limit the type of “system” that may qualify as the BSER to at-the-source measures.¹⁷¹ The EPA explained that it proposed to agree with the part of the D.C. Circuit’s decision in *American Lung Ass’n*,¹⁷² that rejected the ACE Rule’s at-the-source statutory interpretation. The EPA added that it recognized that the Supreme Court, in *West Virginia*, did impose limits, through the application of the major question doctrine, on the type of “system” that may qualify as the BSER.¹⁷³ The EPA made clear that it was not proposing to address the scope of the limits that may result from application of the major question doctrine, and thus was not proposing to

address whether it could include trading or averaging as part of the BSER, or to identify any particular control mechanism that could or could not be part of a specific BSER, in light of those limits. Instead, the EPA stated that it may address further those limits, and their implications for the legality of particular systems of emission reduction and state compliance measures, in future emission guidelines.¹⁷⁴

iv. *The EPA’s finalized interpretation of state authority to grant compliance flexibilities.* The EPA is finalizing its proposal that, contrary to the position of the ACE Rule, CAA section 111 does not preclude states from including compliance flexibilities such as trading or averaging for their sources in their state plans, although in particular emission guidelines the EPA may limit those flexibilities if necessary to protect the environmental outcomes of the guidelines. The EPA is also rescinding the related ACE Rule interpretation that CAA section 111 requires that state plan measures be symmetrical to the types of measures the EPA included in the BSER.

Most commenters agreed with the proposal that CAA section 111 does not preclude states from including compliance flexibilities in their state plans. However, several commenters disagreed and submitted adverse comments. Some commenters stated that *West Virginia* is clear that the EPA cannot include generation-shifting as the BSER, and then argued that the EPA cannot include trading as part of the BSER because trading entails generation shifting, and then further argued that for emission guidelines applicable to electric generating units, the EPA cannot authorize trading as a compliance mechanism because trading incentivizes generation shifting to occur and only works if generation shifting does occur. As explained further below, the EPA does not believe that these adverse comments cast doubt on the rationale that it gave in the proposal for why states have the authority to allow compliance flexibilities such as trading or averaging.¹⁷⁵ The EPA continues to agree with the reasoning in *American Lung Ass’n*,¹⁷⁶ in rejecting the ACE Rule’s limitations on those measures.

To review the reasons that the ACE Rule gave for asserting that trading or averaging across designated facilities is inconsistent with CAA section 111: The ACE Rule stated that those options would not necessarily require any emission reductions from designated

¹⁵⁹ 84 FR 32520, 32523–24 (July 8, 2019).

¹⁶⁰ *Id.* at 32556.

¹⁶¹ *Id.* at 32556–57.

¹⁶² *American Lung Ass’n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021).

¹⁶³ *Id.* at 944–51.

¹⁶⁴ *Id.* at 957–58.

¹⁶⁵ *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

¹⁶⁶ *Id.* at 2601–02.

¹⁶⁷ *Id.* at 2614–16 (internal quotation marks omitted).

¹⁶⁸ *See id.* at 2615 (“We have no occasion to decide whether the statutory phrase ‘system of emission reduction’ refers exclusively to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER.” (emphasis omitted)).

¹⁶⁹ With respect to averaging, the ACE Rule noted that the D.C. Circuit has recognized that the EPA may have statutory authority under CAA section 111 to allow plant-wide emissions averaging. *See U.S. Sugar v. EPA*, 830 F.3d 579, 627 n.18 (D.C. Cir. 2016) (pointing to the definition of “stationary source”), but stated that the Agency’s determination that individual EGUs are subject to regulation under ACE precludes the Agency from attempting to change the basic unit from an EGU to a combination of EGUs for purposes of ACE implementation.

¹⁷⁰ 87 FR 79208.

¹⁷¹ 84 FR 32556.

¹⁷² 985 F.3d at 944–51.

¹⁷³ 142 S. Ct. at 2615–16.

¹⁷⁴ 87 FR 79208.

¹⁷⁵ *Id.*

¹⁷⁶ 985 F.3d at 957–58.

facilities and may not actually reflect application of the BSER. The ACE Rule explained that “state plans must establish standards of performance—which by definition ‘reflects . . . the application of the best system of emission reduction,’ ”¹⁷⁷ and then asserted that implementation and enforcement of such standards should be based on improving the emissions performance of sources to which a standard of performance applies. The ACE Rule added that trading or averaging would effectively allow a state to establish standards of performance that do not reflect application of the BSER, and gave, as an example, the possibility that under a trading program, a single source could potentially shut down or reduce utilization to such an extent that its reduced or eliminated operation generates sufficient allowances for a state’s remaining sources to meet their standards of performance without themselves making any emission reductions from any other source. The ACE Rule asserted that this compliance strategy would undermine the EPA’s determination of the BSER.¹⁷⁸

This interpretation of CAA section 111 is unduly strained and the EPA rejects it. The provisions of CAA section 111(d) by their terms do not affirmatively bar states from considering trading or averaging as a compliance measure where appropriate for a particular emission guideline. Under CAA section 111(d)(1), each state must “establish[],” “implement[],” and “enforce[]” “standards of performance for any existing source.” A state plan may “establish[]” a standard of performance for each source that constitutes an emissions standard that reflects the amount of emission reduction that the source could achieve by applying the BSER, but the state may also allow measures like trading or averaging as potential means of compliance. Nothing in the text of CAA section 111 precludes states from considering a source’s acquisition of allowances as part of a trading program in “implement[ing]” and “enforce[ing]” a standard of performance for that particular source, so long as the state plan achieves the required overall level of emission reductions.¹⁷⁹ CAA section

111(d)(1) requires only that each source comply with its standard, not that each source do so through applying the BSER. By the same token, contrary to the ACE Rule,¹⁸⁰ CAA section 111(d)(1) does not limit the states to compliance measures that are symmetrical to what the EPA determined to be the BSER unless necessary to preserve the environmental outcomes a particular system was designed to achieve.

For further support for the interpretation that CAA section 111 does not preclude states from authorizing compliance flexibilities such as trading or averaging, the EPA notes that CAA section 111(d)(1) requires a “procedure similar to that provided by [CAA section 110].”¹⁸¹ Consideration of the CAA section 110 framework reinforces the absence of any mandate that states consider only compliance measures that apply at and to an individual source. “States have ‘wide discretion’ in formulating their plans” under section 110.¹⁸² The EPA has authorized trading programs in CAA section 110 SIPs for decades. See Economic Incentive guidance.¹⁸³

Such flexibility is consistent with the framework of cooperative federalism that CAA section 111(d) establishes, which vests states with substantial discretion in establishing control requirements for their sources. As the U.S. Supreme Court has explained, CAA section 111(d) “envision[s] extensive cooperation between Federal and state

authorities, generally permitting each State to take the first cut at determining how best to achieve EPA emissions standards within its domain.”¹⁸⁴

This interpretation is also consistent with the EPA’s consistent views prior to the ACE Rule. The EPA authorized trading or averaging as compliance methods in the 2005 Clean Air Mercury Rule for coal-fired EGUs,¹⁸⁵ and the 2015 Clean Power Plan (CPP).¹⁸⁶

It must be emphasized that the EPA retains an important role in reviewing state plans for adequacy. Under CAA section 111(d)(2)(A), the EPA must determine that the state plan is “satisfactory” and, if the state plan is not satisfactory or if the state does not submit a state plan, the EPA must promulgate a plan that establishes Federal standards of performance for the State’s existing sources. Thus, the flexibility that CAA section 111(d)(1) grants to states in adopting measures for their state plans is not unfettered. As the Supreme Court stated in *West Virginia*, “The Agency, not the States, decides the amount of pollution reduction that must ultimately be achieved.”¹⁸⁷ The Court further stated that state plans must contain “emissions restrictions that they intend to adopt and enforce in order not to exceed the permissible level of pollution established by EPA.”¹⁸⁸ Thus, the EPA retains the authority to ensure that the permissible level of pollution is not exceeded by any state plan. If the EPA considers that compliance flexibility measures would compromise the ability of the state plan to achieve the environmental outcomes the best system could achieve, the EPA may, in the emission guidelines, preclude such measures or otherwise conclude that the state plan is not satisfactory.

In *West Virginia v. EPA*, the Supreme Court did not directly address the state’s authority to determine their sources’ control measures. Although the Court did hold that constraints apply to the EPA’s authority in determining the BSER, the Court’s discussion of CAA section 111 is consistent with the EPA’s interpretation that the provision does not preclude states from granting sources compliance flexibility.

At the outset of the decision, the Court made clear CAA section 111

¹⁸⁰ 84 FR 32556 (ACE Rule states that one reason why CAA section 111 precludes states from authorizing trading or averaging is that “[a]pplying an implementation approach that differs from standard-setting would result in asymmetrical regulation”).

¹⁸¹ See CAA section 111(d)(2)(A) (referring to CAA section 110(c)), 111(d)(2)(B) (referring to enforcement of state implementation plans (SIPs)).

¹⁸² *Alaska Dep’t of Env’t. Conservation v. EPA*, 540 U.S. 461, 470 (2004) (citation omitted); see *Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976) (“Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent.”); *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975) (“[S]o long as the ultimate effect of a State’s choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.”).

¹⁸³ The ACE Rule stated that the reference in CAA section 111(d)(1) to CAA section 110 was limited to the procedure under which states shall submit plans to the EPA, and asserted that it does not imply anything about implementation mechanisms available under CAA section 111(d). 84 FR 32557. The EPA believes that the several references to CAA section 110 in CAA section 111(d)(1) and (2), as noted in the accompanying text, support the view that Congress intended that state plans under CAA section 111(d) would be similar to state plans under CAA section 110, including retaining the authority to grant sources compliance flexibility in appropriate circumstances.

¹⁸⁴ *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (citations omitted).

¹⁸⁵ 70 FR 28606, 28617 (May 18, 2005), vacated on other grounds, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), see 40 CFR 60.24(b)(1) (2005) (providing that a state’s “[e]mission standards [may] be based on an allowance system), repealed in the ACE Rule.

¹⁸⁶ 80 FR 64662, 64840 (October 23, 2015), repealed by the ACE Rule. 87 FR 79208.

¹⁸⁷ 142 S. Ct. at 2602.

¹⁸⁸ *Id.*

¹⁷⁷ This paraphrasing by the ACE Rule of the CAA section 111(a)(1) definition of “standard of performance” is incomplete—a “standard of performance” “reflects the degree of emission limitation achievable through the application of the best system of emission reduction.”

¹⁷⁸ 84 FR 32557.

¹⁷⁹ This overall level of emissions reduction is the level that would be achieved if each source were to apply the BSER.

provides different roles for the EPA and the States:

Although the States set the actual rules governing existing power plants, EPA itself still retains the primary regulatory role in Section 111(d). The Agency, not the States, decides the amount of pollution reduction that must ultimately be achieved. It does so by again determining, as when setting the new source rules, “the [BSER]. . . . The States then submit plans containing the emissions restrictions that they intend to adopt and enforce in order not to exceed the permissible level of pollution established by EPA.”¹⁸⁹

The Court was clear that the focus of the case was exclusively on the EPA’s role, that is, whether the EPA acted within the scope of its authority in establishing the BSER.¹⁹⁰ The Court applied the major question doctrine to hold that the generation-shifting BSER that the EPA promulgated in the CPP exceeded the constraints of the CAA section 111 BSER provisions, in light of “separation of powers principles and a practical understanding of legislative intent.”¹⁹¹ The Court did not identify any constraints on the states in establishing standards of performance to their sources, and its holding and reasoning cannot be extended to apply such constraints. In fact, the Supreme Court at least implicitly recognized that CAA section 111(d) does not preclude states from authorizing sources compliance flexibility when the Court observed that a new or modified source “may achieve [the EPA-determined] emissions [standard] any way it chooses.”¹⁹² There is no reason why existing sources should have less flexibility.

It should also be noted that the adverse commenters described above are incorrect in their view that trading necessarily results in generation shifting and that the logic of the *West Virginia* decision precludes any such generation shifting. As just noted, the reasons why the Court held that the CPP’s generation-shifting BSER violated the major question doctrine and thus was invalid have no application to states in developing state plans. In addition, the Court was clear that a BSER that has the incidental effect of resulting in generation shifting would not, on those grounds, violate the major question doctrine. The Court emphasized that “there is an obvious difference between

(1) issuing a rule that may end up causing an incidental loss of coal’s market share, and (2) simply announcing what the market share of coal, natural gas, wind, and solar must be, and then requiring plants to reduce operations or subsidize their competitors to get there.”¹⁹³ The second option is what the Court viewed the CPP’s generation-shifting BSER as attempting to do, which thereby triggers the major question doctrine. But, as a coalition of companies that operate electricity generation as well as transmission and distribution systems commented, the Court “evinced no general concern about option 1, which is an inevitable consequence of regulation within the power sector, in which all sources of emissions are interconnected and increase or decrease their generation based upon demand for electricity and other sources’ availability.”¹⁹⁴ If the Court in *West Virginia* had little concern with the EPA determining a BSER that has the incidental effect of shifting generation, there is no basis for reading the case to preclude a state from adopting trading measures in its state plan on grounds that those measures may have the incidental effect of shifting generation. In any event, in many instances, trading simply apportions the cost of controls between the sources engaged in the transaction, and does not result in generation shifting. To illustrate, assume that the EPA promulgates an emissions guideline that determines as the BSER the installation by a source of control equipment that captures 40 percent of its emissions of a pollutant. Assume further that a state allows two of its designated facilities of comparable size and emissions to engage in an emission trade, so that one source installs control equipment that captures 80 percent of its emissions, and the other one does not put on control equipment but purchases allowances from the first one that fund half the costs of the first one’s control equipment. This type of emissions trade would not necessarily give rise to generation shifting.

For the reasons noted above, the EPA is rescinding the ACE Rule’s interpretation that state plans may not include trading or averaging or other compliance flexibilities.

v. The EPA’s finalized interpretation of BSER. The EPA is also finalizing its proposal to rescind the ACE Rule’s

interpretation that CAA section 111, by its plain meaning, limits the BSER to at-the-source measures. The ACE Rule’s interpretation is incorrect. In addition, as a practical matter, it could call into question many of the EPA’s determinations in prior CAA section 111 rules that well-established control measures, including clean fuels and add-on control technology, qualified as the BSER. This is because many of these traditional measures are not entirely at-the-source controls, but also include outside-the-source components. *West Virginia* does not preclude the EPA from rescinding the ACE Rule interpretation because although the Supreme Court held that the CPP’s generation-shifting BSER violated the major question doctrine, Court declined to address the ACE Rule’s interpretation of CAA section 111.¹⁹⁵

To repeat for convenience the key requirements for determining the BSER under CAA section 111: each state must establish “standards of performance for any existing source” of certain types of air pollutants, under CAA section 111(d)(1); a “standard of performance” is defined as “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction . . . adequately demonstrated, under CAA section 111(a)(1);” and “existing source” is defined as a “stationary source,” which, in turn, is defined, in relevant part, as “any building, structure, facility or installation,” under CAA section 111(a)(6) and (a)(3).

The ACE Rule interpreted CAA section 111 to limit, by its plain language, the type of “system” that the EPA may select as the BSER to control measures that can be applied at each source to reduce that source’s emissions.¹⁹⁶ Specifically, the ACE Rule argued that the requirements in CAA section 111(d)(1), (a)(3), and (a)(6) that each state establish a standard of performance “for” “any existing source” (in the singular), defined, in general, as any “building . . . [or] facility,” and the requirements in CAA section 111(a)(1) that the standard of performance reflect a degree of emission limitation that is “achievable” through the “application” of the BSER, by their terms, impose this limitation.¹⁹⁷

Upon reconsideration, the EPA concludes that, contrary to the ACE Rule, CAA section 111(d) does not limit the EPA to at-the-source measures in determining the BSER. The CAA section

¹⁸⁹ *West Virginia v. EPA*, 142 S.Ct. at 2601–02 (citations omitted).

¹⁹⁰ Id. at 2600 (“The question before us is whether this broad[] conception of EPA’s authority [to determine the BSER] is within the power granted to it by the Clean Air Act.”).

¹⁹¹ Id. at 2609.

¹⁹² Id. at 2601.

¹⁹³ Id. at 2613 n.4.

¹⁹⁴ Comment Letter from Energy Strategy Coalition on “Adoption and Submittal of State Plans for Designated Facilities: Implementing Regulations Under Clean Air Act Section 111(d), EPA–HQ–OAR–2021–0527–0088 at 6.

¹⁹⁵ 142 S.Ct. at 2615–16.

¹⁹⁶ 84 FR 32523–24.

¹⁹⁷ Id. at 32556–57.

111 requirement that each state establish a standard of performance “for” any existing “building . . . [or] facility,” means simply that the state must establish standards applicable to each regulated stationary source; and the requirement that the standard reflect a degree of emission limitation “achievable” through the “application” of the BSER means that the source must be able to apply the system to meet the standard. None of these requirements by their plain language mandate that the BSER is limited to some measure that each source can apply to its own facility to reduce its own emissions in a specified amount. That the standards must be “for” a source does not mean that the control measures that form the basis for the standard are limited to measures that apply at the source or that all emission reductions from the control measures must occur at the source.

The ACE Rule also argued that as a matter of grammar, the term “application,” which is derived from the verb, “to apply,” requires an indirect object, and, further, that the phrase “application of the best system of emission reduction” has, as the unstated indirect object, an existing source. From this premise, the ACE Rule concluded that the phrase must be read to refer to the application of the best system of emission reduction at or to the existing source itself.¹⁹⁸ But this premise is incorrect. As the D.C. Circuit explained in *American Lung Ass’n*, “application” is a noun, and “the phrase ‘application of the best system of emission reduction’ is what is called a nominalization, a ‘result of forming a noun or noun phrase from a clause or a verb.’”¹⁹⁹ The court further explained that “[g]rammar assigns direct or indirect objects only to verbs—not nouns. No objects are needed to grammatically complete the actual statutory phrase.”²⁰⁰ In any event, the fact that any such indirect object is unstated itself contradicts the ACE Rule’s conclusion that CAA section 111 by its plain language mandates that the BSER must be limited to at-the-source measures.²⁰¹

It should also be noted that CAA section 111(a)(1) provides that when the EPA determines the BSER, it must “tak[e] into account” “cost” and “any nonair quality health and environmental impact and energy requirements.” As the ACE Rule itself recognized, the EPA may consider the application of these requirements on a “sector-wide, region-wide or nationwide basis.”²⁰² As discussed below, the reference to “nonair quality health and environmental impact” may encompass to offsite impacts of control measures. Thus, these provisions contradict the ACE Rule’s argument that CAA section 111(d)(1) and (a), by its plain language, limits the BSER to at-the-source measures. By the same token, the term “achievable” refers to the “degree of emission limitation” that must be “reflect[ed]” in the standards of performance “through the application of the [BSER].” This term does not, by its plain language, limit the BSER to at-the-source measures.

Importantly, it should be emphasized that the ACE Rule’s interpretation that

exceed the emissions allowed by any applicable standard established pursuant to [CAA] section [111] or [112].” The ACE Rule pointed to the EPA’s reading of this sentence to mean that section 111 standards of performance “operate as a floor to BACT.” The ACE Rule asserted that, under the definition of BACT, control measures are limited to at-the-source measures. The ACE Rule reasoned that section 111 standards of performance must, by operation of the structure of the CAA, also be interpreted to be limited to at-the-source measures. 84 FR 32525. Upon further review, the EPA rejects this argument. The EPA considers whether CAA section 169(3) should be interpreted to limit BACT to at-the-source measures to be an open question, and is not addressing it at this time. Even if BACT were so limited, the ACE Rule did not demonstrate that any BACT requirement that a particular source would be subject to would be incompatible with any standard of performance that source would also be subject to. Section 169(3) by its plain language provides that the application of BACT may not result in exceedances of any applicable standard of performance.

The ACE Rule also focused on statements in the CPP that it asserted conflated the terms “application” and implementation, as well as “source” and owner/operator; and that defined “system” broadly. The rule asserted that the CPP strained the interpretation of CAA section 111 in those ways to justify determining generation-shifting as the BSER. 84 FR 32526–29. Regardless of whether those arguments have merit with respect to the generation-shifting, they are not relevant to the position that the EPA is taking in the present action that the ACE Rule erred in interpreting CAA section 111 by its terms to limit the BSER to at-the-source measures. It should also be noted that the CPP’s recognition that as a practical matter, it is the owner/operator who takes actions to apply control measures and assure that the source’s emissions meet the standard is a matter of common sense and applies as well to all control measures, whether at the source or outside the source. The ACE Rule itself referred to the “owner or operator” as the entity that “must be able to achieve an applicable standard by applying the BSER” 84 FR 32524.

²⁰² 84 FR 32534 n.152 (referring to application of “energy requirements”).

the provisions of CAA section 111(d)(1) and (a) by their plain language require that the EPA identify as the BSER control measures that apply at-the-source would also impose the same limit on the state, that is, limit the state to authorizing its sources to comply with their standards only through at-the-source measures. As a result, this interpretation would preclude the state from allowing its sources compliance flexibilities such as trading or averaging. In fact, the ACE Rule argued that states were limited in that manner. For the reasons noted above, limiting the states in that manner is contrary to the provisions of CAA section 111(d) and the framework of cooperative federalism that CAA section 111(d) establishes.

The ACE Rule also argued that the legislative history of the 1970 CAA Amendments confirms the rule’s at-the-source interpretation for BSER.²⁰³ The rule read the legislative history to indicate that the House and Senate bills that led to the adoption of CAA section 111 “contemplated only control measures that would lead to better design, construction, operation, and maintenance of an individual source. . . .”²⁰⁴ The EPA disagrees with this interpretation of the legislative history. The ACE Rule itself acknowledged that the 1970 CAA Amendments legislative history also included broader language in describing the types of measures that were to provide the basis for the standards of performance.²⁰⁵ In addition, the ACE Rule went on to narrow its argument about legislative history to saying that the 1990 CAA Amendments made clear only that generation-shifting was precluded.²⁰⁶ *Id.* at 32526 n.62. Thus, the EPA finds that the legislative history cannot be read to confirm the interpretation that section 111(d) and (a)(1), by their plain language, limit the BSER to at-the-source measures.

There is another reason why the ACE Rule’s interpretation is incorrect: it appears to be inconsistent with many EPA determinations in previous CAA section 111 rulemakings that certain control measures qualified as the BSER. This is because although those measures apply at the source and reduce

²⁰³ 84 FR 32525–26.

²⁰⁴ *Id.* at 32526.

²⁰⁵ *Id.* at 32526 n.61. The ACE Rule argued that the canon of *ejusdem generis* required that those broader terms be interpreted to denote at-the-source measures but *ejusdem generis* is an aid in statutory construction and should not be used to narrow the meaning of a statute beyond its intention. Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed, 3 Vanderbilt L. Rev. 395, 405 & n.46 (1950).

²⁰⁶ *Id.* at 32526 n.61.

¹⁹⁸ *Id.* at 32524.

¹⁹⁹ 985 F.3d at 948 (citations omitted).

²⁰⁰ *Id.*

²⁰¹ The ACE Rule stated that the CAA provisions concerning the “best available control technology” (BACT) provide a CAA structural argument that supports its interpretation that CAA section 111 limits BSER to at-the-source measures. CAA section 165(a)(4) provides that construction and modification of major stationary sources of a pollutant are subject to BACT, as defined under CAA section 169(3), for each pollutant subject to regulation under the CAA. The definition of BACT provides, “In no event shall application of [BACT] result in emissions of any pollutants which will

emissions at the source, they also have components that are outside the source. In *West Virginia*, the Supreme Court recognized that the EPA had, in prior rules, identified as the BSER these “more traditional air pollution control measures.”²⁰⁷ The Court made this point as part of its reasoning that the CPP’s generation-shifting BSER—which the Court stated differed from these traditional measures—raised a major question. The Court quoted the CPP as describing these traditional measures as “efficiency improvements, fuel-switching,” and “add-on controls.”²⁰⁸ The Court noted that these types of controls have several characteristics: they “reduce pollution by causing the regulated source to operate more cleanly.”²⁰⁹ They “allow[] regulated entities to produce as much of a particular good as they desire provided that they do so through an appropriately clean (or low-emitting) process.”²¹⁰ They are “technology-based . . . [and] focuse[d] on improving the emissions performance of individual sources.”²¹¹

However, many of these traditional controls also have components that are outside the source. One example includes what the Court, quoting the CPP, identified as “fuel-switching.”²¹² Fuel-switching entails the use of lower-emitting fuels. These include fuels that have been cleaned, or processed, to reduce their level of pollutants,²¹³ such as coal or oil that has been desulfurized. Desulfurization reduces the amount of sulfur in the fuel, which means that the fuel can be combusted with fewer SO₂ emissions. Importantly, the process of desulfurization typically occurs off-site and is undertaken by third parties. Congress itself recognized this in the 1977 CAA Amendments. Specifically, Congress revised CAA section 111(a)(1) to identify the basis for standards of performance for new fossil fuel-fired stationary sources as a “technological system of continuous emission reduction,” including “precombustion

cleaning or treatment of fuels.”²¹⁴ The 1977 House Committee report stated that fuel cleaning includes “oil desulfurization at the refinery.”²¹⁵ The report added that fuel cleaning includes “various coal-cleaning technologies,” which generally are also conducted off-site by third parties.²¹⁶ As noted above, in the 1990 CAA Amendments, Congress eliminated many of the restrictions and other provisions added in the 1977 CAA Amendments by largely reinstating the 1970 CAA Amendments’ definition of “standard of performance.” Nevertheless, there is no indication that in doing so, Congress intended to preclude the EPA from considering fuel cleaning off-site by third parties. In fact, the EPA’s regulations promulgated after the 1990 CAA Amendments continue to impose standards of performance that are based on coal cleaning off-site by third parties.²¹⁷

A second example includes what the Court, again quoting the CPP, identified as “add-on controls.”²¹⁸ These controls include air pollution control devices that are installed at the unit. They routinely operate by removing air pollutants from a unit’s emission stream and capturing them as a liquid or solid. For example, a baghouse is an add-on control device that captures particulate matter by trapping particles as a dust, which must then be disposed of.²¹⁹ Another add-on control device, flue-gas desulfurization, “scrubs” acid gases like sulfur dioxide from emissions using a chemical sorbent that reacts with the pollutant to generate a liquid slurry (wet scrubbing) or solid residue (dry scrubbing). These captured pollutants must then be disposed as solid wastes, discharged as wastewater, or otherwise

managed or reused.²²⁰ The same is true for carbon capture and sequestration (CCS): the carbon capture control device scrubs CO₂ from the flue gas stream using a solvent; and the CO₂ must then be stored underground.²²¹ Downstream management of captured pollutants is thus a commonplace feature of CAA section 111 standards.²²² Downstream management of captured pollutants is thus a commonplace feature of CAA section 111 standards.²²³

Indeed, CAA section 111(a)(1) by its terms recognizes that “system[s] of emission reduction” may entail off-site disposition of pollutants. The provision states that the EPA must consider “nonair quality health and environmental impact” when determining the BSER. Congress adopted this phrase in the 1977 CAA Amendments.²²⁴ As the legislative history stated, Congress added this phrase so that “environmental impacts would be required to be considered in determining best technology which has been adequately demonstrated.”²²⁵ In making this addition, Congress codified the D.C. Circuit’s holding in *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 438–39 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).²²⁶ In *Essex Chem. Corp.*, the D.C. Circuit required that EPA “take into account counter-productive environmental effects” when determining whether a control measure qualifies as the BSER, including “disposal problems” related to the control measure’s captured pollutants. The Court remanded the NSPS at issue because there was no evidence that the EPA had considered “the significant land or water pollution potential

²²⁰ See *id.* at 323–24 n.69; see also 80 FR 21303, 21340 (April 17, 2015) (governing off-site disposal of solid wastes captured by air pollution controls at steam units).

²²¹ 80 FR 64549, 64555 (describing CCS and comparing CCS pollutant disposition to particulate or wet scrubber pollutant disposition).

²²² See, e.g., 80 FR 64582–90 (requiring that an EGU that captures CO₂ assure that it is transferred to an entity that will dispose of it appropriately; generally describing oversight of CO₂ storage; detailing Department of Transportation pipeline regulations; detailing requirements for monitoring, reporting, and verification plans; detailing injection well requirements under the Safe Drinking Water Act; and detailing how existing regulations prevent, monitor, and address potential leakage); 75 FR 54970, 55022–23 (Sept. 9, 2010) (disposal of wastewater and solid waste from CAA section 111 standard for Portland cement plants); 54 FR 34008, 34015 (Aug. 17, 1989) (waste disposal impacts of standard of performance for sulfur oxide emissions for fluid catalytic cracking unit regenerators).

²²³ See 80 FR 64549, 64555 (describing CCS and comparing CCS pollutant disposition to particulate or wet scrubber pollutant disposition).

²²⁴ Pub. L. 95–95, section 109(c)(1)(A) (Aug. 7, 1977), 91 Stat. 699–700.

²²⁵ H.R. Rep. No. 95–294 at 190 (May 12, 1977).

²²⁶ *Id.*

²⁰⁷ 142 S.Ct. at 2611 (citing 80 FR 64662, 64784 (Oct. 23, 2015)).

²⁰⁸ *Id.* (citing 80 FR 64784).

²⁰⁹ 142 S.Ct. at 2610.

²¹⁰ *Id.* (quoting 80 FR 64738).

²¹¹ *Id.* at 2611.

²¹² *Id.*

²¹³ EPA considered fuel cleaning to be within the scope of the best system of emission reduction beginning immediately after the adoption of the 1970 CAA Amendments. See U.S. EPA, *Background Information for Proposed New-Source Performance Standards: Steam Generators, Incinerators, Portland Cement Plants, Nitric Acid Plants, Sulfuric Acid Plants*, Office of Air Programs Tech. Rep. No. APTD–0711, p. 7 (Aug. 1971) (indicating the “desirability of setting sulfur dioxide standards that would allow the use of low-sulfur fuels as well as fuel cleaning, stack-gas cleaning, and equipment modifications” (emphasis added)).

²¹⁴ 1977 CAA Amendments, section 109, 91 Stat. 700; see also CAA section 111(a)(7).

²¹⁵ H.R. Rep. No. 95–294 (May 12, 1977), 1977 CAA Legis. Hist. at 2655 (emphasis added).

²¹⁶ *Id.* EPA recognized in a regulatory analysis of new source performance standards for industrial-commercial-institutional steam generating units that the technology “requires too much space and is too expensive to be employed at individual industrial-commercial-institutional steam generating units.” U.S. EPA, *Summary of Regulatory Analysis for New Source Performance Standards: Industrial-Commercial-Institutional Steam Generating Units of Greater than 100 Million Btu/hr Heat Input*, EPA–450/3–86–005, p. 4–4 (June 1986).

²¹⁷ 40 CFR 60.49b(n)(4); see also Amendments to New Source Performance Standards (NSPS) for Electric Utility Steam Generating Units and Industrial-Commercial-Institutional Steam Generating Units; Final Rule, 72 FR 32742 (June 13, 2007).

²¹⁸ 142 S.Ct. at 2611.

²¹⁹ See *Sierra Club v. Costle*, 657 F.2d 298, 375 (D.C. Cir. 1981).

resulting from disposal of the [scrubber system's] liquid purge byproduct.”²²⁷ That the ACE Rule's interpretation that CAA section 111 limits the BSER to at-the-source measures may be inconsistent with the EPA's prior determinations that traditional control measures like clean fuels and add-on controls qualified as the BSER provides another reason to reject that interpretation.

It should be noted that many of the reasons noted above are comparable to the reasoning by the D.C. Circuit to support its decision in *ALA* that the ACE Rule was incorrect in interpreting CAA section 111 to restrict the BSER to at-the-source measures.²²⁸ The EPA agrees with the D.C. Circuit's reasoning.

In *West Virginia*, the Supreme Court held that the CPP's generation-shifting BSER violated the major question doctrine, and the Court vacated *ALA* on the basis of that holding.²²⁹ However, the Court declined to address the ACE Rule's interpretation of CAA section 111.²³⁰ Thus, its opinion does not cast doubt on the EPA's reasons for rejecting the ACE Rule's interpretation, as noted above and in *ALA*. Several commenters argued that *West Virginia* indicates that control measures that the commenters considered comparable to the generation-shifting BSER of the CPP, including trading programs and other measures that controlled designated facilities in the aggregate, were also precluded from inclusion as the BSER under the major question doctrine.²³¹ Other commenters disagreed, arguing that *West Virginia* identifies distinctions among those programs, so that the major question doctrine would not necessarily apply.²³² However, as noted in the proposal, in this action, the EPA is not addressing what types of controls, in addition to the generation-shifting BSER of the CPP, would be precluded under CAA section 111 by the major question

doctrine. Instead, the EPA will evaluate particular controls against the doctrine, as appropriate, when the EPA considers those controls in future rulemakings under CAA section 111.

2. Minor Amendments or Clarifications

The EPA proposed to amend the regulatory text in subpart Ba to address several editorial and other minor clarifications and is finalizing the amendments as described below. Except as noted specifically below, commenters supported these revisions to the regulatory text.

a. The EPA is finalizing amendments to the applicability provision for subpart Ba under 40 CFR 60.20a, with slight revision from as proposed. As discussed in section II.B. of this preamble, the revised applicability provision clarifies that the provisions of subpart Ba are applicable to an EG published after July 8, 2019. The EPA is finalizing the proposed removal of text that included “if implementation of such final guideline is ongoing” because there are no EGs the implementation of which is ongoing;²³³ thus, leaving this language in the regulation would be needlessly confusing. Emission guidelines issued on and prior to July 8, 2019, and pursuant to CAA section 129 are subject to the provisions of subpart B. Also, in response to comment that the term “final emission guideline” is unclear, the EPA is adding the term “in the **Federal Register**” to 40 CFR 60.20a(a) to clarify the publication in the **Federal Register** determines the applicability date. Further clarification of the term “final emission guideline” is available in 40 CFR 60.22a(a). A commenter also noted that the proposed rule text deleted all references to “subpart C of this part” and removing this language means that it would apply to all EGs in 40 CFR part 60 (that are published after July 8, 2019), including those for incinerators addressed by CAA section 129. This was not the EPA's intent. Therefore, as noted in section III.G.2.b. of this preamble, the EPA is amending the definition of EG within subpart Ba to clarify that subpart Ba does not apply to EGs promulgated under CAA section 129.

b. The EPA is finalizing revisions to 40 CFR 60.21a(e), 60.22a(c), and 60.24a(c) and (f)(1) and (2), largely as proposed, at 40 CFR 60.21a(e), 60.22a(c), and 60.24a(c) and (i)(1) and (2) respectively (differences in numbering are due to provisions changing location in the final

regulations relative to proposal). These revisions delete “subpart C” from these provisions because EGs can be codified in other subparts of this part and not only in subpart C of this part. In response to a comment requesting clarification, 40 CFR 60.21a(e) is also amended clarify that the definition of emission guidelines for purposes of subpart Ba excludes guidelines promulgated pursuant to CAA section 129. As discussed above, EGs under CAA section 129 are subject to the provisions of subpart B.

c. The EPA is finalizing as proposed an editorial amendment to 40 CFR part 60, subpart A, at § 60.1(a) to add a reference to subpart Ba. The applicability provision in 40 CFR 60.1(a) states that “[e]xcept as provided in subparts B and C, the provisions of this part apply to the owner or operator of any stationary source which contains an affected facility, the construction or modification of which is commenced after the date of publication in this part of any standard (or, if earlier, the date of publication of any proposed standard) applicable to that facility.” We are amending this provision to include reference to subpart Ba in addition to subparts B and C.

d. A minor editorial correction at 40 CFR 60.22a(b)(3) amends the term “nonair quality health environmental effects” to “nonair quality health and environmental effects”.

3. Submission of Emissions Data and Related Information

The EPA is finalizing as proposed amendments to 40 CFR 60.25a(a) that delete reference to 40 CFR part 60, appendix D, because the system specified for information submittal by the appendix is no longer in use and clarify that the applicable EG will specify the system for submission of the inventory of designated facilities, including emission data for the designated pollutants and any additional required information related to emissions. The EPA also proposed to delete the term “related to emissions” in 40 CFR 60.25a(a). A commenter noted as proposed this deletion caused the provision to be too vague. The EPA agrees that the term “related to emissions” should be retained to maintain the original and proper context of this provision. The term is retained by this final action.

4. State Permit and Enforcement Authority

Questions have previously arisen as to whether states may establish standards of performance and other plan requirements as part of state permits

²²⁷ *Id.* See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 385 n.42 (D.C. Cir. 1973) (“The standard of the ‘best system’ is comprehensive, and we cannot imagine that Congress intended that ‘best’ could apply to a system which did more damage to water than it prevented to air.”).

²²⁸ 985 F.3d 914, 955–41 (D.C. Cir. 2021).

²²⁹ 142 S.Ct. at 2610, 2614, 2615–16.

²³⁰ *Id.* at 2615–16.

²³¹ API Comment Letter on “Adoption and Submittal of State Plans for Designated Facilities; Implementing Regulations Under Clean Air Act Section 111(d)” (“Subpart Ba”), EPA–HQ–OAR–2021–0527–0074 at 8; Lignite Energy Council Comment Letter on Subpart Ba, EPA–HQ–OAR–2021–0527–0100 at 8–9.

²³² Energy Strategy Coalition Comment Letter on Subpart Ba, EPA–HQ–OAR–2021–0527–0088 at 6 (noting that *West Virginia* distinguished the trading program in the Clean Air Mercury Rule, which was based on technological controls, from the trading program in the CPP).

²³³ The Municipal Solid Waste Landfills EG, which is currently being implemented, has its own applicability provisions and is subject to subpart B.

and administrative orders. The EPA is confirming with this final action that subpart Ba allows for standards of performance and other state plan requirements to be established as part of state permits and administrative orders, which then must be incorporated into the state plan. See 40 CFR 60.27a(g)(2)(ii).

However, the EPA notes that the permit or administrative order alone may not be sufficient to meet the requirements of an EG or the implementing regulations, including the completeness criteria under 40 CFR 60.27a(g). For instance, a plan submittal must include supporting material demonstrating the state's legal authority to implement and enforce each component of its plan, including the standards of performance, 40 CFR 60.27a(g)(2)(iii), as well as a demonstration that each emission standard is quantifiable, non-duplicative, permanent, verifiable, and enforceable. *Id.* at § 60.27a(a)(2)(vi). In addition, the specific EGs may also require demonstrations that may not be satisfied by terms of a permit or administrative order. To the extent that these and other requirements are not met by the terms of the incorporated permits and administrative orders, states will need to include materials in a state plan submission demonstrating how the plan meets those requirements. If a state does choose to use permits or administrative orders to establish standards of performance, it needs to demonstrate that it has the legal authority to do so. These implementing regulations do not themselves provide any independent or additional authority to issue permits and administrative orders under states' EPA approved title I and title V permitting programs.

IV. Summary of Cost, Environmental, and Economic Impacts

In amending general implementing regulations, this final action does not independently impose any requirements and therefore does not directly incur any costs or benefits. However, the amendments finalized in this action can impact the costs and benefits of future EGs subject to subpart Ba. The potential impacts of these amendments as reflected in an EG will vary greatly depending on the source category, number and location of designated facilities, and the designated pollutant and potential controls addressed by the EG. Of note, the EPA may propose to supersede these general provisions in an EG as needed and with appropriate justification. Individual EGs are subject to notice and comment rulemaking, providing the opportunity for

stakeholders, including the public, to consider the impacts of implementing or superseding these general implementing regulations in the course of those rulemaking actions.

As described in detail in section III.A. of this preamble, the EPA is finalizing amendments to subpart Ba to replace timelines vacated by the D.C. Circuit in *ALA*²³⁴ and to improve and update other provisions within subpart Ba. This section considers general impacts that could result from the amendments finalized in this action as adopted by an EG.

As discussed in section III.A. of this preamble, the EPA does not interpret the D.C. Circuit's direction to require the Agency to quantitatively evaluate the impacts of potential subpart Ba framework timelines, but rather to consider the balance between the public health and welfare benefits resulting from appropriate and reasonable deadlines for the implementation of EGs and the time needed for the technical, administrative, and legislative actions needed to develop and adopt approvable state or Federal plans. The EPA expects that the amendments to subpart Ba finalized in this action will improve the implementation of EGs under CAA section 111(d). In particular, the EPA expects that the timelines finalized both appropriately accommodate state and EPA processes to develop and evaluate plans to effectuate an EG and are consistent with the objective of CAA section 111(d) to ensure that designated facilities expeditiously control emissions of pollutants that the EPA has determined may be reasonably anticipated to endanger public health or welfare.

While the EPA initially proposed a 15-month deadline for state plan submissions following the promulgation of an EG (87 FR 79176, Dec. 23, 2022), most commenters, including states and state organizations, indicated that 15 months could not accommodate the technical, administrative, and legal steps necessary to develop and adopt an approvable state plan. Based on the comments and additional information received, the EPA is finalizing 18 months for state plan submissions after promulgation of a final EG, and finds that the additional time, compared with the 9 months provided in subpart B, will better accommodate states' processes to develop and adopt approvable plans and will most efficiently effectuate the applicable EG. Under an 18-month state plan submission timeframe, the costs of

developing a state plan under an applicable EG subject to subpart Ba, compared with the 9 months provided by subpart B, may be spread over 9 additional months. With this state plan submittal timeline, the EPA is providing states sufficient time to develop approvable implementation plans for their designated facilities that adequately address public health and environmental objectives. A timeline that is insufficient for states to conduct, *inter alia*, the appropriate technical analysis and public engagement may preclude them from timely adopting and submitting approvable state plans, which could ultimately delay the implementation of emission reductions. In addition, a successful submittal of approvable state plans will avoid an attendant expenditure of Federal resources associated with the development of a Federal plan.

After receiving a state plan, the EPA first must determine if the plan is complete. The EPA is finalizing amendments to its determination of completeness so the timeframe for such determination is streamlined from six months to 60 days from receipt of the state plan submission (see section III.A.2. of this preamble). If the EPA determines a state plan submission is complete, it then evaluates the plan to determine whether it satisfies the applicable requirements. The Agency proposes an action (e.g., plan approval or plan disapproval) and then finalizes its action pursuant to a notice-and-comment rulemaking process. As described in detail in sections III.A.3. and III.A.4. of this preamble, the EPA is finalizing a 12-month period for the EPA to take final action on a state plan after a submission is found to be complete. The EPA is also finalizing a 12-month timeline for the EPA to promulgate a Federal plan, which runs from either the state plan deadline if a state has failed to submit a state plan, 60 days following the state plan deadline if a state has submitted a plan by the deadline and the EPA determines it is incomplete, or from the date the EPA finalizes disapproval of a state plan submission. As described in detail in section III. of this preamble, because these timeframes provide for the minimum time reasonably necessary for the EPA to accomplish propose and finalize a Federal plan, the EPA expects these timeframes will minimize the impacts on public health and welfare to the extent possible while ensuring that an EG is expeditiously implemented.

As described in detail in section III.A.5. of this preamble, the EPA is finalizing a requirement that state plans include IoPs if the plan requires final

²³⁴ *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 991 (D.C. Cir. 2021).

compliance with standards of performance later than 20 months after the plan submission deadline. The compliance schedule, as defined in subpart Ba (40 CFR 60.21a(g)) is a legally enforceable schedule specifying a date or dates by which a source or category of sources must comply with specific standards of performance contained in a plan. If final compliance for a source to meet their standards of performance is more than 20 months after the state plan submittal deadline, the plan must include IoPs, which are defined steps to achieve compliance (e.g., submittal of a control plan, awarding of contracts for emission control systems or process modification, etc.). This 20 month timeline is the trigger for when IoPs must be included in a state plan. An EG will specify what the IoPs are and associated compliance schedules. The EPA considers this slightly longer timeline than is required under subpart B reasonable given that the EPA is also, in this action, extending the timelines for state plan submission under subpart Ba. The EPA notes that IoPs do not, on their own, govern how expeditiously emission reductions are achieved: this is dictated by the final compliance date, which is established in an individual EG. Additionally, any specific requirements associated with IoPs, including extended or truncated timelines, would be included in the EG, as these are dependent on the source type, pollutant, and control strategy addressed.

The EPA is also finalizing amending subpart Ba to enhance requirements for reasonable notice and opportunity for public participation. In particular, the EPA is requiring that states, as part of the state plan development or revision process, provide documentation that they have conducted meaningful engagement with a broad range of pertinent stakeholders and/or their representatives. Pertinent stakeholders include communities most affected by and vulnerable to the impacts of the plan or plan revision (see section III.C. of this preamble).

Overall, the EPA expects the amendments being finalized in this action will benefit the states in the development of approvable state plans. The EPA expects that the amendments associated with meaningful engagement with pertinent stakeholders will potentially increase the amount of information the states can use in designing state plans, which may increase both the level of resources states will need to employ in the development of an approvable plan, as well as the resulting health and welfare benefits of the plan. In addition to

health and welfare benefits, there are also administrative benefits of engaging with stakeholders and receiving pertinent information as a state plan is being developed. Such engagement may improve the record for the state's plan and reduce the amount of comments received when the state plan is proposed to the public, which would reduce the amount of effort employed after proposal to address issues raised by the public and stakeholders.

There is variation and uncertainty in determining the magnitude of impacts, both to states and the public, resulting from amendments associated with meaningful engagement. First, the EPA notes that the meaningful engagement provisions being finalized in this action are largely procedural in nature and do not prescribe any particular set of actions or activities that states must undertake. The potential costs and benefits will therefore be determined in significant part by choices that are within states' discretion. Second, the impacts of conducting meaningful engagement will be highly dependent on the number and location of designated facilities addressed by an EG, as well as on the type of health or environmental impacts of the associated emissions. If stakeholder and public involvement pursuant to the meaningful engagement provisions does not generate a large number of specific and unique comments, data, or other considerations, then the level of effort states will employ to review them will be lower in comparison to when meaningful engagement comments are voluminous. It might also be expected that less input and fewer comments might, in certain cases, have an adverse impact on the ability of a state plan to fulfill its health and welfare objectives.

To the extent that states already conduct significant engagement with pertinent stakeholders, the meaningful engagement amendments will most likely not result in additional costs. Conversely, states that do not have engagement procedures already in place may be required to increase their level of effort to engage with pertinent stakeholders. The burden and benefits of meaningful engagement for the pertinent stakeholders will also be highly dependent on the EG and associated variables such as, but not limited to, the geographical distribution of the facilities and communities impacted, available modes of participation for those areas, the pollutants addressed, and the range of options available to the state and facilities for meeting the EG standards. The burden and benefits to pertinent stakeholders may be difficult to

quantify, but overall their engagement will be voluntary and is anticipated to result in feedback that may improve the resulting health and welfare benefits of the state plan as perceived and experienced, particularly by those in communities most affected by and vulnerable to the impacts of the plan.

The EPA is also finalizing revisions to the RULOF provisions in subpart Ba. The amendments included in this final action are intended to provide clarity for states to ensure that less-stringent standards of performance for particular designated facilities are consistent with the statutory requirements, as well as a consistent framework for EPA to evaluate such standards across EGs and states (see section III.E. of this preamble).

The magnitude of impacts, both to states and the public, resulting from the final RULOF amendments will vary depending on the particular EG to which the final provisions would apply. As explained in section III.E.2. of this preamble, the EPA believes Congress intended RULOF as a mechanism for states to apply a less-stringent standard of performance in the unusual circumstances in which the degree of emission limitation determined by the EPA is not reasonable for a particular designated facility. Additionally, states are not required to invoke the RULOF provision in any particular instance and may choose not to do so, even if a particular designated facility's circumstances meet the threshold specified in the regulations. If a state does not invoke RULOF in their state plan, then the amendments will not result in any additional costs. If a state does invoke RULOF in their state plan, then the amendments could, in certain circumstances, result in an increased level of effort to develop standards of performance for certain sources. As such, the RULOF amendments could potentially increase the level of resources states will need to employ in the development of an approvable plan. However, because the amendments clarify is required in order for a less-stringent standard pursuant to RULOF to satisfy the statutory requirements, the amendments reduce the uncertainty of states and designated facilities in the development of such standards. This in turn could result in a decrease in the amount of time that a state that wished to invoke RULOF would need, relative to a situation where the requirements were less defined, by avoiding significant back and forth with the EPA and the sources in the state during state plan development. Overall, the EPA expects the RULOF amendments will benefit the states in the development of

approvable state plans and therefore result in benefits to public health and welfare.

Finally, the EPA expects that the requirements for electronic submittal and that the availability of the optional regulatory mechanisms being finalized in this action will improve flexibility and efficiency in the call for and submission, review, approval, and implementation of state plans, and thus will overall result in benefits to the states, the EPA, designated facilities, and public health and welfare. In addition, the EPA expects the requirements for electronic submittal will increase the ease and efficiency of data submittal and data accessibility and benefit the states and the EPA. Electronic submittal will also improve the Agency's efficiency and effectiveness in the receipt and review of state plans.

The EPA expects that the overall impacts of the implementation of the amendments to subpart Ba finalized in this action will improve the implementation of EGs under CAA section 111(d).

V. Statutory and Executive Order Reviews

Additional information about these Statutory 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; Executive Order 13563: Improving Regulation and Regulatory Review; and Executive Order 14094: Modernizing Regulatory Review

This action is a "significant regulatory action" as defined in Executive Order 12866, as amended by Executive Order 14094. Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the Paperwork Reduction Act. The requirements in subpart Ba do not themselves require any reporting and recordkeeping activities, and no Information Collection Request (ICR) was submitted in connection with the original promulgation of subpart Ba or the amendments we are finalizing at this time. Any recordkeeping and reporting requirements are imposed only through the incorporation of specific elements of subpart Ba in the individual emission guidelines, which have their own ICRs.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities. Specifically, this action addresses processes related to state plans for implementation of EGs established under CAA section 111(d).

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This final action does not contain a Federal mandate that may result in expenditures of \$100 million or more for state, local, and Tribal governments, in the aggregate or the private sector in any 1 year.

This final action is also not subject to the requirements of section 203 of UMRA because, as described in 2 U.S.C. 1531–38, it contains no regulatory requirements that might significantly or uniquely affect small governments. This action imposes no enforceable duty on any local, or Tribal governments or the private sector. However, this action imposes enforceable duties on states. This action does not meaningfully require additional mandates on states beyond what is already required of them and will not impose a burden in excess of \$100 million.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government. The EPA believes, however, that this action may be of significant interest to state governments.

Subpart Ba requirements apply to states in the development and submittal of state plans pursuant to emission guidelines promulgated under CAA section 111(d) after July 8, 2019, to the extent that an EG does not supersede the requirements of subpart Ba. This action finalizes amendments to certain requirements for development, submission, and approval processes of state plans under CAA section 111(d). In particular, the amendments associated with state plan submission deadlines, RULOF provisions, meaningful engagement, and regulatory mechanisms may be of significant interest to state governments. In section IV of this preamble, the EPA summarizes the

potential cost, environmental, and economic impacts of the implementation (through individual emission guidelines) of the amendments to subpart Ba being finalized in this action. Overall, the EPA expects these amendments will benefit the states in the development of approvable state plans.

The EPA notes that notice and comment procedures required for the promulgation of individual EGs will provide opportunity for states to address issues related to federalism based on specific application of subpart Ba requirements to that particular EG.

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

This action does not have Tribal implications as specified in Executive Order 13175. It would not impose substantial direct compliance costs on Tribal governments that have designated facilities located in their area of Indian country. Tribes are not required to develop plans to implement the guidelines under CAA section 111(d) for designated facilities. A tribe with an approved TAS under TAR for CAA 111(d) is not required to resubmit TAS approval to implement an EG subject to subpart Ba. This action also will not have substantial direct costs or impacts on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to the action.

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

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

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

This action is not a "significant energy action" because it will not have a significant adverse effect on the supply, distribution or use of energy. Specifically, this action addresses the

submission and adoption of state plans for implementation of EGs established under CAA section 111(d).

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

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

The EPA believes that it is not practicable to assess whether the human health or environmental conditions that exist prior to this action result in disproportionate and adverse effects on people of color, low-income populations and/or indigenous peoples. The 40 CFR part 60, subpart Ba, provisions are the implementing regulations for states to plan in response to individual EGs, and these individual EGs are applicable to specific pollutants from specified categories of existing sources. It is not possible to identify or assess human health and environmental conditions that will be impacted by this rule because this rule does not address a particular set of sources or a particular pollutant. This action is revising the implementing regulations and does not directly impact environmental justice communities or result in new disproportionate and adverse effects.

The EPA identified and addressed environmental justice concerns by specifying new requirements for meaningful engagement with pertinent stakeholders, which includes communities most affected by and/or vulnerable to the impacts of a state plan.

The information supporting this Executive order review is contained in section III.C. and section III.E.3.f. of this action.

K. Congressional Review Act (CRA)

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

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedures, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Michael S. Regan,
Administrator.

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

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

- 1. The authority citation for part 60 continues to read as follows:

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

- 2. Amend § 60.1 by revising paragraph (a) to read as follows:

§ 60.1 Applicability.

(a) Except as provided in subparts B, Ba, and C of this part, the provisions of this part apply to the owner or operator of any stationary source which contains an affected facility, the construction or modification of which is commenced after the date of publication in this part of any standard (or, if earlier, the date of publication of any proposed standard) applicable to that facility.

* * * * *

- 3. Amend § 60.20a by revising paragraph (a) introductory text to read as follows:

§ 60.20a Applicability.

(a) The provisions of this subpart apply upon publication of a final emission guideline under § 60.22a(a) if the guideline is published in the **Federal Register** after July 8, 2019.

* * * * *

- 4. Amend § 60.21a by:
 - a. Revising paragraphs (e) and (f); and
 - b. Adding paragraphs (k) and (l).

The revisions and additions read as follows:

§ 60.21a Definitions.

* * * * *

(e) *Emission guideline* means a guideline set forth in this part, with the exception of guidelines set forth pursuant to section 129 of the Clean Air Act, or in a final guideline document published under § 60.22a(a), which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy

requirements) the Administrator has determined has been adequately demonstrated for designated facilities.

(f) *Standard of performance* means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated, including a legally enforceable regulation setting forth an allowable rate, quantity, or concentration of emissions into the atmosphere, or prescribing a design, equipment, work practice, or operational standard, or combination thereof.

* * * * *

(k) *Meaningful engagement* means the timely engagement with pertinent stakeholders and/or their representatives in the plan development or plan revision process. Such engagement should not be disproportionate in favor of certain stakeholders and should be informed by available best practices.

(l) *Pertinent stakeholders* include, but are not limited to, industry, small businesses, and communities most affected by and/or vulnerable to the impacts of the plan or plan revision.

- 5. Amend § 60.22a by revising paragraphs (b)(3) and (c) to read as follows:

§ 60.22a Publication of emission guidelines.

* * * * *

(b) * * *

(3) Information on the degree of emission limitation which is achievable with each system, together with information on the costs, nonair quality health and environmental effects, and energy requirements of applying each system to designated facilities.

* * * * *

(c) The emission guidelines and compliance times referred to in paragraph (b)(5) of this section will be proposed for comment upon publication of the draft guideline document, and after consideration of comments will be promulgated in this part with such modifications as may be appropriate.

- 6. Amend § 60.23a by:
 - a. Revising paragraph (a)(1);
 - b. Adding paragraph (a)(3);
 - c. Revising paragraph (b); and
 - d. Adding paragraph (i).

The revisions and additions read as follows:

§ 60.23a Adoption and submittal of State plans; public hearings.

(a)(1) Unless otherwise specified in the applicable subpart in this part, within eighteen months after publication in the **Federal Register** of a final emission guideline under § 60.22a(a), each State shall adopt and submit to the Administrator a plan for the control of the designated pollutant to which the emission guideline applies. The submission of such plan shall be made in electronic format according to paragraph (a)(3) of this section or as specified in an applicable emission guideline.

* * * * *

(3) States must submit to the Administrator any plan or plan revision using the State Planning Electronic Collaboration System (SPeCS), which can be accessed through the EPA's Central Data Exchange (CDX) (<https://cdx.epa.gov/>) or through an analogous electronic reporting tool provided by the EPA for the submission of any plan required by this subpart. Do not use SPeCS to submit confidential business information (CBI). Anything submitted using SPeCS cannot later be claimed to be CBI. The State must confer with the Regional Office for the procedures to submit CBI information. All CBI must be clearly marked as CBI.

(b) If no designated facility is located within a State, the State shall submit a letter of certification to that effect to the Administrator within the time specified in paragraph (a) of this section. Such certification shall exempt the State from the requirements of this subpart for that designated pollutant. The State must submit the letter using the SPeCS, or through an analogous electronic reporting tool provided by the EPA for the submission of any plan required by this subpart.

* * * * *

(i) The State must submit, with the plan or revision, documentation of meaningful engagement including a list of identified pertinent stakeholders and/or their representatives, a summary of the engagement conducted, a summary of stakeholder input received, and a description of how stakeholder input was considered in the development of the plan or plan revisions.

■ 7. Amend § 60.24a by:

■ a. Revising paragraphs (b) introductory text, (c), (d), (e), and (f); and

■ b. Adding paragraphs (g), (h), and (i).

The revisions and additions read as follows:

§ 60.24a Standards of performance and compliance schedules.

* * * * *

(b) Standards of performance shall be in the form of an allowable rate, quantity, or concentration of emissions, except when it is not feasible to prescribe or enforce such a standard of performance. The EPA shall identify such cases in the emission guidelines issued under § 60.22a. Where standards of performance prescribing design, equipment, work practice, or operational standards, or combination thereof are established, the plan shall, to the degree possible, set forth the emission reductions achievable by implementation of such standards, and may permit compliance by the use of equipment determined by the State to be equivalent to that prescribed.

* * * * *

(c) Except as provided in paragraph (e) of this section, standards of performance shall be no less stringent than the corresponding emission guideline(s) specified in this part, and final compliance shall be required as expeditiously as practicable, but no later than the compliance times specified in an applicable subpart of this part.

(d) Any compliance schedule extending more than twenty months from the date required for submittal of the plan must include legally enforceable increments of progress to achieve compliance for each designated facility or category of facilities. Unless otherwise specified in the applicable emission guideline, increments of progress must include, where practicable, each increment of progress specified in § 60.21a(h) and must include such additional increments of progress as may be necessary to permit close and effective supervision of progress toward final compliance.

(e)(1) The State may apply a standard of performance to a particular designated facility that is less stringent than or has a compliance schedule longer than otherwise required by an applicable emission guideline taking into consideration that facility's remaining useful life and other factors, provided that the State demonstrates with respect to each such facility (or class of such facilities) that the facility cannot reasonably achieve the degree of emission limitation determined by the EPA based on:

(i) Unreasonable cost of control resulting from plant age, location, or basic process design;

(ii) Physical impossibility or technical infeasibility of installing necessary control equipment; or

(iii) Other circumstances specific to the facility.

(2) For the purpose of this paragraph (e), the State must demonstrate that there are fundamental differences between the information specific to a facility (or class of such facilities) and the information EPA considered in determining the degree of emission limitation achievable through application of the best system of emission reduction or the compliance schedule that make achieving such degree of emission limitation or meeting such compliance schedule unreasonable for that facility.

(f) If the State makes the required demonstration in paragraph (e) of this section, the plan may apply a standard of performance that is less stringent than required by an applicable emission guideline.

(1) The standard of performance applied under this paragraph (f) must be no less stringent (or have a compliance schedule no longer) than is necessary to address the fundamental differences identified under paragraph (e) of this section. To the extent necessary to determine a standard of performance satisfying that criteria, the State must evaluate the systems of emission reduction identified in the applicable emission guideline using the factors and evaluation metrics EPA considered in assessing those systems, including technical feasibility, the amount of emission reductions, the cost of achieving such reductions, any nonair quality health and environmental impacts, and energy requirements. The States may also consider, as justified, other factors specific to the facility that were the basis of the demonstration under paragraph (e) as well as other systems of emission reduction in addition to those EPA considered in the applicable emission guideline.

(2) A standard of performance under this paragraph (f) must be in the form as required by the applicable emission guideline.

(g) Where a State applies a standard of performance pursuant to paragraph (f) of this section on the basis of an operating condition(s) within the designated facility's control, such as remaining useful life or restricted capacity, the plan must also include such operating condition(s) as an enforceable requirement. The plan must also include requirements to provide for the implementation and enforcement of the operating condition(s), such as requirements for monitoring, reporting, and recordkeeping.

(h) A less stringent standard of performance must meet all other applicable requirements, including in this subpart and in any applicable emission guideline.

(i) Nothing in this subpart shall be construed to preclude any State or political subdivision thereof from adopting or enforcing, as part of the plan:

(1) Standards of performance more stringent than emission guidelines specified in this part; or

(2) Compliance schedules requiring final compliance at earlier times than those specified in applicable emission guidelines.

(ii) [Reserved]

■ 8. Amend § 60.25a by revising paragraph (a) to read as follows:

§ 60.25a Emission inventories, source surveillance, reports.

(a) Each plan shall include an inventory of all designated facilities, including emission data for the designated pollutants and any additional information related to emissions as specified in the applicable emission guideline. Such data shall be summarized in the plan, and emission rates of designated pollutants from designated facilities shall be correlated with applicable standards of performance. As used in this subpart, *correlated* means presented in such a manner as to show the relationship between measured or estimated amounts of emissions and the amounts of such emissions allowable under applicable standards of performance.

* * * * *

■ 9. Amend § 60.27a by:

■ a. Revising paragraph (a);

■ b. Adding paragraphs (b)(1) and (2);

■ c. Revising paragraphs (c), (d), (f) introductory text, and (g)(1);

■ d. Removing the word “and” from the end of paragraph (g)(2)(viii);

■ e. Redesignating paragraph (g)(2)(ix) as paragraph (g)(2)(x); and

■ f. Adding new paragraph (g)(2)(ix) and paragraphs (h), (i) and (j).

The revisions and additions read as follows:

§ 60.27a Actions by the Administrator.

(a) The Administrator may, whenever he determines necessary, amend the period for submission of any plan or plan revision or portion thereof.

(b) * * *

(1) *Full and partial approval and disapproval.* In the case of any plan or plan revision on which the Administrator is required to act under this paragraph (b), the Administrator shall approve such plan or plan revision as a whole if it meets all of the applicable requirements of this subpart. If a portion of the plan or plan revision meets all the applicable requirements of this subpart, the Administrator may approve the plan or plan revision in part

and disapprove in part. The plan or plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan or revision as complying with the applicable requirements of this subpart.

(2) *Conditional approval.* The Administrator may approve a plan or plan revision based on a commitment of the State to adopt and submit to the Administrator specific enforceable measures by a date certain, but not later than twelve months after the date of conditional approval of the plan or plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(c) The Administrator will promulgate, through notice-and-comment rulemaking, a Federal plan, or portion thereof, at any time within twelve months after:

(1) The State fails to submit a plan or plan revision within the time prescribed or the State has failed to satisfy the minimum criteria under paragraph (g) of this section as of the time prescribed in paragraph (g)(1) of this section; or

(2) The Administrator disapproves the required State plan or plan revision or any portion thereof, as unsatisfactory because the applicable requirements of this subpart or an applicable emission guideline under this part have not been met.

(d) The Administrator will promulgate a final Federal plan, or portion thereof, as described in paragraph (c) of this section unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal plan.

* * * * *

(f) Prior to promulgation of a Federal plan under paragraph (d) of this section, the Administrator will conduct meaningful engagement with pertinent stakeholders and/or their representatives and provide the opportunity for at least one public hearing in either:

* * * * *

(g) * * *

(1) *General.* Within 60 days of the Administrator's receipt of a State submission, the Administrator shall determine whether the minimum criteria for completeness have been met for a plan submission or revision. Any plan or plan revision that a State submits to the EPA, and that has not been determined by the EPA within 60 days after the Administrator's receipt of a State submission to have failed to meet the minimum criteria, shall on that date be deemed by operation of law to

meet such minimum criteria. Where the Administrator determines that a plan submission does not meet the minimum criteria of this paragraph (g), the State will be treated as not having made the submission and the requirements of this section regarding promulgation of a Federal plan shall apply.

(2) * * *

(ix) Documentation of meaningful engagement, including a list of pertinent stakeholders or their representatives, a summary of the engagement conducted, and a summary of stakeholder input received, and a description of how stakeholder input was considered in the development of the plan or plan revisions; and

* * * * *

(h) The requirements of this paragraph (h) apply to parallel processing. A State may submit a plan requesting parallel processing prior to adoption and to completion of public outreach and engagement by the State in order to expedite review and to provide an opportunity for the State to consider EPA comments prior to submission of a final plan for final review and action. Under these circumstances and at the discretion of the EPA, the following exceptions to the completeness criteria under paragraph (g)(2) of this section apply to plans submitted explicitly for parallel processing:

(1) The letter required by paragraph (g)(2)(i) of this section must request that EPA propose approval of the proposed plan by parallel processing;

(2) In lieu of paragraph (g)(2)(ii) of this section, the State must submit a schedule for final adoption or issuance of the plan;

(3) In lieu of paragraph (g)(2)(iv) of this section, the plan must include a copy of the proposed/draft regulation or document, including indication of the proposed changes to be made to the existing approved plan, where applicable;

(4) In lieu of paragraph (g)(2)(ix) of this section, the plan must include documentation of the engagement conducted prior to the parallel processing submittal and of any planned additional meaningful engagement to be conducted prior to adoption of the final plan; and

(5) The requirements of paragraphs (g)(2)(v) through (viii) of this section do not apply to plans submitted for parallel processing. The exceptions granted in the preceding sentence apply only to EPA's determination of proposed action and all requirements of paragraph (g)(2) of this section must be met prior to publication of EPA's final determination of plan approvability.

(i) The requirements of this paragraph (i) apply to calls for plan revisions. Whenever the Administrator finds that the applicable plan is substantially inadequate to meet the requirements of the applicable emission guidelines in this part, to provide for the implementation of the applicable requirements, or to otherwise comply with any applicable requirement of this subpart or the Clean Air Act, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator must notify the State of the inadequacies and such plan revisions shall be submitted to the Administrator within twelve months or as determined by the Administrator. Such findings and notice must be public.

(1) Any finding under this paragraph (i) shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this part to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate.

(2) If the Administrator makes this finding on the basis that a State is

failing to implement an approved plan, or part of an approved plan, the State may submit a demonstration to the Administrator it is adequately implementing the requirements of the approved State plan in lieu of submitting a plan revision. Such demonstration must be submitted by the deadline established under this paragraph (i).

(j) The requirements of this paragraph (j) apply to error corrections. Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or portion thereof) was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

■ 10. Amend § 60.28a by revising paragraph (a) to read as follows:

§ 60.28a Plan revisions by the State.

(a) Any significant revision to a State plan shall be adopted by such State after reasonable notice, public hearing, and meaningful engagement. For plan

revisions required in response to a revised emission guideline, such plan revisions shall be submitted to the Administrator within fifteen months, or as determined by the Administrator, after publication in the **Federal Register** of a final revised emission guideline under § 60.22a. All plan revisions must be submitted in accordance with the procedures and requirements applicable to development and submission of the original plan.

* * * * *

■ 11. Amend § 60.29a by revising the introductory text to read as follows:

§ 60.29a Plan revisions by the Administrator.

After notice and opportunity for public hearing in each affected State, and meaningful engagement for any significant revision, the Administrator may revise any provision of an applicable Federal plan if:

* * * * *

[FR Doc. 2023-25269 Filed 11-16-23; 8:45 am]

BILLING CODE 6560-50-P



FEDERAL REGISTER

Vol. 88

Friday,

No. 221

November 17, 2023

Part V

The President

Notice of November 16, 2023—Continuation of the National Emergency
With Respect to the Situation in Nicaragua

Presidential Documents

Title 3—

Notice of November 16, 2023

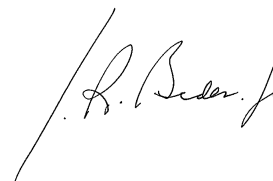
The President

Continuation of the National Emergency With Respect to the Situation in Nicaragua

On November 27, 2018, by Executive Order 13851, the President declared a national emergency pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the situation in Nicaragua. On October 24, 2022, I issued Executive Order 14088 to take additional steps with respect to the national emergency declared in Executive Order 13851.

The situation in Nicaragua, including the violent response by the Government of Nicaragua to the protests that began on April 18, 2018, and the Ortega-Murillo regime's continued systematic dismantling and undermining of democratic institutions and the rule of law, its use of indiscriminate violence and repressive tactics against civilians, as well as its corruption leading to the destabilization of Nicaragua's economy, continues to pose an unusual and extraordinary threat to the national security and foreign policy of the United States. For this reason, the national emergency declared on November 27, 2018, must continue in effect beyond November 27, 2023. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency declared in Executive Order 13851 with respect to the situation in Nicaragua.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
November 16, 2023.

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